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By GWILLIM.

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A

NEW ABRIDGMENT OF THE LAW.

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OF THE MIDDLE TEMPLE, ESQ.

THE FIFTH EDITION, CORRECTED;
WITH CONSIDERABLE ADDITIONS,
INCLUDING THE LATEST AUTHORITIES;
By HENRY GWILLIM,
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1798.

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MVSEVM
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Verdict.

THE word Verdict is derived from the two *Latin* words *veritatis dictum.*

Costs and damages, which might very well have been treated of under this title, have been treated of under the titles *Costs* and *Damages.*

The remaining Matter, which appertains to this Title, shall be ranged in the following Order.

(A) Of a Verdict *de bene Esse.*

(B) Of a Privy Verdict.

(C) Of a General Verdict.

(D) Of a Special Verdict.

(E) Of the Province of the Court where a Special Verdict is found.

(F) Of a Verdict in which the Jurors did not all agree.

(G) Of the Power of the Jury to depart from a General Verdict, after it is given in open Court.

(H) In what Cases a Verdict is bad, on account of Misbehaviour in one or more of the Jurors.

(I) In what Cases a Verdict is bad, on account of Misbehaviour in one of the Parties.

(K) Of a Verdict upon an informal or immaterial Issue.

(L) Of a Verdict upon an Issue, Part of which is insensible or insufficient.

(M) Of a Verdict which does not find all that is in Issue.

(N) Of a Verdict which finds a Thing that is not in Iſſue.

(O) Of a Verdict which varies from the Iſſue.

1. In an Action of *Aſſumpſit*.
2. In an Action upon the Caſe,
3. In an Action of Covenant.
4. In an Action of Debt.
5. In an Action of Ejectment.
6. In an Action of Replevin.
7. In an Action of Treſpaſs.
8. In divers other Actions.
9. In a criminal Proſecution.

(P) Of a Verdict where the Words *Modo et Forma* are uſed in the Traverſe upon which Iſſue is joined.

(Q) Of a Verdict which does not find the Matter in Iſſue with Certainty.

(R) Of a Verdict which does not find the Matter in Iſſue expreſsly.

(S) Of a Verdict which finds a Matter in a Foreign County.

(T) Of a Verdict which is contrary to a Matter of Record.

(U) Of a Verdict which is contrary to a Matter of Eſtoppel.

(W) Of a Verdict which is contrary to ſomething that is confeſſed, or not denied, in the Pleadings.

(X) What Omiſſion in the Pleadings is cured by a Verdict.

(Y) What Miſtake, or Omiſſion, in the Copy of the Iſſue delivered is cured by a Verdict.

(Z) Of divers Things, which did not fall properly under any of the foregoing Heads.

(A) Of a Verdict *de bene Eſſe*.

Brown Meth. 13.

IF the judge, before whom a cauſe is tried, have a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene eſſe*; which verdict, if the court ſhall be of opinion that a verdict ought to have been found, ſhall ſtand.

If

If an action of debt be brought against a husband and wife, and at the trial of the cause the wife make default, and a protection be cast for her, the judge may direct the jury to find a verdict *de bene esse*; which, if the protection be disallowed by the court, shall stand. Bro. Protect. pl. 30.

(B) Of a Privy Verdict.

A Privy verdict is so called; because what is thereby found ought to be kept secret, until a verdict is given in open court. 1 Inst. 228.

A jury may find differently by a verdict given in open court from what they found by a privy verdict. 1 Inst. 227. Moor, 33.

The jury, who by a privy verdict had found for the defendant, did by a verdict given in open court find for the plaintiff. Both verdicts being returned upon the *postea*, it was holden that the latter should stand: and by the court—The verdict given in open court is the binding verdict, the other being only allowed for the ease of the jury. Plowd. 211. Saunders v. Freeman, Dyer, 217.

It is in one book laid down, that a privy verdict cannot be given in a case of life or member. 1 Inst. 227.

It two other books it is laid down, that a privy verdict cannot be given in a case of felony; because the jury are directed, and ought, in such case, to look upon the prisoner when they give their verdict. Raym. 193. Rex v. Ladsingham. 1 Ventr. 97.

But it is in these books said, that, wherever the personal appearance of the defendant is not necessary, the jury may give a privy verdict, and that it is usual so to do. Raym. 193. Rex v. Ladsingham. 1 Ventr. 97.

In an information for a misdemeanour the jury had given a privy verdict. The verdict afterwards given in open court was upon this account objected to; but it was holden to be good. Raym. 193. Rex v. Ladsingham. 1 Ventr. 97.

[If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *publick* and not a *privy* verdict.] 3 Bl. Com. 377.

(C) Of a General Verdict.

A General verdict is so called; because the whole matter in issue is thereby found generally.

If the venue in an action of assault and battery be laid in the parish of *A.*, the jury shall not be received to say, that the defendant is not guilty in the parish of *A.*, for the jury must either find the whole matter in issue specially, or they must find generally that the defendant is or is not guilty. 2 Roll. Abr. 694. U. pl. 1.

The jury may in any case, if they will take upon themselves the knowledge of the law, find a general verdict: but it is in some cases dangerous for them so to do; for if they mistake the law, they run themselves into the danger of an attaint. It is therefore the safer way, for the jury to find a special verdict in a case which appears to them doubtful. 1 Inst. 228. 4 Rep. 54.

(D) Of a Special Verdict.

A Special verdict is ſo called; becauſe ſome matter of fact is thereby found ſpecially.

The deſign of a ſpecial verdict is to ſubmit ſome queſtion of law, which ariſes upon the matter of fact found ſpecially, to the conſideration of the court.

Bro. Verd. pl. 45. pl. 56. pl. 85. It ſeems to have been always holden, that if the general iſſue be pleaded, the jury may find a ſpecial verdict.

Bro. Verd. pl. 45. Dyer, 117. It is laid down in two books, that if an iſſue be joined upon a ſpecial plea, the jury cannot find a ſpecial verdict.

1 Inſt. 226, 227. But it is laid down in another book, that although there be caſes to the contrary, it is ſettled, that the jury may find a ſpecial verdict as to the matter in iſſue upon a ſpecial plea; for that a queſtion of law may as well ariſe in ſuch caſe, as where the general iſſue is pleaded.

9 Rep. 12. Dowman's caſe. And in another book it is ſaid to have been holden, that in all pleas of the crown, and in every civil action, whether it be real, perſonal, or mixed, in which an iſſue is joined betwixt the king and a party, or betwixt party and party, the jury may find a ſpecial verdict.

1 Inſt. 228. 9 Rep. 12. It is ſaid, that the court cannot refuſe to receive a ſpecial verdict, provided the matter ſpecially found be pertinent to the iſſue; for that the jury have a right to find ſuch verdict in every caſe which appears to them doubtful.

1 Inſt. 228. Vaugh. 145. Ld. Raym. 1494. Foſt. 256, 257. But, although the jury may find a ſpecial verdict in every caſe which appears to them doubtful, it is not neceſſary, even for their own ſafety, to do this in every ſuch caſe. For if the judge before whom the cauſe is tried take upon himſelf to determine the queſtion of law, concerning which the jury doubt, and direct them to find a general verdict, they may, without danger to themſelves, find ſuch verdict.

2 H. H. P. C. 303. Foſt. 279. If upon the trial of a perſon indicted for murder it appear, that at the time of the homicide he was inſane, the jury may, upon being informed by the judge that an inſane perſon cannot be guilty of murder, it being a maxim of law that *crimen non contrahitur niſi voluntas ſit nocendi*, find a general verdict of not guilty.

2 H. H. P. C. 303. 1 Hawk. 70. Foſt. 279. If upon the trial of a perſon indicted for murder, the judge be upon all the circumſtances of the caſe of opinion, that the homicide is juſtifiable, the jury may find a general verdict of not guilty.

If upon the trial of a perſon indicted for murder, the judge be upon all circumſtances of the caſe of opinion, that the homicide amounts to manſlaughter, the jury may find a verdict of manſlaughter.

Ld. Raym. 1494. Foſt. 256, 257. It is ſaid, that if the jury are diſſatisfied with the determination of the judge, as to the queſtion of law concerning which they doubt, they are not obliged to follow his direction, but may find a ſpecial

a ſpecial verdict. But it is likewiſe ſaid, that the jury will, if they are well adviſed, find a general verdict, in every caſe wherein the judge determines the queſtion of law concerning which they doubt, and directs them to find ſuch verdict.

Nor are they in ſuch caſe, although the judge ſhould be miſtaken, liable to an attaint; for as it is only ſaid, *that the jury are liable to an attaint, where they will take upon themſelves the knowledge of the law and miſtake the law*, it follows, that they are not liable thereto, when they find according to the direction of the judge. 1 Inſt. 227. 4 Rep. 54.

The minutes for a ſpecial verdict are to be approved of by the judge; it being his province to take care that the queſtion of law be fairly ſtated, and they ought to be delivered to the jury before they find the verdict. 2 Lill. Abr. 791. F.

If this be not done, the jury may find a general verdict without incurring the danger of an attaint. 2 Lill. Abr. 790. H.

The minutes for a ſpecial verdict intended to be found ought to be ſigned by one of the counſel for each party.

But, if all the counſel for one of the parties refuſe to ſign the minutes for a ſpecial verdict, the judge may direct the jury to find one from the minutes as ſigned by one of the counſel for the other party. 2 Lill. Abr. 793. G.

It is the duty of the party, at whoſe inſtance a ſpecial verdict was found, to draw it up from the minutes: but either of the parties may draw it up; and if one of them do this, and the other neglect to pay his ſhare of the expence, the court will not hear counſel for him when the verdict is ſet down for argument. 2 Lill. Abr. 790. E.

If a ſpecial verdict be not drawn up according to the minutes, as ſigned and approved of at the trial of the cauſe, the court may order it to be amended from the minutes. 2 Lill. Abr. 790. D.

If the queſtion of law be not properly ſtated in a ſpecial verdict, and the verdict cannot be amended from the minutes, as ſigned and approved of at the trial of the cauſe, the court may order it to be amended from the notes of the judge before whom the cauſe was tried. *Ibid.*

It is in one book laid down generally, that the court may order a ſpecial verdict to be amended, from the notes of the judge, in ſuch manner as to bring the queſtion of law properly before the court. 2 Lill. Abr. 797. H.

It is in another book laid down, that the court may order a ſpecial verdict to be amended as to a matter of fact, from the notes of the judge before whom the cauſe was tried. 2 Roll. Abr. 701. pl. 16.

In an action of trover it was found by a ſpecial verdict, that the defendant, who was a conſiderable farmer, did annually buy and ſell for gain divers large quantities of potatoes, and the queſtion ſubmitted to the court was, whether he was a trader within the meaning of any ſtatute of bankruptcy? The court inclined to be of opinion, that he was: but a doubt aroſe, whether it was not neceſſary for the jury to have found the quantity of potatoes which the defendant did annually buy and ſell, that the court might be better able to judge, how far he ſought his living by buying and ſelling. *Pratt*, Ch. J. did not think it neceſſary, that Str. 513, 514. Mayo v. Archer. [As to the amending of ſpecial verdicts, *vide ſupra*, tom. 1. pag 159, 160.]

this quantity ſhould be found; it being in his opinion ſufficient, if the defendant did in any degree ſeek his living by buying and ſelling. *Eyre*, J. and *Forteſcue*, J. being of a different opinion, the cauſe was adjourned. A motion was afterwards made, upon an affidavit of the quantity, which was at the trial of the cauſe proved to have been annually bought and ſold, that a *venire facias de novo* might be awarded. This was not awarded: but the ſpecial verdict was ordered to be amended as to this. The reporter adds, that it was ſo amended; and that at another day judgment was given for the plaintiff.

It ſeems, however, to be the better opinion, that the court cannot order a ſpecial verdict to be amended as to a matter of fact.

2 Lill. Abr. 790. D. 792. B. It is in one caſe laid down, that if the proper facts are not found by the ſpecial verdict, the court will not hear the queſtion of law argued; becauſe no judgment can be given upon the verdict; but will award a *venire facias de novo*, that the proper facts may be found.

2 Lill. Abr. 791. B. In another caſe it is laid down, that if a proper fact be omitted in the minutes for a ſpecial verdict, the court cannot order the verdict to be amended as to this, although the counſel for both parties conſent thereto; for that this would amount to making a new verdict as to that fact by the court and counſel. It is added, that the court will in ſuch caſe award a *venire facias de novo*.

Gilb. Eq. Rep. 255, 256. Lodge v. Jennings. In another caſe it is laid down, that a ſpecial verdict, in which the jury have omitted to find a proper fact, is not good; for that the court will never determine the queſtion of law, unleſs every proper fact be found by the jury.

The opinion, that the court has no power to amend a ſpecial verdict as to a matter of fact, is moreover confirmed by divers caſes: in which it is laid down, not only that every proper fact muſt be found by the jury, but alſo that it muſt be found expreſsly; it not being ſufficient for the jury to find evidence or circumſtances, from which the court may fairly infer a fact.

Noy, 147. Smith v. Foaves. The matter in iſſue was, whether *J. S.* had reſigned a benefice to a biſhop. The jury found an inſtrument, under the ſeal of the biſhop, upon which there was an indorſement that *J. S.* did reſign the benefice to him, and that he accepted the reſignation. The verdict was holden to be bad; becauſe it did not find expreſsly, that *J. S.* had reſigned the benefice.

2 Roll. Abr. 603. S. pl. 1. An eſtate having been granted by copy of court roll to three perſons for their lives, the matter in iſſue was, whether a heriot was by the cuſtom of the manor due upon the death of one of them. The jury found, that the cuſtom of the manor did not warrant the granting of an eſtate for three lives. The verdict was holden to be bad; becauſe it only found argumentatively, that a heriot ought not in the preſent caſe to be paid; whereas the jury ought to find every fact expreſsly.

2 Roll. Abr. 603. S. pl. 2. If the matter in iſſue be, whether an eſtate may by the cuſtom of a manor be granted by copy of court roll for two lives, and the jury find, that an eſtate may by the cuſtom of the manor be granted for three lives, the verdict is bad; becauſe it is only argumentative

mentative to ſay, that, inaſmuch as a greater eſtate may by the cuſtom of the manor be granted, a leſs one may.

If the conſequence of the verdict upon an indictment may be corporal puniſhment, every proper fact muſt be found expreſsly; it not being ſufficient for the jury to find either evidence or circumſtances, from which the court may fairly infer a fact. 12 Mod. 628. Rex v. Plummer.

(E) Of the Province of the Court where a Special Verdict is found.

IF the jury, after finding a fact ſpecially, take upon themſelves to draw a concluſion not warranted by law, the court ought not in giving judgment to pay any regard to the concluſion of the jury; becauſe they ought not to have drawn ſuch concluſion. 11 Rep. 10. Priddle's caſe.

If the iſſue in an aſſize be, whether there is a ſeiſin, and the jury after finding ſome fact ſpecially, conclude with ſaying that this amounts to a ſeiſin, the court, without paying any regard to the concluſion of the jury, will judge whether the fact found do amount to a ſeiſin. Bro. Verd. pl. 41.

In an action againſt an executor, the iſſue was whether he had aſſets in his hands. The jury found, that the defendant's teſtator, in a leaſe granted by him, had reſerved a rent to himſelf, his heirs and aſſigns, and that the defendant had received the rent from the time of his teſtator's death; and they concluded with ſaying that this is aſſets. The court held the concluſion to be void; becauſe it appeared from the fact found, that the rent ran with the reverſion, and conſequently that, as it did not belong to the executor, but to the heir, it was not aſſets. Dyer, 362. Anon. Hob. 53.

If the jury find a deed ſpecially, they ought to find it *in hæc verba*, and not to find what they judge to be the ſubſtance of the deed, that the court may have an opportunity of inſpecting the deed, in order to put a conſtruction thereupon: but, if the deed be loſt, it is the duty of the jury to find the ſubſtance thereof, in caſe this be proved. Vaugh. 77. Rowe v. Huntingdon.

The court will never entertain a doubt, concerning any thing that is not ſubmitted to their conſideration by a ſpecial verdict; but will, on the contrary, intend every thing which can be fairly intended, in order to ſupport the verdict. 5 Rep. 97. Goodall's caſe.

The queſtion ſubmitted to the court by a ſpecial verdict was, whether the reſignation of a donative to the donor be good; but it was not found that the donor had accepted the reſignation. It was holden, that the acceptance of the reſignation ſhould be intended: and by the court—The queſtion ſubmitted to our conſideration is, whether the reſignation of a donative to the donor be good; and we will never entertain a doubt as to any thing whereof the jury have not doubted. Cro. Ja. 63. Fairchild v. Gayre. Hob. 262.

In an action of *ejectione firmæ* the jury found, that the premiſes in queſtion were granted by letters patent of King *Henry* the Eighth, and they concluded with ſaying, that if the court ſhall be of opinion that the letters patent are good, then they find for the Cro. Car. 22. Caſtle v. Hobbs.

defendant; but, if the court ſhall be of opinion that the letters patent are void, then they find for the plaintiff. Upon arguing the ſpecial verdict it was inſiſted, that, as no title to the premiſes is found in the plaintiff, he is not entitled to judgment, even if the court ſhould be of opinion, that the letters patent are void. Judgment was given for the plaintiff: and by the court—As the queſtion ſubmitted to our conſideration is, whether the letters patent are void, and we are of opinion that they are void, we will, as nothing is found to the contrary, intend, that the plaintiff has in all other reſpects a good title to the premiſes.

(F) Of a Verdict in which the Jurors did not all agree.

2 H. H. P. C. 297.

IN very antient times it was not neceſſary in a civil cauſe, for all the jurors to agree in a verdict. But it has been for many years ſettled, that, if in a civil cauſe the jurors do not all agree in a verdict, the verdict is bad.

41 Aſſize, 11. Bro. Verd. pl. 49.

In an aſſize the juſtices took a verdict of eleven of the jurors, the twelfth not having agreed therein. The verdict was upon great deliberation holden to be bad; and a *venire facias de novo* was awarded: and by the court—The juſtices ought not to have taken the verdict, but to have carried the jurors with them in a cart, until they all agreed in a verdict.

41 Aſſize, 11. 2 H. H. P. C. 297.

The twelfth juror, who, inſtead of agreeing with his fellows in the verdict, ſaid he would rather die in priſon than agree therein, was in the caſe laſt cited fined and impriſoned but he was afterwards diſcharged; and it was ſaid, that no man ought to be puniſhed for not agreeing in a verdict, which he does not think a right one.

Vaugh. 150. Buſhel's caſe.

The jurors are not obliged to agree in the reaſon for finding a verdict as it is found; and if a reaſon be given by one or more of them, upon a queſtion being aſked by the judge, for finding it as it is found, this is not to be conſidered or recorded as part of the verdict.

(G) Of the Power of the Jury to depart from a General Verdict after it is given in open Court.

1 Inſt. 227. Plowd 212. 2 H. H. P. C. 299, 300.

IF a jury, who by miſtake, or from partiality, have given an improper verdict, do of themſelves give a different verdict before the improper verdict is recorded; or, if at the recommendation, or by the leave, of the judge, they go together again before the improper verdict is recorded, and afterwards give a different verdict, the verdict which is laſt given ſhall ſtand.

B o. Jur. pl. 7.

In a writ of conſpiracy againſt two, the jury gave a verdict of guilty as to one, and of not guilty as to the other. At the recommendation of the judge they went together again, to reconſider their verdict, and afterwards gave a verdict of guilty as to both.

The

The title to three acres of land being in iſſue, the jury as to one of the acres gave a verdict for the plaintiff, and as to another for the defendant; but as to the third ſaid they were not agreed. By leave of the court they went together again, to conſider of a verdict as to the third acre. Afterwards, without taking any notice of the verdict already given, they gave a verdict as to all the three acres for the plaintiff. The latter verdict was upon great deliberation holden to be good. Dyer, 204, 205.

It is ſaid, that, after the jury have given a verdict of not guilty in an indictment for felony, the judge may, if the verdict be in his opinion contrary to clear and full evidence, ſend them out again to reconſider their verdict: but it is likewiſe ſaid, that, if the jury will ſtand to their verdict, the judge is bound to receive it. It is added, that the king may in ſuch a caſe bring an action of attaint. 2 H. H. P. C. 310.

(H) In what Caſes a Verdict is bad, on account of Miſbehaviour in one or more of the Jurors.

IF the jurors, when they go from the bar to conſider of a verdict, do without the leave of the court take with them any writing under ſeal, which has been given in evidence, they are guilty of a miſbehaviour; but the verdict is good. Bro. Enqueſt. pl. 49. 2 Roll. Abr. 714. pl. 6. pl. 7.

It is in divers books laid down generally, that if the jurors, when they go from the bar to conſider of a verdict, do without the leave of the court, or the conſent of both parties, take with them any writing not under ſeal which has been given in evidence, they are guilty of a miſbehaviour; but that the verdict is good. 1 Inſt. 227. Cro. Eliz. 411. 12 Mod. 520.

The jurors, when they went from the bar to conſider of a verdict, did, without the leave of the court, or the conſent of both parties, take with them an act of common council which had been given in evidence. The verdict was holden to be good; and by *Holt*, Ch. J.—It was a very improper behaviour in the jury: but, as the act of common council was evidence for both parties, the verdict ought to ſtand. In the caſe of Lady *Joy*, a verdict was ſet aſide, becauſe the jury did, without the leave of the court or the conſent of both parties, take with them a map which had been given in evidence: but the verdict was, in that caſe, ſet aſide, becauſe the map was evidence for only one party, which is not the preſent caſe. Ld. Raym. 148. Rex v. Burdett.

After the jurors were gone from the bar to conſider of a verdict, one of the witneſſes, who had been examined on the part of the defendant, was ſent for and re-examined by them; and they afterwards gave a verdict for the defendant. Complaint being made of this to the judge, the jurors confeſſed that they had re-examined the witneſs; but they ſaid, that the evidence upon the re-examination was in effect the ſame as he had given in court. The verdict was holden to be bad; and a *venire facias de novo* was awarded. Cro. Eliz. 189. Metcalfe v. Dean.

Cro. Eliz. 411. Vicary v. Farthing.

In another caſe the caſe of *Metcalfe* and *Dean* is ſaid to be law; becauſe the evidence improperly received by the jurors was parol evidence; for that, as the witneſs might vary in his evidence upon the re-examination from what he had given in court, it would be of the moſt dangerous conſequence to ſuffer ſuch verdict to ſtand: but it is in this caſe ſaid, that there is not ſo much danger in letting a verdict ſtand, where the jurors have improperly taken with them written evidence which has been given in court; becauſe written evidence remains always the ſame.

11 Hen. 4. 37 b. 18 a.

The plaintiff in an aſſize delivered a writing relative to the matter in iſſue to a perſon returned upon the pannel. This perſon being ſworn upon the jury, he, after the jurors were withdrawn to conſider of a verdict, ſhewed the writing to his fellows. A verdict being given for the plaintiff, the court was moved for judgment. For the plaintiff it was ſaid, that as the writing was to the ſame effect as ſome of the evidence given in court, the behaviour of the plaintiff was not ſo bad, as if evidence to the ſame effect had not been given in court. It was holden that he ſhould not have judgment; and by *Gaſcoigne* and *Hulls*: after the jurors are ſworn they ought not to ſee or to carry with them any writing, except it has been given in evidence, and was delivered to them by order of the court.

1 Sid. 235. Goodman v. Coddington.

After the jurors were gone from the bar to conſider of a verdict one of them went from his fellows. He ſoon after returned with a copy of a court roll in his hand, and told them that the merits, with which he was perfectly well acquainted, were with the plaintiff. Hereupon the other jurors, before of a different opinion, were prevailed upon by him to give a verdict for the plaintiff. The verdict was afterwards ſet aſide.

Cro. Eliz. 616. Graves v. Short.

Upon a writ of error it was aſſigned for error, that one of the jurors did, after they were gone from the bar to conſider of a verdict, ſhew to his fellows a writing in favour of the plaintiff that had not been given in evidence, by reaſon of which they found a verdict for the plaintiff. It was holden, that this was not error: and by the court—As it does not appear that the writing was delivered to the juror by the plaintiff, it ſhall be intended that it was in his own poſſeſſion; and if ſo, as he might have given the writing in evidence, it was lawful for him to ſhew it to his fellows. Another reaſon is given why this was holden not to be error; namely, that the fact did not appear upon the *poſtea*; and this ſeems to be the better reaſon: for the other, that, as the writing might have been given in evidence by the juror, it was lawful for him to ſhew it to his fellows, does not ſeem to be concluſive.

Vaugh. 147. Buſhel's caſe.

It is ſaid in one book, that the jurors are not obliged to found their verdict entirely upon the evidence given in court; for that it may be in part founded upon their own perſonal knowledge. But no caſe is cited in ſupport of this doctrine, and the contrary may be inferred from other books.

It is in one book ſaid, that if a witneſs named in a deed be returned of the jury, it is a good cauſe of challenge. 1 Inſt. 157.

In another book it is ſaid, that one of the jurors, after having heard all the other evidence, was at the prayer of the defendant's counſel ſworn, and gave evidence in court; from whence it may be inferred, that he could not have given this evidence to his fellows after they were gone from the bar. 1 Sid. 133. Fitzjames v. Moyſe.

In another book it is ſaid, that if a perſon returned to ſerve upon a jury know any thing relative to the matter in iſſue, it is his duty to tell the court ſo, that inſtead of being ſworn upon the jury he may be examined as a witneſs. 7 Mod. 2. Anon.

It may moreover be inferred from the practice of granting a new trial becauſe a verdict is contrary to evidence, that the jurors ought to found their verdict entirely upon the evidence given in court; for if they have a power to found it partly upon other evidence, it would be quite unreaſonable for the judge before whom the cauſe was tried, who muſt always be a ſtranger to what did not paſs in court, to report that a verdict is contrary to evidence, or for the court to ſet it aſide as being ſo.

If a juror eat or drink at his own expence, before he and his fellows have agreed in a verdict, he is liable to be fined; but the verdict is good. 1 Inſt. 227. Bro. Verd. pl. 19. Dyer, 218. 1 Ventr. 125. 12 Mod. 111.

After the jurors had been locked up together ſome time, the officer who attended them, being ſurprized at their delay in agreeing in a verdict, ſearched them, and found figs in the pockets of three, and pippins in the pockets of two others. This being repreſented to the judge, the three, who confeſſed the having eaten of the figs, were fined four pounds each; and the other two, notwithſtanding they declared upon oath that they had not eaten of the pippins, were fined forty ſhillings each: but the verdict was, upon conference with the judges of the other courts, holden to be good. 1 Leon. 132. Mounſon v. Weſt.

In a caſe of neceſſity, as, if a juror be ſuddenly taken ill, it is in the power of the court to ſuffer him to eat and drink at his own expence, before he and his fellows have agreed in a verdict. 1 Ventr. 125.

If the trial of a cauſe be very long, it is at this day uſual for the court, the conſent (*a*) of both parties being firſt obtained, to give the jurors leave to eat and drink during the trial at their own expence, or at the equal expence of both parties.

[(*a*) In the late trials for treaſon the jurors were permitted to eat, drink, and retire to reſt, attended by proper officers, without requiring the formal conſent of the parties. The irregularity was ſufficiently juſtified by the neceſſity of the caſe.]

If the jurors eat or drink at the expence of one party before they have agreed in a verdict, they are liable to be fined; and if the verdict be in favour of that party, it is bad: but, if it be in favour of the other party, it is good. 1 Inſt. 227. 12 Mod. 111.

It is ſaid in one book, that if the jurors, after they have agreed in a verdict, eat or drink at the expence of the party in whoſe favour it is, the verdict is good. 1 Inſt. 227.

1 Ventr. 125. But it is in another book laid down, that the jurors can never be said to have agreed in a verdict, unless they have, by giving a privy verdict, signified to the judge, that they have agreed in one.

Bro. Verd. pl. 57. Moor, 33. It is said in two books, that although the jurors have given a privy verdict, they must not eat or drink without leave of the court, until they have given a verdict in open court.

Bro. Verd. pl. 57. And it is in one of these said, that although the jurors may with leave of the court eat and drink after they have given a privy verdict, they must be kept together, until they have given a verdict in open court.

Barnes, 441. Ld. St. John v. Abbot. The jurors having received their charge withdrew to consider of a verdict. Before the rising of the court they came into court to ask a question of the judge, which being answered, they again withdrew. At the sitting of the court in the afternoon of the same day, the judge was informed that two or three of the jurors were in court. Being asked by the judge what they did there, and having answered that they and their fellows could not agree in a verdict, they were ordered to go to their fellows. A verdict was afterwards given for the plaintiff, and the judge did not report that it was contrary to the evidence. The court being moved that this verdict might be set aside, it was holden to be good: and by the court—Some of the jurors have been guilty of a great misbehaviour, and are liable to be fined; but, as the plaintiff has not been guilty of any misbehaviour, the verdict ought to stand.

1 Freem. 415. Ld. Fitzwalter's case. The jurors being equally divided in opinion, threw dice for whom they should find a privy verdict, and found one for the party in whose favour the dice came; and without conferring afterwards together, they gave a verdict for the same party in open court. The verdict was set aside: and by the court—As our estates, liberties, and lives are in the power of jurors, they ought to be very circumspect in their conduct. In this case the jurors have behaved very improperly; for they were determined by chance in the finding of their privy verdict, and they had not any conference together afterwards, before they gave their verdict in open court.

2 Lev. 205. Foster v. Hawden. The jurors, who could not agree in a verdict, drew lots for whom they should find one, and found one for the party in whose favour the lot was. The verdict was set aside; and the jurors were ordered to appear in court.

Str. 642. Hale v. Cove. [*Vide supra*, Tom. 6. page 657.] Another verdict was for the same reason set aside, notwithstanding the judge reported, that the party, in whose favour it was, ought in his opinion to have had a verdict.

Bunb. 51. Mellish v. Arnold. A verdict was set aside, because the jurors were determined as to the damages they should give by throwing up cross or pile, whether they should give five hundred pounds or three hundred.

Comb. 14. Anon. If the jurors who cannot agree in a verdict vote, and give a verdict according to the greater number of votes, the verdict is nevertheless good.

In

In a modern caſe wherein the jurors voted for a verdict, ſeven of them were for finding a verdict as it was found, and no objection was made by the other five when the verdict was given. The court refuſed to ſet aſide the verdict: and by *Lee*, Ch. J. —Nothing was in this caſe determined by chance. The five jurors might ultimately be convinced by the ſeven: but, if they only acquieſced in the finding of the verdict, that is ſufficient; and they ſhall not now be received to ſay, that they did not acquieſce. Sayer, 100. Lawrence v. Boſwell.

A verdict was ſet aſide upon an affidavit of eleven of the jurors, that they and the other juror had agreed to give a verdict for the plaintiff; but that the foreman had given a verdict for the defendant. Ca. of Pr. in C. B. 66. Miles v. Baker.

It is ſaid, that a miſbehaviour in one or more of the jurors cannot be aſſigned for error, unleſs the miſbehaviour appear upon the *poſtea*, if the cauſe were tried at *niſi prius*, or upon the record, if it were tried at bar; for that, if a miſbehaviour not appearing on record could be taken advantage of by writ of error, a verdict might at a great diſtance of time be ſet aſide, when by reaſon of the death of one of the parties, or of one or more of the jurors, the truth of the miſbehaviour ſuggeſted could not be properly inquired into. Cro. Eliz. 616. Graves v. Short.

It is laid down in two caſes, that the court will not ſet aſide a verdict for miſbehaviour in one or more of the jurors, unleſs the miſbehaviour appear upon the *poſtea*, if the cauſe were tried at *niſi prius*, or upon the record, if it were tried at bar. Cro. Eliz. 189. Medcalf v. Dean, Trin. 32 Eliz. Cro Eliz. 411. Vacary v. Farthing, Mich. 37 Eliz.

But the court in a ſubſequent caſe ſet aſide the verdict, upon an affidavit that the jurors had eaten at the expence of the party in whoſe favour it was given, before they had agreed in the verdict. 1 Freem. 79. Bellamy v. Player, Paſch. 23 Car. 2.

In another ſubſequent caſe the court ſet aſide a verdict, upon an affidavit of the officer who attended the jurors, that they had toſſed up croſs and pile for whom they ſhould find the verdict, and had found one accordingly. 2 Jon. 83. Fry v. Hardy. Mich. 29 Car. 2.

(I) In what Caſes a Verdict is bad, on account of a Miſbehaviour in one of the Parties.

IF one of the parties ſpeak words of mere civility to one of the jurors, before they have agreed in a verdict, the verdict, although it be in favour of ſuch party, is good. 1 Ventr. 125. Duke of Richmond v. Wiſe. 2 Roll. Abr. 716. pl. 17.

If one of the parties ſay theſe words to one of the jurors, before they have agreed in a verdict, *the matter is clearly of my ſide*, or theſe words, *I hope you will find for me*, the verdict, if it be in favour of ſuch party, is bad: but, if it be in favour of the other party, it is good. 1 Ventr. 125. Duke of Richmond v. Wiſe. 2 Roll. Abr. 716. pl. 17.

If

1 Inſt. 227. If one of the parties or his agent deliver to the jurors, before they have agreed in a verdict, a writing relative to the matter in iſſue which was not given in evidence, the verdict, if it be in favour of ſuch party, is bad: but, if it be in favour of the other party, it is good.

Ibid. If one of the parties or his agent, without leave of the court, deliver to the jurors, before they have agreed in a verdict, a writing ſealed or not ſealed which was given in evidence, the verdict, if it be in favour of ſuch party, is bad; but, if it be in favour of the other party, it is good.

2 Roll. Abr. 714. pl. 6. And it is ſaid, that the verdict, if it be in favour of the party who delivered the writing, is bad, notwithſtanding the jurors afterwards declare upon oath, that they never read the writing; for that it would be of the moſt dangerous conſequence, if the jurors ſhould be ſuffered to receive a writing privately from one of the parties.

Cro. Eliz. 411. Vicary v. Farthing. After the jurors were gone from the bar, but before they had agreed in a verdict, the plaintiff's attorney delivered to them a book which had been given in evidence. A verdict being afterwards found for the plaintiff, *Fenner*, J. was, upon a motion to ſet it aſide, of opinion, that, as the verdict was in favour of the party in behalf of whom the book was delivered, it was bad. The reporter adds, that the cauſe was adjourned; and that there was afterwards judgment for the plaintiff.

Moor, 452. In another report of the ſame caſe it is ſaid, that *Clinch*, J. as well as *Fenner*, J., was of opinion, that the verdict was bad; and if ſo, notwithſtanding the plaintiff had judgment, which followed of courſe as the court was equally divided, this caſe does not contradict what is laid down in the books above cited.

(K) Of a Verdict upon an informal or immaterial Iſſue.

IF an iſſue be joined upon a point ſo material, that the determination thereof will determine the matter in queſtion, but be not joined properly, this is an informal iſſue.

An iſſue, which would have been bad upon a demurrer by reaſon of informality, is after a verdict helped by the 32 *H.* 8. *c.* 30. the joining of iſſue being one of the things mentioned in that ſtatute.

Cro. Ja. 576. Jouce v. Parker. In an action of prohibition to a ſuit for tithes, the plaintiff alleged a preſcription for all the pariſhioners to clip the wool from the necks of their ſheep in order to preſerve them, and that, in conſideration of paying the tenth fleece when the ſheep ſhould be ſheared, they had been uſed to be diſcharged of the tithe of the wool ſo clipped from the necks of their ſheep. The defendant traverſed the preſcription in this manner, *abſque hoc*, that, in conſideration of paying the tenth fleece when their ſheep ſhould be ſheared, they had been uſed to be diſcharged of the tithe of the wool ſo clipped from the necks of their ſheep. Iſſue being joined upon the traverſe, and a verdict being found for the defendant, the court was moved, that a conſultation ought not to be

be awarded, becauſe the iſſue is not well joined. A conſultation was awarded: and by the court—Although the iſſue be not aptly joined, it is after a verdict helped by the ſtatute.

In an action of replevin the defendant avowed the taking as a diſtreſs for rent in arrear, which he claimed under a grant of a rent-charge from *J. N.* the heir of *E. N.*, who was ſeiſed in fee of the land. The plaintiff replied, that *E. N.* was ſeiſed of an eſtate tail, and that upon the death of *J. N.* her ſon became entitled to the land, and that upon his death it deſcended upon the plaintiff; and he traverſed the ſeiſin of *E. N.* in fee. Iſſue being joined upon the traverſe, and a verdict being found for the defendant, it was ſaid upon a motion in arreſt of judgment, that the iſſue is immaterial; for that, as it is not material how the anceſtor of the grantor of the rent-charge was ſeiſed, but how the grantor was himſelf ſeiſed, the traverſe ought to have been upon the ſeiſin in fee of the grantor. Judgment was given for the defendant: and by the court—As the defendant has alleged a ſeiſin in fee in *E. N.*, her ſeiſin in fee is material, and, conſequently, was traverſable; ſo that, although this be not ſo apt an iſſue as might have been joined, it is after a verdict helped by the ſtatute. Cro. Ja. 44. Pigot v. Pigot.

In an action of *aſſumpſit* the defendant pleaded not guilty. Iſſue being joined upon the plea, a verdict was found for the plaintiff. Upon a motion in arreſt of judgment it was ſaid, that the iſſue is immaterial; but judgment was given for the plaintiff: and by the court—Although this be not the moſt proper iſſue, and would have been bad upon a demurrer, yet, as deceit is charged in the declaration in an action of *aſſumpſit*, the plea of not guilty is ſuch an anſwer thereto, that the iſſue joined upon it is after a verdict helped by the ſtatute. *Walmſley*, J. added—That there are many precedents, in which an iſſue joined in an action of *aſſumpſit* upon the plea of not guilty has been tried, and judgment has been given. Cro. Eliz. 470. Corbyn v. Brown.

If an iſſue be joined upon a point ſo immaterial that the determination thereof will not determine the matter in queſtion, this is an immaterial iſſue.

An immaterial iſſue is not helped by any of the ſtatutes of jeofails. Carth. 371. 1 Lev. 32.

In an action of treſpaſs the defendant pleaded an accord betwixt *J. S.* and the plaintiff of the one part, and himſelf of the other. The plaintiff replied, that no accord was made betwixt the defendant and him. Iſſue being joined upon this replication, and a verdict being found for the plaintiff, it was holden, that no judgment could be given by reaſon of the immateriality of the iſſue; it not being joined upon the accord pleaded by the defendant, but upon a different accord. 1 Roll. Rep. 86. Carpenter v. Starr.

In an action of trover againſt huſband and wife, which charged a converſion by the wife, both the defendants pleaded not guilty. Iſſue being joined upon the plea, and a general verdict being found for the plaintiff, a repleader was awarded: and by the court—If judgment ſhould be given for the plaintiff, it would amount Cro. Ja. 5. Coxe v. Croſwell.

amount to saying, that the husband and wife were both guilty of the conversion; whereas the plaintiff only charges that the wife was guilty thereof.

Ca. of Pr. in C. B. Noble v. Lancaster. Barnes, 125. S. C.

In an action of trover the defendant pleaded *non assumpsit*. Issue being joined upon the plea, and a verdict found for the plaintiff, a repleader was awarded on account of the immateriality of the issue.

2 Str. 973. Cory v. Hinton.

In an action of trespass *quare clausum fregit* the defendant pleaded, that the place in which the trespass is charged is his land. The plaintiff replied, that the place in which the trespass is charged is his land, and not the land of the defendant. Issue being joined upon the replication, a verdict was found for the plaintiff. Upon a motion in arrest of judgment it was said, that the issue is immaterial; for that the place in which the trespass is charged may be the estate of the plaintiff, and yet he may not be in the possession thereof, which he must be in order to maintain this action. The plaintiff had judgment: and by the court—It is found, that the place in which the trespass is charged is the land of the plaintiff; and we will after a verdict rather intend that he was in the possession thereof than that he was not.

5 Rep. 43. Nichol's case. Moor, 692. S. C.

In an action of debt upon a single bill the defendant pleaded payment of the money due thereupon; but did not plead an acquittance. Issue being joined upon the plea, a verdict was found for the plaintiff, and judgment was given for him. A writ of error being brought in the Exchequer Chamber, it was assigned for error, that, as the payment of the money due upon a single bill is no discharge of the bill, unless there be an acquittance, the issue is immaterial. The judgment was affirmed: and by the court—If the verdict had been for the defendant, it would perhaps have been bad, because an acquittance could not upon this issue have been found: but, as the verdict finds that the money due upon the bill is not paid, it virtually finds that the bill is not discharged; and the court will never suffer a defendant to avail himself of his own bad pleading, in order to deprive a plaintiff of the benefit of a verdict, upon which judgment may be well given.

Cro. Ja. 678. Johns v. Ridler.

In an action of *ejectione firmæ* the defendant pleaded, that *J. S.*, being seised in fee of the premises, demised them to him for the term of five years; that by virtue of this demise the defendant entered, and was possessed, until the plaintiff's lessor disseised him; that the plaintiff's lessor being seised of the premises by the disseisin, demised the same to the plaintiff; and that the defendant entered upon the plaintiff, as it was lawful for him to do: the plaintiff replied that his lessor was seised in fee, and traversed the disseisin of the defendant. Issue being joined upon the replication, a verdict was found for the plaintiff. Upon a motion in arrest of judgment it was said, that, as the defendant was by his own shewing only a termor, he could not be disseised, and, consequently,

ſequently, that, the iſſue being immaterial, no judgment could be given upon the verdict. Judgment was given for the plaintiff: and by the court—If a verdict had been found for the defendant, it would have been bad; becauſe it would have found a diſſeiſin of a termor: but, as the verdict is for the plaintiff, judgment may be well given; becauſe it only finds that his leſſor did not diſſeiſe the defendant; and the court will never ſuffer one party, if conſiſtently with the rules of law it can be prevented, to avail himſelf of his own bad pleading, in order to deprive the other of the benefit of a verdict.

In an action of replevin the defendant avowed the taking as a diſtreſs for an arrear of rent, due to him under a demiſe from the plaintiff made at *A.* dated 1 *Nov.* 18 *Car.* 2. The plaintiff replied, that he did not make a demiſe to the defendant at *A.* dated 1 *Nov.* 18 *Car.* 2. in manner and form as alleged. Iſſue being joined upon the replication, the jury found a verdict for the plaintiff, and judgment was given for him. A writ of error being brought, it was aſſigned for error, that the iſſue is immaterial; becauſe it only is, whether a demiſe was made by the plaintiff to the defendant at a place certain, and upon a day certain, whereas a demiſe at any other place, and upon any other day, would have been ſufficient to have warranted the diſtreſs of the defendant. It was moreover ſaid, that as the merits, namely, whether there was a ſufficient demiſe to warrant the diſtreſs, had not been tried, and as the trial thereof had been prevented by the bad pleading of the plaintiff, who has by the replication made the place and day of the demiſe material, neither of which is in ſuch caſe material, he ought not to have judgment. On the other ſide it was ſaid, that this is at moſt only a misjoining of iſſue, which is after a verdict helped by the ſtatute of jeofails. 2 Lev. 11. Holbeck v. Bennett. 2 Saund. 317. S. C.

The opinion of the court was, that this caſe is not within the ſtatute of jeofails; and that, as the merits have not been tried, the plaintiff was not entitled to judgment upon the verdict: but, as it appeared, that the avowry of the defendant was bad, it was holden the plaintiff was entitled to judgment upon the declaration which is good; and the judgment was affirmed.

(L) Of a Verdict upon an Iſſue, Part of which is inſenſible or inſufficient.

IF part of an iſſue be inſenſible, the verdict thereupon found, notwithſtanding it be a general one, is good; for the court will not intend that part of the damages was given for the inſenſible part. On the contrary the court will, in ſupport of the verdict, intend that no damages were given for that part. Carth. 131. Nightingale v. Bridges. Salk. 364.

In an action of *aſſumpſit* the plaintiff declared, upon the cuſtom of merchants, for money due upon a promiſſory note; and he likewiſe declared upon an *indebitatus aſſumpſit*. Iſſue was joined upon the plea of *non aſſumpſit*, and a general verdict was found for Salk. 129. 364. Clark v. Martin.

the plaintiff. It being upon a motion in arreſt of judgment holden, that a promiſſory note is not within the cuſtom of merchants, it was inſiſted, that the court may after a verdict intend, that no damages were given on account of the note. The judgment was arreſted: And by the court—As the note is not matter inſenſible, but matter inſufficient in law, the court muſt intend that part of the damages was given on account thereof, and if it was given, the verdict is bad (*a*).

[(*a*) This inconvenient and ill-founded rule, that where there are ſeveral counts, entire damages, and one count is bad, and the others are not, this ſhall be fatal, upon the fictitious reaſoning delivered in the text, is now fully ſettled in civil caſes; though it does not hold in the caſe of criminal proſecutions; for, when there is a general verdict of *guilty* in an indictment conſiſting of ſeveral counts, if any one of them is good, that is held to be ſufficient. Grant v. Aſtle, Dougl. 730. However, though this diſtinction has been made in civil caſes, yet if there was only evidence at the trial upon ſuch of the counts as were good and conſiſtent, a general verdict may be altered from the notes of the judge, and entered only on thoſe counts; but, if there is *any* evidence, which applied to the other bad or inconſiſtent counts, (as, for inſtance, in an action for words, where ſome actionable words are laid, and others not actionable, and evidence given of both ſets of words, and a general verdict,) there, the *poſtea* cannot be amended, becauſe it would be impoſſible for the judge to ſay on which of the counts the jury had found the damages, or how they had apportioned them. In ſuch a caſe, the only remedy is by awarding a *venire de novo*. Eddowes v. Hopkins, Dougl. 377.]

(M) Of a Verdict which does not find all that is in Iſſue.

1 Inſt. 227. IF a verdict only find part of what is in iſſue, it is bad; becauſe the jury have failed in their duty, which was to find all that is in iſſue.

Ibid. In an information for intruding into a meſſuage and a hundred acres of land, iſſue was joined upon the plea of not guilty; the jurors found for the plaintiff as to the land, but were ſilent as to the meſſuage. The verdict was holden to be bad.

Cro. Eliz. 133. Finnymore v. Stanley. In an action of debt the plaintiff declared for ſeven pounds. The defendant pleaded *nil debet*, and iſſue was joined upon the plea. The jury found that the defendant owed the plaintiff ſix pounds, but were ſilent as to the ſeventh pound. The verdict was upon a writ of error holden to be bad.

3 Leon. 82. Roſſe's caſe. In an action of treſpaſs the plaintiff declared for the breaking of his cloſe, for the beating of his ſervant, and for the carrying away of his goods. The defendant pleaded not guilty, and iſſue was joined upon the plea. The jury found the defendant guilty of breaking the cloſe, but were ſilent as to the beating of the ſervant and the carrying away of the goods. The verdict was holden upon a motion in arreſt of judgment to be bad; becauſe it does not find all that is in the iſſue, and a *venire facias de novo* was awarded.

Hardr. 166. Rochel and his Wife v. Steedle. The declaration in an action of treſpaſs brought by *baron* and *feme* charged the beating of both. The defendant pleaded not guilty, and iſſue was joined upon the plea. The jury found the defendant guilty of beating the *feme*, but were ſilent as to the beating of the *baron*. Upon a motion in arreſt of judgment the verdict was holden to be bad; becauſe it does not find all that is in iſſue, and a *venire facias de novo* was awarded.

If

If in an indictment for privately conveying ducats into the profecutor's pocket, with an intent to charge him with a robbery, the jury find the defendant guilty of the fact, but are filent as to the intent; no judgment can be given, the verdict being incomplete. Sayer, 36. Rex v. Simons.

In an action of debt upon a charter-party, by which the defendant had contracted to pay fifty guineas a month for the uſe of a ſhip, the plaintiff alleged, that five hundred pounds were due to him for the uſe of the ſhip for a time therein mentioned. The defendant pleaded, that he had paid the plaintiff, at the rate of fifty guineas a month, for all the time he had had the uſe of the ſhip. Iſſue being joined upon the plea, the jury found, that three hundred pounds were due to the plaintiff for the uſe of the ſhip; but were ſilent as to the reſidue of the five hundred pounds. Upon a writ of error it was aſſigned for error, that the verdict does not find all that is in iſſue. In ſupport of the verdict it was ſaid, that, as the iſſue is ſpecial, and the jury have aſcertained what is upon the whole due to the plaintiff for the uſe of the ſhip, no other action can be brought for the uſe thereof, for any part of the time mentioned in the declaration. The judgment was reverſed: And by the court—There is no difference, as to the queſtion before the court, betwixt the caſe of a verdict upon a ſpecial iſſue and that of a verdict upon a general iſſue; for the jury muſt in either caſe find all that is in iſſue. Str. 1089. Hooper v. Shepherd.

If there are ſeveral counts in a declaration, and the verdict is taken upon only one of the counts, it is good, provided all that is in iſſue upon that count be found; becauſe every count is to be conſidered as a diſtinct declaration. Salk. 133. Hill v. Lewis. 1 Ventr. 27. 12 Mod. 5.

If a verdict find all that is in iſſue in one count which is material, it is good; for, if any thing not material be put in iſſue, the verdict is good, notwithſtanding it be ſilent as to that. 1 Inſt. 227.

In an action of debt, for the penalty given for not having ſet out tithes, the plaintiff declared upon a leaſe from *J. S.* of the tithes of the pariſh of *A.* for the term of ſix years, in caſe *J. S.* ſhould ſo long live, *and continue to be parſon of the pariſh of A.* The defendant pleaded *nil debet* and iſſue was joined upon the plea. The jury found a leaſe from *J. S.* of the tithes of the pariſh of *A.* for the term of ſix years, in caſe *J. S.* ſhould ſo long live; but they found likewiſe, that the words *and continue to be parſon of the pariſh of A.* were not contained in the leaſe. *Haughton*, J. was of opinion, that the plaintiff ought not to have judgment: but the other juſtices were of a different opinion; and by them—The leaſe found is in ſubſtance the ſame as that which is in iſſue; for although the words, *and continue to be parſon of the pariſh of A.*, are not contained in the leaſe, they are implied therein. It was moreover ſaid, that the leaſe is only matter of inducement, the not having ſet out the tithes being the giſt of the action; for which reaſon, as enough is found to ſhew that the tithes were not ſet out, and that the plaintiff had a right thereto, he ought to have judgment. Cro. Ja. 328. Wheeler v. Haydon.

Str. 844, 845. Rex v. Hayes.

In an indictment which contained three counts, the first count charged the forging of a certain bond; the second charged the publishing of the forged bond by the defendant; the third charged the publishing of a bond, knowing it to have been forged. The jury found, that it was proved, that the defendant did forge the bond set out in the indictment, and that he did publish the same; and then, without saying any thing as to the fact charged in the third count, they concluded with saying, that if upon this evidence the court shall be of opinion that the defendant is guilty of the fact charged, then they find him guilty; but, if the court shall be of opinion that he is not guilty thereof, then they find him not guilty. It was said for the defendant, that this verdict is bad; because it does not find all that is in issue. It was holden, that the court is not in this case bound by the conclusion of the jury; but that, upon what is found to have been proved, it is the duty of the court to adjudge the defendant guilty of the forging and the publication charged in the two first counts, and not guilty as to the residue; and judgment was given accordingly.

Str. 887. Rex v. Huggins.

It is said, that the court will never award a *venire facias de novo* in an indictment for a capital offence; although a material fact be not found by the verdict. It is likewise said, that, if the facts found be not sufficient to warrant a judgment against the defendant in an indictment for a capital offence, the court will, provided a verdict be sufficient to found a judgment upon, give judgment for him; for that no man's life ought to be twice in jeopardy for the same offence.

(N) Of a Verdict which finds a Thing that is not in Issue.

1 Inst. 227.

A Verdict is not bad, on account of its finding a thing that is not in issue, it being a maxim, that *utile per inutile non vitiatur*, and the court will, in giving judgment, reject that part of the verdict which relates to the thing not in issue as surplusage; inasmuch as the jury had nothing to do therewith.

6 Rep. 57. Dowdale's case. Cro. Ja. 55.

If the matter in issue be, whether there are assets, and the jury find that there are assets *beyond the seas*, the verdict is nevertheless good; for the court will, in giving judgment, reject the words *beyond the seas* as surplusage.

Bro. Nugat. pl. 25. Bro. Verd. pl. 68.

If the matter in issue be, whether *J. S.* died seised of certain premises, and the jury, after finding that he did die seised thereof, find that *continual claim* has, since the death of *J. S.*, been made by *J. N.*, the verdict is nevertheless good; for the court, in giving judgment, will not pay any regard to what is found concerning the *continual claim*.

Cro. Ja. 407. Sidenham v. Man. 2 Roll. Abr. 717. pl. 4.

If in an action upon the case for words, the jury, after finding that the defendant spoke the words in issue, find that he spoke *other slanderous words*, the verdict is nevertheless good; for the court will, in giving judgment, reject the finding of the *other slanderous words* as surplusage.

In

In an action of *ſcire facias* againſt the executor of *J. S.* the matter in iſſue was, whether *J. S.* had been taken in execution by virtue of a *capias ad ſatisfaciendum* ſet out in the declaration, which iſſued upon a judgment obtained by the plaintiff againſt *J. S.* The jury found, that *J. S.* was not taken in execution by virtue of the *capias ad ſatisfaciendum* ſet out in the declaration, but that he was taken in execution by virtue of an *alias capias ad ſatisfaciendum* which iſſued upon the judgment. This was holden to be a verdict for the plaintiff: And by the court—As it is found that *J. S.* was taken in execution by virtue of a *capias ad ſatisfaciendum* which iſſued upon the judgment, the word *alias*, which only ſhews the particular ſpecies of *capias ad ſatisfaciendum*, ought to be rejected as ſurpluſage. Hob. 53, 54. Foſter v. Jackſon.

In an action of *aſſumpſit* the jury found a verdict for the plaintiff, and, after aſſeſſing damages to the amount of thirty pounds, added the following words, *the damages to be paid in dying, if by law they may be ſo paid.* Theſe words being omitted in the judgment, a writ of error was brought, and the omiſſion was aſſigned for error. The judgment was affirmed: And by the court—As the verdict, which finds for the plaintiff and aſſeſſes damages, is a complete verdict, what is added *as to the manner of paying the damages* is nugatory, and being ſo it is very properly omitted in the judgment. Cro. Car. 219. Taylor v. Willes.

After an indictment found at an aſſize had been moved by *certiorari* into the King's Bench, the defendant pleaded not guilty, and iſſue was joined upon the plea by the king's coroner. The jury found the defendant guilty of the premiſes, *prout* the *coroner has complained againſt him.* Upon a motion in arreſt of judgment it was ſaid, that the verdict is bad, becauſe, as the indictment was found at an aſſize, *the coroner has not complained againſt the defendant*; and that the fault is not cured by any of the ſtatutes of jeofails. The verdict was holden to be good: And by the court—The verdict, which finds the defendant guilty of the premiſes, is complete, and, conſequently, as that which follows *concerning the complaint of the coroner* ought to be rejected as ſurpluſage, it will not want the help of any of the ſtatutes of jeofails. 2 Saund. 308. Rex v. Urlyn.

Upon an iſſue directed out of the court of Chancery the jury found a verdict in the following words. Our verdict is, that the defendant did not aſſume to the plaintiff in manner and form as in the record is ſuppoſed: but notwithſtanding this, if the two witneſſes, *J. S.* and *J. N.*, have teſtified the truth, as we think they have, then we find, that the defendant did aſſume to re-aſſure to the plaintiff ſo much of the land mentioned in the record as the defendant had bought of the plaintiff, upon the payment of two hundred and fifty pounds by the plaintiff to the defendant within three years after the aſſumption; and if the court ſhall think ſo, we find for the plaintiff, and aſſeſs damages to the amount of twenty pounds, and coſts to the amount of four pounds. The verdict was decreed by the Chancellour to be a verdict for the defendant; and *Dyer*, J. and *Ayloffe*, J. whom he called Dyer, 372. Heyward's caſe.

called to his aſſiſtance, and the counſel for both parties, were ſatisfied with the decree.

Bro. Nugat. pl. 27. If a verdict, after finding the matter in iſſue, find a thing which might have been pleaded in abatement, as *joint-tenancy*, the verdict is good; for, as the defendant did not avail himſelf of the *joint-tenancy*, by pleading it in abatement, the court will reject it as ſurpluſage.

3 Leon. 80. Pepy's caſe. In an action of waſte the plaintiff declared, that the defendant, being ſeiſed in fee of the premiſes on which the waſte was committed, had enfeoffed *J. S.* to the uſe of the defendant for life, with remainder to the plaintiff in fee. The defendant pleaded, that the feoffment was to the uſe of himſelf in fee, *abſque hoc*, that it was to the uſe of himſelf for life, with remainder to the plaintiff in fee. Iſſue being joined upon the plea the jury found, that the feoffment was to the uſes mentioned by the plaintiff: but they found further, that the eſtate for life reſerved to the defendant *was without impeachment of waſte*; and ſubmitted it to the court whether the plaintiff ought to have judgment. *Wyndham*, J. was of opinion, that the plaintiff ought to have judgment; inaſmuch as it appeareth from what is found by the verdict, that he had no cauſe of action. But *Anderſon*, Ch. J. *Rhodes*, J. and *Periam*, J. were of opinion, that the plaintiff ought to have judgment; and by *Anderſon*, Ch. J. the matter in iſſue is found for the plaintiff; and as the defendant did not avail himſelf *of the privilege of being diſpuniſhable of waſte*, by pleading it, the jury, it not being in iſſue, had nothing to do therewith; for which reaſon that which is found concerning it ought to be rejected as ſurpluſage.

Cro. Car. 130. Inkerſalls v. Sams. In an action of *aſſumpſit* againſt an executor the plaintiff declared upon a promiſe of the defendant's teſtator. Iſſue being joined upon the plea of *non aſſumpſit*, the jury found for the plaintiff: but they likewiſe found, *that the teſtator was dead before the day on which the promiſe is alleged to have been made.* The verdict was holden to be good: And by the court—As the jury have found for the plaintiff, their finding, *that the teſtator was dead before the day on which the promiſe is alleged to have been made*, ought to be rejected as ſurpluſage.

(O) Of a Verdict which varies from the Iſſue.

A Verdict which varies from the iſſue in a matter of ſubſtance is bad.

What is ſuch a variance betwixt a verdict and the iſſue as will make the verdict bad, is beſt to be learned from conſidering the determinations upon the point, the principal of which in divers actions ſhall be mentioned.

1. In an Action of *Aſſumpſit*.

2 Roll. Abr. 709. pl. 49. The plaintiff in an action of *aſſumpſit* declared upon a contract by two perſons. Iſſue being joined upon the plea of *non aſſumpſit*, the

the jury found, that the contract was made by only one of the perſons. This was holden to be a verdict for the defendant; the contract found being different from that which is in iſſue.

The plaintiff in an action of *aſſumpſit* declared upon a promiſe by four perſons. The defendants all joined in the plea of *non aſſumpſerunt infra ſex annos*, and iſſue was thereupon joined. The jury found, that one of the defendants had promiſed within ſix years; but they likewiſe found, that the other three had not. It was holden, that, as the jury had not found the promiſe which was in iſſue, the verdict was for the defendants. 2 Ventr. 151. Bland v. Haſelrig and others. [*Vide* Dougl. 653. n. *ſupra* Tom. 4. pag. 484.]

In an action of *aſſumpſit* the defendant an adminiſtrator pleaded, that three judgments had been obtained againſt him as adminiſtrator to *J. S.*, that thoſe judgments are ſtill in force, and that he has aſſets in his hands only to the value of five ſhillings which are liable to thoſe judgments. The plaintiff replied, that thoſe judgments are kept in force by fraud, and iſſue was joined upon the replication. The jury found that one of thoſe judgments was kept in force by fraud. The verdict was holden to be for the plaintiff: And by the court—As the defendant's plea is found to be falſe as to part, the plaintiff ought to have judgment. Carth. 196. Beake v. Kent.

In an action of *aſſumpſit* the plaintiff declared, that the defendant was indebted to him in the ſum of twenty pounds, which he promiſed to pay upon requeſt. The defendant having pleaded *non aſſumpſit*, the jury found, that the defendant was indebted to the plaintiff in the ſum of ten pounds upon one account, and in the ſum of ten pounds upon another. The verdict was holden to be bad; becauſe, as the iſſue is joined upon one promiſe and the jury have found two promiſes, the variance is in a matter of ſubſtance. 2 Roll. Abr. 719. pl. 18.

In an action of *aſſumpſit* it was alleged in the declaration, that the defendant, in conſideration that the plaintiff would give credit for certain goods to *J. S.*, promiſed to pay for the ſame, when he ſhould, after the delivery of any goods, be requeſted ſo to do. The defendant pleaded *non aſſumpſit*, and iſſue was joined upon the plea. The jury found, that the defendant did promiſe to pay for the goods, but they did not find that a requeſt of payment had been made to him after the delivery of the goods. The verdict was holden to be bad: And by the court—As the duty could not in this caſe ariſe until a requeſt was made, the requeſt is material, and, conſequently, as this is not found, the verdict is bad. Brownl. 13. Gore v. Colethorpe.

It has been heretofore holden, that if the plaintiff in an action of *aſſumpſit* declare upon an *indebitatus aſſumpſit*, he cannot recover a leſs ſum than he declares for. In an action of *aſſumpſit* the plaintiff declared, that the defendant was indebted to him in the ſum of fifty pounds, which he promiſed to pay. The jury found, that as to forty-ſeven pounds, parcel of the ſaid fifty pounds, the defendant had promiſed to pay it, but they likewiſe found, that as to the reſidue he had not promiſed to pay it. The verdict was Cro. Eliz. 292. Bagnal v. Sacheverel.

holden to be for the defendant; becauſe the promiſe found is different from that which is in iſſue.

But, however it may have been heretofore holden, it is at this day certain, that the plaintiff in an action of *aſſumpſit* may recover a leſs ſum than he has declared for, notwithſtanding he have declared upon an *indebitatus aſſumpſit*.

MS. Rep. Thompſon v. Spencer, Eaſt. 8G. 3. in K. B.

And it was in a very late caſe holden, that, although the plaintiff in an action of *aſſumpſit* have declared upon an *inſimul computaſſent*, he may recover damages to a leſs amount than the balance alleged to be due: And by *Yates*, J.—As the promiſe upon which an action of *aſſumpſit* is founded cannot extend further than to what is juſtly due, the jury, in aſſeſſing damages, have a power to divide the damages alleged in ſuch manner that the plaintiff may recover what is juſtly due.

2. In an Action upon the Caſe.

Cro. Eliz. 884. Gravenor v. Mete.

In an action upon the caſe the plaintiff declared, that the defendant, of whom he had bought two oxen, warranted them to be ſound, and he alleged that they were unſound. The defendant pleaded not guilty, and iſſue was joined upon the plea. The jury found the defendant guilty as to one of the oxen, and not guilty as to the other. Upon a motion in arreſt of judgment it was inſiſted, that, as the iſſue is, whether the two oxen warranted to be ſound were unſound, and the verdict finds that only one of them was unſound, the plaintiff ought not to have judgment. Judgment was given for the plaintiff: And by the court—As the action is not in this caſe founded upon the contract, but upon the deceit, the verdict is good.

Carth. 228. Vaughan v. Lewis.

In an action upon the caſe for a falſe return to a *mandamus*, the plaintiff declared that he was choſen bailiff of the borough of *A.* upon the firſt day of *October* in a certain year, which was alleged to be the cuſtomary day for chooſing a bailiff. The defendant pleaded not guilty, and iſſue was joined upon the plea. It was proved at the trial, that the plaintiff was choſen bailiff upon the twenty-ninth day of *September* in the year mentioned, and that this was the cuſtomary day for chooſing a bailiff. It was objected, that as the day, which is in this caſe parcel of the cuſtom, is material, the election proved is a different one from that which is in iſſue, and that for this reaſon the plaintiff ought not to recover. The objection was over-ruled; and by *Holt*, Ch. J. As the ſubſtantial part of the iſſue, namely, whether the plaintiff was elected according to the cuſtom, is proved, it is not material whether the election was upon the day mentioned in the declaration, or not.

Cro. Ja. 630. Eardley v. Turnock.

In an action upon the caſe, in which the declaration charged the incloſing of three acres of land, the plaintiff alleged a right of common therein as appurtenant to ſixty acres of land, ſixty acres of meadow, and eighty acres of paſture. The defendant pleaded not guilty, and iſſue was joined upon the plea. It being found by the jury, that the plaintiff had a right of common in the three acres

acres of land, as appurtenant to a meſſuage, and ninety acres of land, meadow, and paſture thereto appertaining; and for the reſidue, that he had not common; judgment was given for the plaintiff. A writ of error being brought, it was aſſigned for error, that the right of common found by the verdict is different from that which is in iſſue. The judgment was affirmed: And by the court—The right of common alleged is only matter of inducement; the ſubſtantial part of the iſſue being whether a wrong has been done to the plaintiff by incloſing. If the iſſue had been, whether the plaintiff's right of common were appurtenant to ſo much land, meadow, and paſture, as is mentioned in the declaration, the verdict would peradventure have been bad: but it is not material upon the preſent iſſue, whether the plaintiff's right of common be found preciſely as it is alleged or not.

An action upon the caſe in the nature of a conſpiracy being brought againſt two, they both pleaded not guilty, and iſſue was joined upon the plea. The jury found only one of the defendants guilty. The verdict was holden to be good: And by the court—In an action upon the caſe in the nature of a conſpiracy one perſon may be found guilty. 2 Roll. Abr. 708. pl. 52.

But, if in an action of conſpiracy againſt two iſſue be joined upon the plea of not guilty, and the jury find only one of them guilty, the verdict is bad; becauſe one perſon cannot be guilty of a conſpiracy. *Ibid.*

3. In an Action of Covenant.

The plaintiff in an action of covenant declared, that upon the ſale of certain land by the defendant to him, which was eſtimated at a certain number of acres, the defendant covenanted to pay him at the rate of eleven pounds by the acre, for as many acres as ſhould be wanting of the number the land was eſtimated at; and he alleged, that as many acres were wanting, as did, at the rate of eleven pounds by the acre, amount to the ſum of ſeven hundred pounds. The defendant pleaded, that there were not ſo many acres wanting, as did, at the rate of eleven pounds by the acre, amount to ſeven hundred pounds, and iſſue was joined upon the plea. The jury found a general verdict for the plaintiff; but they aſſeſſed damages to the amount of only four hundred pounds. The verdict was objected to as being variant from the iſſue; but it was holden to be good: And by the court—As the deſign of the preſent action was to recover damages, it was entirely in the breaſt of the jury, notwithſtanding they found all the acres to be wanting, to aſſeſs ſuch damages as appeared to them to be reaſonable. 2 Roll. Abr. 703. Hicks v. Goats.

4. In an Action of Debt.

In an action of debt upon the 2 & 3 *E.* 6. for not ſetting out tythes, the defendant pleaded *nil debet*; the jury found the value of the tythes ſubtracted to be leſs than the value alleged in the plaintiff's declaration. This was holden to be a verdict for the plain- Cro. Ja. 449. Pemberton v. Skelton.

tiff: And by the court—There is a difference betwixt an action of debt founded upon a ſpecialty, or upon a contract, and one founded upon a ſtatute giving an uncertain ſum by way of ſeveralty. In the former caſe the verdict cannot be for a leſs ſum than is demanded, unleſs it be found that part of the debt was ſatisfied: but in the latter caſe, the verdict is good, although a leſs ſum than is demanded is found to be due.

2 Roll. Abr. 702. Baugh v. Philips. The plaintiff in an action of debt declared for the ſum of twenty-four pounds eight ſhillings. The defendant pleaded *nil debet*, and iſſue was joined upon the plea. The jury found, that the defendant was indebted to the plaintiff in the ſum of twenty-four pounds; but they likewiſe found, that he was not indebted to him in the further ſum of eight ſhillings. It was holden that the plaintiff ſhould have judgment: And by the court—The eight ſhillings may have been paid.

2 Roll. Abr. 702. pl. 3. The plaintiff in an action of debt declared for the ſum of twenty pounds. The defendant pleaded *nil debet*, and iſſue was joined upon the plea. The jury found, that the defendant was indebted to the plaintiff in the ſum of forty pounds. This was holden to be a verdict for the defendant.

2 Roll. Abr. 702. pl. 4. In an action of debt brought againſt an executor the plaintiff declared for the ſum of twenty pounds, the defendant pleaded that he had no aſſets in his hands, and iſſue was joined upon the plea. The jury found, that the defendant had aſſets in his hands to the amount of forty pounds. This was holden to be a verdict for the plaintiff; for, notwithſtanding it vary from the iſſue, the ſubſtantial part of the iſſue, namely, whether the defendant had aſſets in his hands ſufficient to ſatisfy the plaintiff's debt, is found for the plaintiff.

Cro. Ja. 136. Lane v. Pledall, Mich. 4 Ja. 1. In an action of debt the plaintiff declared upon a bond dated the 25th day of *November*. The defendant pleaded *non eſt factum*, and iſſue was joined upon the plea. The jury found a bond dated the 15th day of *November*. This was holden to be a verdict for the plaintiff; becauſe the ſubſtantial part of the iſſue, namely, whether the bond be the deed of the defendant, is found for the plaintiff.

Salk. 463. Cromwell v. Grunſden, Paſch. 10 W. 3. But it is ſaid in a ſubſequent caſe, that the verdict would in ſuch caſe be for the defendant; becauſe the bond found is not the bond that is in iſſue; and the caſe of *Lane* v. *Pledall* is expreſsly denied to be law. It is however in this caſe laid down, that, if the jury in ſuch caſe find a bond dated the ſame day as the bond upon which the action is brought is alleged to be dated, the verdict is for the plaintiff; notwithſtanding they likewiſe find, that the bond was delivered upon a day different from that on which it is dated.

5 Rep. 119. Whelpdale's caſe. The plaintiff in an action of debt declared upon a bond entered into by the defendant. The defendant pleaded *non eſt factum*, and iſſue was joined upon the plea. The jury found a bond entered into by the defendant and *J. S.* This was holden to be a verdict for the plaintiff; for that, as the defendant and *J. S.* did both ſeal

ſeal and deliver the bond, it is the deed of each of them, and conſequently each of them is anſwerable for the whole money thereupon due.

In an action of debt upon a bond, conditioned for the performance of the covenants in an indenture, one of which was that the defendant ſhould not cut down trees, the breach aſſigned was cutting down twenty trees. The defendant pleaded that he did not cut down twenty trees, and iſſue was joined upon the plea. The jury found, that the defendant did not cut down twenty trees; but they found, that he cut down ten. This was holden to be a verdict for the plaintiff: And by the court—Although the verdict vary from the iſſue; yet, as enough is found to make the defendant liable to the penalty of the bond, the plaintiff ought to have judgment. Dyer, 115. Anon. 1 Inſt. 282. Hob. 53.

The defendant in an action of debt pleaded payment of the money, for which the action was brought, at *A.* Iſſue being joined upon the plea, the jury found that the money was paid at *B.* This was holden to be a verdict for the defendant; for that, as the payment of the money is the ſubſtantial part of the iſſue, it is not material where it was paid. 1 Keb. 662. Lucas v. Harlow.

5. In an Action of Ejectment.

The plaintiff in an action of ejectment declared upon a leaſe from two perſons. Iſſue being joined upon the plea of not guilty, the jury found, that the leſſors of the plaintiff were tenants in common. This was holden to be a verdict for the defendant. And by the court—As only one leaſe is declared upon, and the verdict virtually finds two, the eſtates of tenants in common being ſeveral, the variance is in a matter of ſubſtance. But it is ſaid, that if the jury had found, that the leſſors of the plaintiff were coparceners, the verdict would have been for the plaintiff; becauſe, as two coparceners make only one heir, their joint leaſe is as good as the joint leaſe of two joint-tenants would have been. 2 Roll. Abr. 719. pl. 25.

If the plaintiff in an action of ejectment declare upon a leaſe for a term of years made at a day certain, the term demiſed by which is to commence immediately, and the jury find a leaſe for the ſame term made at another day, the verdict is for the defendant, the variance being in a matter of ſubſtance. 2 Roll. Abr. 704. pl. 20.

But, if the plaintiff in an action of ejectment declare upon a leaſe for a term of years made the firſt day of *May* in a certain year, the term demiſed by which is to commence at the *Michaelmas* day following, and the jury find a leaſe for the ſame term made the firſt day of *June* in the ſame year, the term demiſed by which is to commence at the *Michaelmas* day following, the verdict is for the plaintiff; for it is not material upon what day the leaſe was in ſuch caſe made, provided it was made before the day on which the term was to commence. 2 Roll. Abr. 704. pl. 119.

If the plaintiff in an action of ejectment declare upon a leaſe of twenty acres, and the defendant who has pleaded not guilty, be found guilty as to ten acres, the verdict is good: but it is in this Dalſ. 105.

caſe ſaid, that if the defendant had pleaded *non dimiſit*, and the defendant had been found guilty as to ten acres, the verdict would have been bad.

2 Roll. Abr. 703. Brown v. Meredith, Paſch. 43 Eliz.

And it is in a ſubſequent caſe laid down, that the plaintiff would in ſuch caſe be entitled to judgment as to ten acres, notwithſtanding the defendant had pleaded *non dimiſit*.

2 Roll. Abr. 720. Brown v. Ellis, Paſch. 3 Ja. 1.

But in a ſtill later caſe it is laid down, that the plaintiff would not in ſuch caſe be entitled to judgment; for that, as the leaſe found is not that on which iſſue is joined, the variance is in a matter of ſubſtance.

2 Roll. Abr. 704. pl. 22. Jenk. 268. pl. 83.

If the plaintiff in an action of ejectment declare upon a leaſe of a houſe, and the jury find, that only part of the houſe is built upon the land of the plaintiff, he ſhall have judgment for that part.

Cro. Eliz. 33. Guy v. Rand.

The plaintiff in an action of ejectment declared upon a leaſe of a hundred acres of land. The jury found the defendant guilty as to forty acres, and as to the reſidue not guilty. The verdict was holden to be good.

1 Sid. 229. Ablett v. Skinner.

The plaintiff in an action of ejectment declared upon a leaſe of a fourth part of a fifth part of a field. The jury found the defendant guilty as to a third part of a fourth part of a fifth part. The verdict was holden to be good. And by the court—The jury may always find the defendant in an action of ejectment guilty as to ſo much as the plaintiff proves a title unto: but the reporter ſubjoins a query, In what manner the writ of poſſeſſion is in ſuch caſe to be executed?

MS. Rep. Burgeſs v. Burgeſs, Eaſt. 30 G. 2. in B. R. [1 Burr. 326. S. C.]

The plaintiff in an action of ejectment declared upon a leaſe of a moiety of certain premiſes. The jury found the defendant guilty as to a third part of the premiſes. In order to arreſt the judgment it was ſaid, that the verdict is bad; becauſe it does not find the defendant guilty as to all that the plaintiff has declared for. The rule for arreſting the judgment was diſcharged: And by Lord *Mansfield*, Ch. J.—There ſeems to be no good reaſon, why the plaintiff in an action of ejectment ſhould not recover that part of what he has declared for to which he proves a title; and it is laid down in 1 *Sid.* 229, that he may recover ſuch part.

Latch, 61. Hems v. Stroud.

If an action of ejectment be brought againſt a huſband and his wife, and only one of them be found guilty, the verdict is good.

6. In an Action of Replevin.

Cro. Eliz. 790. Lewes v. Bucknall. Yelv. 148.

The defendant in an action of replevin alleged, that the plaintiff held land of him by fealty, ſuit of court, and the yearly rent of three ſhillings and four pence; and he avowed the taking for rent in arrear. The plaintiff traverſed the holding alleged by the defendant, and iſſue was joined upon the traverſe. The jury found, that the plaintiff held of the defendant by fealty, and the yearly rent of three ſhillings and four pence; but that he did not hold by ſuit of court. This was holden to be a verdict for the plaintiff; becauſe the whole of the title to diſtrain alleged by the avowant, every

every part of which is material in an action of replevin, is not found.

In an action of replevin the defendant, a commoner, avowed the taking of cattle damage-feasant upon the eleventh day of *April* in a certain year. The plaintiff replied, that *Williams*, another commoner, had upon the thirtieth day of *March* in the same year demised his right of common to the plaintiff, to be holden by him from the twenty-fifth day of the said *March* for one year. The defendant traversed the demise, and issue was joined upon the traverse. The jury found a demise from *Williams* to the plaintiff, made the twenty-fifth day of *March* in the same year, by which *Williams* had demised his right of common to the plaintiff for one year from thence next ensuing. In order to arrest the judgment it was insisted, that the demise found is different from that which is in issue: but judgment was given for the plaintiff. And by the court—The substantial part of the issue, namely, whether the plaintiff had at the time of taking his cattle a right of common under a demise from *Williams*, is found for him; and the day of making the demise is not material. The reporter adds, that, if the jury had found any other right of common in the plaintiff than under a demise from *Williams*, the verdict would have been bad. Hob. 72. Pope v. Skinner.

The defendant in an action of replevin avowed the taking of cattle damage-feasant. In bar of this avowry the plaintiff prescribed for a right of common. Issue being joined upon the prescription, the jury found, that the plaintiff had a right of common; but they likewise found, that he ought to pay yearly for the same a hen and five eggs. This was holden to be a verdict for the plaintiff; for that, as the payment is not parcel of the prescription, but a collateral recompence, for which the person to whom it is due has a remedy, it was not necessary for the plaintiff to set out, that he was liable to the payment, his title to the right of common being complete without setting this out: but it is added, that if the jury had found, that the plaintiff had a right of common upon paying a hen and five eggs, the verdict would have been for the defendant; because, as the payment would then have been parcel of the prescription, the plaintiff would not, in case he had omitted to set this out, have shewn a complete title to the right of common. 5 Rep. 78. Gray's case.

7. In an Action of Trespass.

In an action of trespass the plaintiff declared, for the threshing and carrying away of twenty bushels of barley. The defendant having pleaded not guilty, the jury found him guilty of carrying away the barley, but not of threshing it. This was holden to be a verdict for the plaintiff. And by the court—Torts are several, and the carrying away of the barley was a tort, for which the plaintiff is entitled to recover damages. 2 Roll. Abr. 703. pl. 15.

In an action of trespass the plaintiff declared for breaking and entering his close. The defendant having pleaded not guilty, the jury Cro. Eliz. 170. Dod v. Coke.

2 Roll. Abr. 703. pl. 10. jury found, that the treſpaſs was committed in the cloſe, and that one acre of the cloſe was in the poſſeſſion of the plaintiff: but they likewiſe found, that a larger part of the cloſe was in the poſſeſſion of the defendant, and that a ſtill larger part thereof was in the poſſeſſion of *J. S.* This was holden to be a verdict for the plaintiff. And by the court—As it is found, that the treſpaſs was committed in the cloſe, and that part of the cloſe was in the poſſeſſion of the plaintiff, he is entitled to recover damages.

Cro. Ja. 662. Elſton v. Durrant. In an action of treſpaſs the plaintiff declared for breaking his cloſe, and for eating his graſs with divers cattle, to wit, with horſes, oxen and cows. The defendant having pleaded not guilty, the jury found him guilty of breaking the cloſe and eating the graſs with divers beaſts; and judgment was given for the plaintiff. A writ of error being brought, it was aſſigned for error, that it is not found, that the graſs was eaten by the beaſts of any of the kinds mentioned in the declaration. The judgment was affirmed. And by the court—The ſubſtantial part of the iſſue, namely, whether the graſs of the plaintiff was eaten by divers cattle of the defendant, is found; and it is not material of what kind the beaſts were.

Cro. Ja. 134. Marler v. Aſliff and another. In an action of treſpaſs againſt *J. S.* and *J. N.* the plaintiff declared for taking his gun. The defendant *J. S.* pleaded, that the plaintiff made an aſſault upon *A. B.* with the gun, and that thereupon he, in order to keep the peace and preſerve the life of *A. B.* took the gun. The defendant *J. N.* pleaded not guilty. Iſſues being joined upon both pleas, the jury found the iſſue upon the firſt plea for *J. S.*, but they found *J. N.* guilty. In order to arreſt the judgment againſt *J. N.* it was inſiſted, that, as the firſt iſſue is found for *J. S.*, there ought not to be judgment againſt *J. N.* Judgment was given againſt him. And by the court—As *J. N.* is found guilty, the court, rather than ſuffer him to avail himſelf of the plea of juſtification found for *J. S.*, will intend that the taking of the gun by *J. N.* was at another time. But it is ſaid, that if *J. S.* had pleaded a giſt of the gun by the plaintiff, and *J. N.* had pleaded not guilty; and the iſſue upon the plea of *J. S.* had been found for him, there could not have been judgment againſt *J. N.* notwithſtanding the iſſue upon the plea of not guilty had been found againſt him; becauſe it would then have appeared to the court, from the finding of the iſſue upon the plea of *J. S.*, that the plaintiff had no cauſe of action.

8. In divers other Actions.

Bro. Verd. pl. 99. In an action of account the defendant pleaded, that he had accounted before *J. S.* and *J. N.*, auditors aſſigned by the plaintiff. Iſſue being joined upon the plea, the jury found that the defendant had accounted before *J. S.* only. This was holden to be a verdict for the defendant. And by the court—The ſubſtantial part of the iſſue, namely, whether he had accounted to an auditor aſſigned by the plaintiff, is found for him.

In

In an aſſize of darrein preſentment the demandant alleged, that the avoidance of the church was by deprivation of the laſt incumbent. Iſſue being joined upon the allegation, the jury found, that the avoidance of the church was by the death of the laſt incumbent. This was holden to be a verdict for the demandant. And by the court—The avoidance of the church is the ſubſtantial part of the iſſue, the manner of avoiding being only a circumſtance. 1 Inſt. 282.

In a writ of ſecond deliverance the plaintiff made title under a deed of feoffment to *A.* and *B.* to his uſe. The defendant traverſed, that the deed of feoffment was to the uſe of the plaintiff, and iſſue was joined upon the traverſe. The jury found a deed of feoffment to *A.*, *B.*, and *C.*, to the uſe of the plaintiff. This was holden to be a verdict for the plaintiff. And by the court—The ſubſtantial part of the iſſue is, whether a deed of feoffment was made to the uſe of the plaintiff, which being found, it is not material whether the number of the feoffees was two or three. Noy, 93. Dicker v. Mollard.

In a ſuit upon a writ of prohibition the plaintiff alleged a *modus*. The defendant pleaded, that there is not ſuch a *modus* as the plaintiff has alleged. Iſſue being joined upon the plea, the jury found a *modus* different from that alleged by the plaintiff, and a conſultation was prayed. It was holden, that a conſultation ought not to be awarded. And by the court—As the jury have found, that there is a *modus*, the defendant ought not to be ſuffered to ſue in the ſpiritual court for tythes in kind. 1 Ventr. 32. Anon. [1 Term Rep. 427. Brock v. Richardſon, S. P.]

9. In a criminal Proſecution.

In an indictment for murder, the jury, provided they are ſatisfied the killing was not of malice afore-thought, may find the priſoner guilty of manſlaughter; for the killing is the ſubſtantial part of the iſſue.

It is ſaid to be uſual, to prefer two indictments againſt a perſon guilty of homicide by ſtabbing, one upon the ſtatute againſt ſtabbing, and another for murder, that, in caſe the evidence be not ſufficient to convict the priſoner of murder upon the former indictment, he may be convicted of manſlaughter upon the latter. Foſt. 299.

But it is in other books laid down, that the perſon indicted upon the ſtatute againſt ſtabbing may, upon this indictment, be found guilty of manſlaughter; for that the killing is the ſubſtantial part of the iſſue. H. P. C. 58. 1 Jo. 433. Kel. 132.

It was charged in an indictment for murder, that *Mackally* the priſoner did felonioufly wound *Richard Fell*, and that he died of the wound. The jury found, that *Mackally* did give a wound to *Richard Fell*, together with the circumſtances which attended the giving of it, and that he died of the wound; and they concluded their verdict in theſe words: "If upon the whole matter the court "ſhall be of opinion that the killing was murder, then we find "*Mackally* guilty of murder in the manner it is charged in the indictment." An exception was taken, that, as the jury had not found that *Mackally* did felonioufly wound *Richard Fell*, the court could 9 Rep. 63. 69. Mackally's caſe.

not

not adjudge that the wounding was felonious. The exception was not allowed. And by the court—The jury may in any caſe find the fact with its circumſtances, and ſubmit the law ariſing thereupon to the conſideration of the court. In the preſent caſe the jury have moreover virtually found, that the wounding was felonious; for they ſay, that, *if upon the whole matter the court ſhall be of opinion that the killing was murder, then we find* Mackally *guilty of murder in the manner it is charged in the indictment.* The conſequence is, that as the court have adjudged the killing to be murder, the jury have found *Mackally* guilty of murder in the manner it is charged in the indictment; and it is therein charged that the wounding was felonious.

2 Roll. Abr. 707. pl. 48. In an information againſt *J. S.* and *J. N.* the engroſſing of a thouſand quarters of corn was charged. The defendants having both pleaded not guilty, the jury found that *J. S.* had engroſſed ſeven hundred quarters of corn. The other defendant *J. N.* was found not guilty. It was holden, that judgment ſhould be given againſt *J. S.* becauſe the information is for a tort, and torts are ſeveral.

(P) Of a Verdict where the Words *Modo et Forma* are contained in the Traverſe upon which Iſſue is joined.

2 Roll. Abr. 708. pl. 53. IF iſſue be joined upon a traverſe in which the words *modo et forma* are contained, ſome circumſtances, that would not otherwiſe be ſo, are by theſe words made material, and muſt be found by the verdict.

1 Inſt. 281. If a feoffment by deed be traverſed, and the words *modo et forma* be contained in the traverſe, and the jury find a feoffment without deed, the verdict is bad; the words *modo et forma* being in this caſe eſſential to the iſſue.

2 Roll. Abr. 702. pl. 2. In an action of debt the plaintiff declared, that the defendant was indebted to him in the ſum of forty ſhillings for a horſe ſold. The defendant pleaded *nil debet modo et forma*, and iſſue was joined upon the plea. The jury found, that the defendant was indebted to the plaintiff in the ſum of forty ſhillings for two horſes ſold. The verdict was holden to be bad; becauſe the contract found is different from that upon which iſſue is joined.

2 Roll. Abr. 709. pl. 61. In an action of replevin the defendant avowed the taking as a diſtreſs for rent in arrear, and made title in himſelf to diſtrain, by virtue of an abſolute deviſe from *J. S.* to him of the place in which the diſtreſs was taken. The plaintiff replied, that *J. S.* did not deviſe to the defendant *modo et forma* as he has alleged, and iſſue was joined upon the replication. The jury found a deviſe from *J. S.* to the defendant upon a condition precedent; and they alſo found, that the condition was performed at the time the deviſe was pleaded. The verdict was holden to be for the plaintiff. And by the court—As the deviſe to the defendant is conditional, and not abſolute, it is not ſuch a deviſe as he has alleged.

A de-

A deviſe by *J. S.* of certain premiſes to *J. N.* in fee having been pleaded, the plaintiff replied, that *J. S.* did not deviſe *modo et forma* as the defendant has alleged. Iſſue being joined upon the replication, the jury found, that *J. S.* deviſed the premiſes to *A.* for a term of years, with remainder to *J. N.* in fee, and that the term was ſubſiſting. It was holden, that, as the deviſe found is ſubſtantially different from that on which the iſſue is joined, the one being a deviſe of an eſtate in poſſeſſion, the other a deviſe of an eſtate in remainder, it is not ſuch a deviſe as the defendant has alleged. 1 Jon. 224. Rex v. Nudigate.

Upon conſidering the caſes already cited it will appear, that the circumſtances traverſed by traverſers in which the words *modo et forma* were contained were holden to be material, becauſe they were eſſential to the iſſues: from whence it may be fairly inferred, that the verdict was not in any one of the caſes holden to be bad, merely becauſe the words *modo et forma* were contained in the traverſe upon which it was joined, but becauſe the jury had not found a circumſtance, which was eſſential to the iſſue.

It will appear from ſome other caſes which ſhall be mentioned, that, although the words *modo et forma* are contained in the traverſe upon which iſſue is joined, the materiality of what is traverſed very ſeldom depends upon theſe words.

It is in one book laid down generally, that, although the words *modo et forma* are contained in the traverſe upon which iſſue is joined, it is not neceſſary, that the verdict ſhould find every circumſtance which is traverſed; for that, if all the material circumſtances of the iſſue are found, it is not neceſſary that any immaterial circumſtance ſhould be found. 1 Inſt. 281.

If a man bring a writ of entry in *caſu proviſo* upon the alienation of tenant in dower to his diſheriſon, and allege an alienation in fee; and the tenant plead, that ſhe did not alienate *modo et forma*, and iſſue be joined upon the plea, and it be found by the jury, that the tenant did alienate in tail or for life, the demandant ſhall recover, notwithſtanding the alienation was not ſuch an alienation as is alleged; becauſe, as the ſubſtantial part of the iſſue, namely, whether the tenant did alienate to the diſheriſon of the demandant, is found, the manner of alienating is not material. *Ibid.*

In an action of treſpaſs the plaintiff declared for the taking of his goods upon a day certain, and at a place certain. The defendant pleaded not guilty *modo et forma* as the plaintiff has alleged, and iſſue was joined upon the plea. The jury found the defendant guilty upon another day, and at another place. The verdict was holden to be good; becauſe the ſubſtantial part of the iſſue, namely, whether the goods were taken, is found, and neither the day when, nor the place where, they were taken is material. 1 Inſt. 282.

In an action of treſpaſs *quare clauſum fregit* the defendant juſtified under a right of common in the *locus in quo*, from the day of Pentecoſt in every year to a day certain in the ſame year. The plaintiff traverſed that the defendant had a right of common *modo et forma* as he had alleged, and iſſue was joined upon the traverſe. The jury found, that the defendant had a right of com- Moor, 864. Thorowgood v. Johnſon. 2 Roll. Abr. 708. pl. 55. S. C.

mon upon the day of Pentecoſt in every year, and from the day next thereunto, until the day certain in the ſame year mentioned in his plea. This was holden to be a verdict for the defendant; becauſe the ſubſtantial part of the iſſue, namely, whether he had a right of common at the time the treſpaſs is charged, is found; and it is not neceſſary that the title of the defendant to the right of common ſhould in ſuch caſe be found preciſely as it is ſet out. But it was in this caſe agreed, that if a man bring an aſſize of right of common, it is neceſſary to ſet out a title thereto, and that this muſt be found preciſely as it is ſet out; for that the demandant is not in ſuch caſe entitled to recover, unleſs it be found by the jury, that he has the very title to the right of common which is ſet out.

Yelv. 148. Goodman v. Ayling.

In an action of treſpaſs the plaintiff declared for breaking his houſe and taking his goods. The defendant pleaded, that the houſe is holden of him, as of his manor of *A.*, by homage, fealty, eſcuage, ſuit of court, and the yearly rent of one pound of cummin ſeed, and that he entered the houſe and diſtrained the goods for three years' rent in arrear. The plaintiff replied, that the houſe is holden of *J. S.* as of his manor of *B.*, *abſque hoc* that it is holden of the defendant *modo et forma* as he has alleged. Iſſue being joined upon the replication, the jury found, that the houſe is holden of the defendant, as of his manor of *A.*, by homage, fealty, and the yearly rent of one pound of cummin ſeed, and not otherwiſe. This was holden to be a verdict for the defendant: and by the court—Notwithſtanding the verdict does not find the holding to be preciſely as the defendant has alleged, it finds the ſubſtantial part of the iſſue, that the houſe is holden of the defendant; which, although it would not have been ſufficient finding in an action of replevin, is ſo in the preſent action, wherein the defendant is charged as a wrong-doer.

Dyer, 75. Brugis v. Warneford.

The declaration in an action upon the caſe charged the ſpeaking of the following words, *There is a great neſt of thieves at* Pirton, *and Sir* John Brugis *is the maintainer of them, and he is a ſtrong thief himſelf.* The defendant traverſed the ſpeaking of the words *modo et forma* as the plaintiff has alleged. Iſſue being joined upon the traverſe, the jury found, that the defendamt ſpoke all the words charged, except the word *ſtrong*, and aſſeſſed damages for the plaintiff. Upon a motion in arreſt of judgment it was inſiſted, that, as all the words charged are not found to have been ſpoken by the defendant, the plaintiff ought not to have judgment: but judgment was after deliberation given for the plaintiff.

Cro. Ja. 407. Sidenham v. Man.

In an action upon the caſe the plaintiff charged the ſpeaking of the following words, *If Sir* John Sidenham *might have his way he would kill the king.* The defendant traverſed the ſpeaking of the words *modo et forma* as the plaintiff has alleged. Iſſue being joined upon the traverſe, the jury found, that the defendant ſpoke the following words, *I think in my conſcience if Sir* John Sidenham *might have his way he would kill the king.* *Haughton*, J. was of opinion, that as the jury have found other words as well as thoſe

charged, the verdict is for the defendant: but *Montague*, Ch. J., *Croke*, J., and *Dodderidge*, J. were of opinion, that as the words charged are all found, and the other words found do not alter the ſenſe or take off the force of the words charged, the verdict is for the plaintiff; and judgment was given for him. A writ of error being brought in the Exchequer-chamber, *Hobart*, Ch. J. of the Common Pleas, *Wynch*, and *Denham* were of opinion, that, as the manner and form of ſpeaking the words is traverſed, and they are not found to have been ſpoken preciſely as they are charged, the verdict is for the defendant: but *Tanfield*, Ch. Bar., *Warburton*, *Bromley*, and *Hutton* being of a different opinion, the judgment of the court of King's Bench was affirmed.

(Q) Of a Verdict which does not find the Matter in Iſſue with Certainty.

IN an action of ejectment for a meſſuage, the jury found the defendant guilty as to ſo much of the meſſuage as ſtands upon a certain bank. The verdict was holden to be bad, becauſe it is uncertain: and by the court—Although a verdict which finds the defendant guilty as to part of what is demanded in ejectment may be good, it can only be ſo where the defendant is found guilty as to a certain part; becauſe, if the verdict do not find ſomething in certainty, the court cannot give judgment; for the maxim is *oportet quod res certa deducatur in judicium.* Mar. 97. Juxon v. Andrews.

In an action of dower the tenant pleaded, that the huſband of the demandant was never ſeiſed of the premiſes of which ſhe demanded dower. Iſſue being joined upon the plea, the jury found, that the huſband was ſeiſed of the premiſes, except ſo much thereof as belonged to *J. S.* The verdict was holden to be bad; becauſe, as it does not appear what part of the premiſes did belong to *J. S.*, the court cannot tell of how much to give judgment. 2 Roll. Abr. 694. U. pl. 2.

In an aſſize the demand was of an arrear of a rent-charge of twenty pounds deviſed to the demandant. The jury found, that the rent-charge was in arrear for the term of thirty years; but they did not find when the deviſor died. The verdict was upon a writ of error holden to be bad; becauſe, as the time of the deviſor's death is not found, it does not appear at what time the thirty years ended, for which the rent-charge is found to be in arrear. Cro. Car. 521. Morris v. Prince.

In an action of debt the plaintiff declared for divers ſums of money, amounting the whole to forty pounds. Iſſue being joined upon the plea of *nil debet*, the jury found, that the defendant was indebted to the plaintiff in the ſum of thirty pounds, but that the reſidue of the forty pounds was not due to the plaintiff. Judgment being given for the plaintiff, it was upon a writ of error holden, that, as the verdict does not find in which of the particular ſums the defendant was indebted to the plaintiff, he ought not to have had judgment; becauſe, as it is uncertain Cro. Ja. 653. Treſwell v. Middleton.

for which of the ſums the judgment was given, the defendant can never know now to plead the judgment in bar, in caſe another action ſhould be brought for any of the ſums; and the judgment was reverſed.

It appears from the caſes already cited, that the verdicts therein were holden to be bad; becauſe they were uncertain as to ſomething which was material to the giſt of the action; and it may be inferred from the following caſes, that if the thing, as to which a verdict is uncertain, be not eſſential to the iſſue, the verdict is, notwithſtanding ſuch uncertainty, good.

Noy, 125. Winkſworth v. May, Mar. 97. In an action of treſpaſs *quare clauſum fregit* the declaration charged, that the treſpaſs was committed in a certain acre of land, of which the abuttals were ſet forth. Iſſue being joined upon the plea of not guilty, the jury found the defendant guilty of a treſpaſs in one half of the acre, and aſſeſſed damages for the plaintiff; but they did not find in which half the treſpaſs was committed. The verdict was holden to be certain enough: and by the court—As damages are to be recovered in this action, and not the land itſelf, the plaintiff may recover damages for a treſpaſs in one half of the acre, and it is not material in which half it was committed.

3 Keb. 835. Duke of Norfolk v. Johnſon. In an action of debt upon the 1 *Ja.* 1. *c.* 22. for felling oaks at a time prohibited, not guilty was pleaded, and iſſue was joined upon the plea. The jury found, that the defendant had felled ten oaks, and that the value of each was ſix ſhillings and eight pence. Upon a motion in arreſt of judgment it was inſiſted, that the verdict is bad; becauſe the jury have not added the ſums together and found a preciſe ſum. The verdict was holden to be good: and by the court—If the defendant had pleaded *nil debet* the verdict would have been bad, for want of having found a preciſe ſum to be due; but it is not neceſſary, that a preciſe ſum ſhould be found to be due, where the plea in an action of debt is not guilty.

12 Mod. 561. Anon. An indictment was found againſt a perſon for exerciſing a trade unlawfully for the ſpace of three months, to wit, from a day certain to a day certain. Iſſue being joined upon the plea of not guilty, the defendant was found guilty as to one month without ſaying which, and not guilty as to the two other months. Upon a motion in arreſt of judgment it was inſiſted, that as it does not appear for which of the three months the defendant is found guilty, he cannot plead a conviction upon this indictment in bar of a ſecond for the ſame offence. The verdict was holden to be certain enough: and by the court—If a ſecond indictment ſhould be found againſt the defendant, he may plead a conviction upon the firſt indictment for one month, and traverſe his having been guilty any other month.

(R) Of a Verdict which does not find the Matter in Iſſue expreſsly.

THE matter in iſſue was, Whether *J. S.* had reſigned a certain benefice to a certain biſhop. The jury found an inſtrument under the ſeal of the biſhop, upon which there was an indorſement, that *J. S.* had reſigned the benefice to the biſhop, and that he had accepted the reſignation. The verdict was holden to be bad; becauſe it does not find expreſsly that *J. S.* had reſigned the benefice. Noy, 147. Smith v. Foaves.

An eſtate having been granted by copy of court roll to three perſons for their lives, the matter in iſſue was, Whether a heriot was, by the cuſtom of the manor, due upon the death of one of the three perſons. The jury found, that the cuſtom of the manor did not warrant the granting of an eſtate for three lives. The verdict was holden to be bad; becauſe it only finds argumentatively that a heriot ought not to be paid; whereas it is the duty of the jury to find the matter in iſſue expreſsly. 2 Roll. Abr. 693. S. pl. 1.

If the matter in iſſue be whether an eſtate may by the cuſtom of a manor be granted by copy of court roll for two lives, and the jury find, that an eſtate may by the cuſtom of the manor be granted for three lives, the verdict is bad; becauſe it is only argumentative to ſay, that, inaſmuch as a greater eſtate may by the cuſtom of the manor be granted, a leſs one may. 2 Roll. Abr. 693. S. pl. 2.

In an action of *aſſumpſit* the plaintiff declared, that the defendant in conſideration of four pence promiſed to give the plaintiff forty pounds. Iſſue being joined upon the plea of *non aſſumpſit*, the jury found a ſpecial verdict in theſe words, "If the law will "that the jury ſhall give damages to the amount of forty pounds, "then they aſſeſs damages to that amount: but, if the law will "that the jury may give damages as they pleaſe, then they aſſeſs "damages to the amount of three pounds and no more." The verdict was holden to be bad; becauſe the jury have not aſſeſſed any damages expreſsly. 2 Roll. Abr. 695. pl. 6.

If the matter in iſſue be, whether a thing is fraudulent, the court will never conclude that it is ſo, however ſtrong the circumſtances of fraud found by the jury are. Cro. Car. 550. Criſp v. Pratt.

In an action of trover the court will never intend, that the defendant is guilty of a converſion, unleſs it be expreſsly found that he is, however ſtrongly the circumſtances found by the jury may tend to ſhew that he is guilty. 2 Mod. 244. 245. Mires v. Solebay. 10 Rep. 57.

The court will never intend, from any evidence or circumſtances found by the jury, that the defendant in an indictment is guilty of the offence therein charged, unleſs the jury expreſsly find him guilty. 12 Mod. 628. Rex v. Plummer.

(S) Of a Verdict which finds a Matter in a Foreign County.

Bro. Attaint. pl. 104.

IF the *venue* in an action for a tranſitory treſpaſs be laid in the county of *A.*, a jury of the county of *A.* may find a verdict in the action; notwithſtanding it appear in evidence, that the treſpaſs was committed in the county of *B.* But it is added, that they are not bound to find a verdict.

6 Rep. 47. Dowdale's caſe.

The latter part of the doctrine of this book is in another book expreſsly denied to be law; and it is in the latter laid down, that, although a *venue* muſt in every action be laid in ſome place, the place is not material in an action for a tranſitory treſpaſs; and that the jury of the county where the *venue* in an action for ſuch treſpaſs is laid are bound, under the penalty of an attaint, to find the defendant guilty, although it appear in evidence, that the treſpaſs was committed in another county.

Ibid.

In an action of debt againſt an executor he pleaded *plene adminiſtravit*. The plaintiff replied, that the executor had aſſets at *Exeter* in the county of *Devon*. Iſſue being joined upon the replication, the jury found, that the defendant had aſſets in *Ireland*. This was holden to be a verdict for the plaintiff: and by the court—It is uſual for merchants to have great part of their goods in foreign parts, and God forbid that ſuch goods ſhould not be liable to their debts in *England*.

Bro. Verd. pl. 80. 2 Roll. Abr. 688. M. pl. 1.

It is in the general true, that the jury ought to find every local matter in its proper county.

6 Rep. 47. Dowdale's caſe. Bro. Damage, pl. 53. pl. 103. Bro. Trial, pl. 118. 2 Roll. Abr. 687. pl. 1.

But, if an action be brought for a local matter in the county of *A.*, and the defendant, by pleading a releaſe in the county of *B.*, make it neceſſary, to try the iſſue concerning the validity of the releaſe in the county of *B.*, the jury of the county of *B.* may aſſeſs damages for the local matter in the county of *A.*, it being a maxim of law, that *multa conceduntur per obliquum quæ non conceduntur per directum.*

If in an action brought in the county of *A.* the general iſſue be pleaded, the jury of the county of *A.* may find a local matter in any other county, provided the matter be incidental to the iſſue joined in the county of *A.*

2 Roll. Abr. 688. Pike v. Haſſen. 3 Leon. 233.

In an action of debt upon the ſtatute againſt bargaining for pretended titles, the bargain was alleged to have been made in the county of *Norfolk*; but the land bargained for was in the county of *Suffolk*. The defendant pleaded *nil debet*, and iſſue was joined upon the plea. It was holden, that the jury of the county of *Norfolk*, who tried the iſſue, might find the value of the land; becauſe the value thereof is incidental to the iſſue.

6 Rep. 47. Dowdale's caſe.

If in an action of debt brought in the county of *A.* againſt an heir he plead *riens per deſcent*, and iſſue be joined upon the plea, the

the jury may find *aſſets per deſcent* in any county; becauſe the heir is anſwerable for all *aſſets per deſcent*.

In an action of *detinue* for a releaſe made in the county of *A.*, the plaintiff alleged, that, by reaſon of the detention of the releaſe, he loſt lands in the county of *B.* The defendant pleaded *non detinet*, and iſſue was joined upon the plea. It was holden, that the jury of the county of *A.*, who tried the iſſue, might aſſeſs damages to the value of the land: and by the court—As the loſs of the land is laid in aggravation of damages, it is incidental to the iſſue. Bro. Damage, pl. 87. Jenk. 20. pl. 38.

There ſeems to be good reaſon, that the jury, who try an iſſue, ſhould in every caſe aſſeſs damages for a matter in a foreign county, which is laid in aggravation of damages, notwithſtanding the matter be local; otherwiſe a writ muſt go to a jury of the foreign county to inquire of the damages in that county, which would not be ſo proper; becauſe a jury are not liable to an attaint, for a falſe verdict upon a writ to inquire of damages. 2 Roll. Abr. 688. L. pl. 3.

If an action be brought in an inferior court, the jury by whom an iſſue in the action is tried, may find any matter incidental to the iſſue; although it ariſe out of the juriſdiction of the court.

An action of debt being brought in an inferior court againſt *J. S.* as heir to *J. N.*, the defendant pleaded *riens per deſcent*, and iſſue was joined upon the plea. The jury found aſſets out of the juriſdiction of the court, and the plaintiff had judgment. A writ of error being brought, it was aſſigned for error, that the jury had no power to find aſſets out of the juriſdiction of the inferior court. The judgment was affirmed: and by the court—As the matter found out of the juriſdiction of the inferior court is incidental to the iſſue, the verdict is good. Cro. Ja. 502. Bourn v. Carrington.

In an action upon the caſe for words, brought in an inferior court, the plaintiff alleged, that, by reaſon of the ſpeaking of the words, he loſt cuſtomers at a place out of the juriſdiction of the court. The defendant having pleaded not guilty, the jury found a verdict for the plaintiff, and aſſeſſed damages to the amount of a hundred marks; and judgment was given for the plaintiff. A writ of error being brought, it was aſſigned for error, that the jury have aſſeſſed damages for a matter ariſing out of the juriſdiction of the court, which it was ſaid they had no power to do. The judgment was affirmed: and by the court—The jury, by whom an iſſue is tried in an inferior court, cannot find an original matter, unleſs the ſame aroſe within the juriſdiction of the court: but the verdict is in the preſent caſe good; becauſe the matter alleged out of the juriſdiction of the court, which is laid in aggravation of damages, is not an original matter, but incidental to the iſſue. Cro. Car. 570. Ireland v. Lockwell.

It is a rule of law, that a jury cannot find a perſon indicted for an offence guilty, in any other county than that wherein the offence was committed; it being a maxim of law, that *ubi quis delinquit ibi punietur*. 6 Rep. 47. Dowdale's caſe.

But, if *J. S.*, who has ſtolen goods in the county of *A.*, carry them into the county of *B.*, he may be found guilty of larceny in H. P. C. 69. 1 Hawk. c. 33. § 9.

the county of *B.*; for, as the legal poſſeſſion as well as the property of the goods ſtolen does, notwithſtanding the felonious taking, continue in the perſon from whom they were taken, every moment's continuance of the illegal poſſeſſion obtained by the thief is as much a felonious taking as the firſt taking was; and, conſequently, he does, by continuing the illegal poſſeſſion of the goods in the county of *B.*, become guilty of larceny in that county.

(T) Of a Verdict which is contrary to a Matter of Record.

Bro. Verd. pl. 96. EVERY verdict, ſo far as it is contrary to a matter of record, is bad; becauſe more credit is due to the record than to the verdict.

Ibid. If the jury find any thing contrary to what one of the parties to the action has confeſſed, the verdict is as to ſo much bad; becauſe it is a finding contrary to a matter of record.

Palm. 20. Crawley's caſe, there cited. 1 Roll. Rep. 443. To a writ of *ſcire facias* brought againſt *J. S.* as heir to his father, upon a recognizance entered into by his father, he pleaded *riens per deſcent.* Iſſue being joined upon the plea, the jury found, that *J. S.* had land by deſcent as heir to his father; and the plaintiff had execution of the land. An action of ejectment being afterwards brought by *J. S.*, in order to recover the poſſeſſion of the ſame land, the jury found that the land did not deſcend to *J. S.* as heir to his father; but that it came to him as donee in tail upon the death of his father. The verdict was holden to be bad; becauſe it is contrary to the verdict in the action upon the writ of *ſcire facias*; it being thereby found, that the land did deſcend to *J. S.* as heir to his father.

1 Roll. Rep. 443. Crawley v. Morton. It is in one book laid down generally, that, if a verdict have been found againſt a tenant in tail, no one of the iſſue in tail can falſify the verdict.

Ld. Raym. 1050. Traviban v. Lawrence. But in another book it is ſaid, that although no one of the iſſue in tail can falſify a verdict, which has been found againſt a tenant in tail, directly, he may do it obliquely; as, by ſhewing, that the tenant in tail did not give a material thing in evidence, which it is in his power to give.

Cro. Ja. 627. Langley v. Pain. If a *venire facias de novo* have been awarded, the firſt verdict, notwithſtanding it be continued upon the record, is a nullity; and, conſequently, the ſecond verdict is not bad, although it be contrary to the firſt.

(U) Of a Verdict which is contrary to a Matter of Eſtoppel.

1 Inſt. 227. IT is more proper to plead a matter of eſtoppel, than to give it in evidence; becauſe, when the matter of eſtoppel is pleaded, the judgment of the court may be had thereupon without going to trial.

But

But a matter of eſtoppel may be given in evidence; and if ſuch matter be given in evidence, and the jury find contrary thereto, the verdict is bad. 1 Inſt. 227. Dyer, 171. 2 Rep. 4. Cro. Eliz. 140. 1 Leon. 206.

If *J. S.*, after having by indenture demiſed certain premiſes for a term of years, during the term bring an action of ejectment for the recovery of the poſſeſſion of the premiſes, and the indenture be given in evidence, and the jury find contrary thereto, the verdict is bad; becauſe it is contrary to a matter of eſtoppel: for the jury ought in ſuch caſe either to find for the defendant, or to find the matter ſpecially. Cro. Car. 110. Iſeham v. Morrice.

(W) Of a Verdict which is contrary to ſomething that is confeſſed, or not denied, in the Pleadings.

IF the jury find one thing contrary to ſome other thing, that is confeſſed, or not denied, in the pleadings, the verdict is as to ſo much bad; becauſe the jury had nothing to do with that which is confeſſed, or not denied in the pleadings. Dyer, 147. 2 Rep. 4. Cro. Eliz. 283. 2 Roll. Abr. 691. R. pl. 1.

The tenant in an action of dower pleaded, that the huſband of the demandant did not die ſeiſed of the eſtate of which ſhe demanded dower, and iſſue was joined upon the plea. The jury found that the huſband died ſeiſed; but they likewiſe found, that the eſtate was not liable to dower. The latter part of the verdict was holden to be bad; becauſe, as the plea does not deny the liability of the eſtate to dower, it virtually confeſſes it. 2 Roll. Abr. 691. R. pl. 2.

If the demandant in an action of waſte, wherein the waſte is charged in a place called *A.*, plead, that there is no ſuch place as *A.*, and iſſue be joined upon the plea, and it be found againſt him, the jury have no power to inquire whether the waſte were committed; becauſe the commiſſion of the waſte is not denied in the plea. 2 Roll. Rep. 691. R. pl. 3.

An action of debt being brought upon a bond, with condition to perform an award to be made by *J. S.*, the defendant pleaded, that *J. S.* did not make the award alleged by the plaintiff. The plaintiff replied, that *J. S.* did make the award; and iſſue was joined upon the replication. The jury found, that *J. S.* did make the award; but they found likewiſe a matter in avoidance thereof. The latter part of the verdict was holden to be bad: and by the court—The award, as the iſſue is only whether *J. S.* did make it, ſhall be taken to be good, unleſs it appear upon the face thereof to be bad; and, as the defendant could not have rejoined any matter in avoidance of the award, becauſe this would have been a departure, the jury had no power to find ſuch matter. 2 Roll. Abr. 690. pl. 10.

In an action of debt againſt an heir, upon the bond of his father, the defendant pleaded, that he had nothing by deſcent except twenty acres of land in *A.* The plaintiff replied, that, beſides the twenty acres in *A.*, he had forty acres of land by deſcent in *B.* The defendant rejoined, that he had not forty acres of land by deſcent in *B.*, and the iſſue joined upon the rejoinder was found Jenk. 102. Molineux's caſe.

for him. It was holden, that the plaintiff ſhould have judgment, notwithſtanding the verdict for the defendant: and by the court —As the defendant has confeſſed the having of twenty acres of land by deſcent, the plaintiff has a right to judgment as to theſe.

2 Mod. 5. Wilcox v. Skipwith.

In an action of replevin the defendant alleged, that the plaintiff held of him by the yearly rent of twelve ſhillings, and a heriot upon every alienation; and he avowed the taking for a heriot. The plaintiff traverſed, that a heriot was due upon every alienation, and iſſue was joined upon the traverſe. The jury found, that the holding was by the yearly rent of three ſhillings, and a heriot upon every alienation. Upon a motion in arreſt of judgment it was inſiſted, that the defendant ought not to have judgment; becauſe the tenure found is different from that alleged. Judgment was given for the defendant: and by the court—It is alleged in the pleadings, that the plaintiff held of the defendant by the yearly rent of twelve ſhillings, and heriot upon every alienation; and it is a rule of law, that whatever is well alleged in the pleadings, and not denied, ſhall be taken to be as alleged, notwithſtanding the jury find contrary thereto.

(X) What Omiſſion in the Pleadings is cured by a Verdict.

2 Lill. Abr. 797.

THE want of having ſet out the writ, which would be bad upon a demurrer, is cured by a verdict; for the court will, in ſupport of the verdict, intend it to have been proved at the trial, that there was a writ.

Ibid.

But, if a writ, which appears upon the face thereof to be bad, is ſet out, the badneſs of the writ is not cured by a verdict; for it can never be intended, that ſuch writ was proved to be good.

Carth. 389. Blackall v. Eale. Salk. 662. S. C. 5 Mod. 287. S. C. Com. 12.

If it be not alleged in the declaration in an action of treſpaſs, that the treſpaſs charged was commited upon a day certain, the declaration is bad upon demurrer. But the omiſſion of ſuch allegation is cured by a verdict; for, as the day is not material in an action of treſpaſs, the court will, in ſupport of the verdict, intend, that the treſpaſs was proved to have been committed upon a day antecedent to the commencement of the action.

Plowd. 202. Salk. 365. [So, if the plaintiff wholly omits to ſtate his title; for in that caſe there is no room for preſumption. Dougl. 683.]

If a defective title be ſet out in the pleadings, the defect is cured by a verdict; for the court will, in ſupport of the verdict, intend, that it was ſupplied by evidence: but, if a bad title be ſet out in the pleadings, the badneſs is not cured by a verdict; for the court will never intend, that a title, which is apparently bad, was proved to be good.

Carth. 130. Brunetti v. Lewin.

In an action of *aſſumpſit* upon a bill of exchange there was a verdict for the plaintiff, and judgment was given for him. A writ of error being brought, it was aſſigned for error, that it is not alleged in the declaration, that the plaintiff did pay the money due

due upon the bill to the laſt indorſee; and that, as this is not alleged, the plaintiff ought not to recover; becauſe the defendant, unleſs the money were paid to the laſt indorſee, is liable to an action for it. The judgment was affirmed: and by the court—After a verdict it ſhall be intended, that the money was proved to have been paid to the laſt indorſee. It is alleged, that the money was paid upon account of the defendant, which it cannot have been, unleſs it was paid to the laſt indorſee.

In an action of covenant the breach aſſigned was, that the defendant did not offer to grant an advowſon to the plaintiff before he granted it to *J. S.* The defendant pleaded, that he did not grant the advowſon to *J. S.*, and iſſue was joined upon the plea. A verdict being found for the plaintiff, it was in arreſt of judgment inſiſted, that it is not alleged, that the defendant granted the advowſon to *J. S.* by deed, and, conſequently, as no grant of an advowſon except it be by deed is good, there is not a breach of covenant aſſigned. Judgment was given for the plaintiff: and by the court—It ſhall, in ſupport of the verdict, be intended, that a grant to *J. S.* by deed was proved. Hutt. 54. Lightfoot v. Brightman.

In another book, wherein this caſe is cited, it is ſaid, that, as no grant of an advowſon, except it be by deed, is good, it is to be preſumed, that the jury would not have found a verdict for the plaintiff, unleſs a grant to *J. S.* by deed had been proved. 10 Mod. 301. Muſton v. Yateman.

[In an action againſt an unqualified perſon for uſing a gun, the declaration ſtated, that the defendant uſed a gun, *being an engine for the deſtruction of game.* In arreſt of judgment it was objected, that it was not averred, that the defendant *uſed* the gun for the deſtruction of game, but the court over-ruled the objection. Lord *Mansfield* obſerved, that, according to one way of pointing, the offence was ſufficiently charged, and that ſuch an ambiguity, though it might be a good cauſe of ſpecial demurrer, or an objection to a conviction, was cured by verdict.] Avery v. Hoole, Cowp. 825

The omiſſion of alleging a matter in the pleadings, which is eſſential to the action, is never cured by a verdict; becauſe every ſuch matter, it being traverſable, muſt be alleged, that it may be put in iſſue.

If the declaration in an action of treſpaſs, brought by a maſter for the beating of his ſervant, do not charge, that by reaſon of the beating the plaintiff loſt the ſervice of his ſervant, the omiſſion is not cured by a verdict; the loſs of ſervice being the giſt of the action. 1 Bulſtr. 163. Anon.

The declaration in an action of treſpaſs, brought for keeping a bull accuſtomed to run at perſons, did not charge, that the defendant knew the bull was accuſtomed to run at perſons. It was holden, that the omiſſion is not cured by a verdict; becauſe it is an omiſſion of that which is the giſt of the action. As it was not moreover neceſſary for the plaintiff to prove, that the defendant knew the bull was accuſtomed to run at perſons, it not being alleged, the court cannot intend, that this was proved. Salk. 662. Buxendin v. Sharp. Sayer, 282.

[In an action on a bill of exchange againſt the *indorſor*, the plaintiff did not allege notice to the defendant of the refuſal by the acceptor, or indeed a demand and refuſal by the *acceptor* on the Ruſhton v. Aſpinall, Dougl. 679.

the day when the bill was payable. It was inſiſted, that this was cured by the verdict; that it muſt be preſumed, that thoſe facts were proved at the trial. But by the court—It was not requiſite for the plaintiff to prove, either the demand on the acceptor, or notice to the defendant; becauſe they are neither laid in the declaration, nor are they circumſtances neceſſary to any of the facts charged. If they were to be preſumed to have been proved, no proof at the trial can make good a declaration, which contains no ground of action on the face of it. The promiſe alleged to have been made by the defendant is an inference of law, and the declaration does not contain premiſes from which ſuch an inference can be drawn.

Spieres v. Parker, 1 Term Rep. 141.

In an action of debt on 19 *C.* 2. *c.* 30. for the penalty of 50*l.* for impreſſing a mariner in the *Weſt India* trade, it was not averred in the declaration, that he had not deſerted from *any* of his majeſty's ſhips of war. A verdict was had for the plaintiff, and upon motion in arreſt of judgment for this omiſſion, it was contended by his counſel, that it muſt be preſumed, after verdict, that this was proved at the trial. But by the court—Nothing is to be preſumed after verdict, but what is expreſsly ſtated in the declaration, or what is neceſſarily implied from thoſe facts which are ſtated. At the trial it is only neceſſary to prove what is alleged in the declaration: and here it was only alleged that the mariner had not deſerted from a particular ſhip: therefore we cannot preſume, that in this caſe it was proved he had not deſerted from *any* of his majeſty's ſhips.]

(Y) What Miſtake, or Omiſſion, in the Copy of the Iſſue delivered is cured by a Verdict.

Barnes, 477. Johns v. Smith.

IN the firſt count, in the copy of the iſſue delivered in an action of *aſſumpſit*, inſtead of its being alleged, that the defendant was indebted to the plaintiff, it was alleged, that the plaintiff was indebted to the plaintiff. The other counts were right, and the miſtake in the firſt count was corrected in the record of *niſi prius*: but it was done without leave of the court. A motion being made to ſet aſide the verdict obtained by the plaintiff, on account of the variance betwixt the copy of the iſſue delivered and the record of *niſi prius*, it was holden, that, as the variance is not in a thing material to the iſſue, the verdict is good.

MS. Rep. Mather v. Brinker, Eaſt. 4 G. 3. in C. B.

Upon a rule to ſhew cauſe why the verdict obtained by the plaintiff ſhould not be ſet aſide, it appeared, that in the recital of the writ in the copy of the iſſue delivered, the defendant, whoſe name was *John*, was called *James*; that in other parts of the copy of the iſſue delivered he was called *John*; and that no defence was made at the trial. The rule was diſcharged: and by the court—The variance in this caſe is ſo immaterial, that no advantage can be taken thereof after a verdict.

1 Barnard. 58. Scrimſhaw v. Proctor.

Theſe words, *et prædictus querens ſimiliter*, were inſerted in the copy of the iſſue delivered, in the room of the words, *et prædictus defendens ſimiliter*. The verdict was holden to be bad.

In

In the copy of the iſſue delivered, the name of the defendant was inſerted inſtead of that of the plaintiff, in the joining of iſſue; but in the record of *niſi prius* the plaintiff's name was inſerted. A motion was made to ſet aſide the verdict obtained by the plaintiff, on account of the variance betwixt the copy of the iſſue delivered and the record of *niſi prius*. The verdict was holden to be good; becauſe it was general, and there was another iſſue which was well joined. Barnes, 475. Thompſon v. Simmons.

Theſe words, *and the ſaid plaintiff likewiſe*, were omitted in the copy of the iſſue delivered. The plaintiff obtained a verdict: but as the defendant relied upon the materiality of the omiſſion, and made no defence at the trial, a rule was granted to ſhew cauſe, why the verdict ſhould not be ſet aſide. Upon ſhewing cauſe, it was inſiſted, that the record of *niſi prius* is right, and that the iſſue is amendable after a verdict. The rule was made abſolute: and by the court—This is a material variance, and, as the defendant relied upon it, and did not make any defence at the trial, it is fatal. Barnes, 475. Rye v. Croſſman.

In an action, brought by the indorſee of a promiſſory note againſt an indorſor, the name of the indorſor was omitted in the copy of the iſſue delivered, which was in theſe words, *he the ſaid indorſed*, inſtead of theſe words, *he the ſaid* J. S. *indorſed;* but the indorſor's name was inſerted in the record of *niſi prius*. The plaintiff obtained a verdict; but, as the defendant relied upon the materiality of the variance, and did not make any defence at the trial, the verdict was ſet aſide. Barnes, 476. Wreathock v. Bingham.

Theſe words, *and the ſaid plaintiff likewiſe*, were omitted in the copy of the iſſue delivered; but they were inſerted in the record of *niſi prius*. Upon ſhewing cauſe againſt a rule for ſetting aſide the verdict obtained by the plaintiff, it appeared, that one of the counſel for the defendant did at the trial object to the ſufficiency of the plaintiff's evidence. This, although no witneſs for the plaintiff was croſs examined, and although no witneſs was called for the defendant, was holden to be ſuch a making of defence at the trial, as cured the omiſſion. Barnes, 445. Grave v. Cliff.

(Z) Of divers Things, which did not fall properly under any of the foregoing Heads.

THE queſtion was, whether a verdict, which found a deed *in hæc verba*, found all that was recited in the deed. It was holden that it did not. And by the court—If it ſhould be holden, that a verdict, which finds a deed *in hæc verba* finds all that is recited in the deed, the jury, who are ſworn to find the truth, would, whenever there is a falſe recital in a deed, find a falſity. It has been obſerved, that if a deed of bargain and ſale, wherein the conſideration money is recited to have been paid, be found, it is found that the money is paid: but the obſervation does not apply, it not being in ſuch caſe found, that the conſideration money is paid: nor is it neceſſary, that this ſhould be found; for, if any ſum of money be mentioned in a deed of bargain and ſale Freem. 529. Blackmore v. Cumberford.

ſale as the conſideration, the deed is good, although the money have not been paid.

1 Barnard. 108. Rex v. Willis and Brown. Cro. Ja. 396. The pannel of the jury, who were to try an indictment againſt *Willis*, was by miſtake annexed to the *diſtringas* upon an indictment for the ſame offence againſt *Brown*; and the pannel of the jury, who were to try an indictment againſt *Brown*, was by miſtake annexed to the *diſtringas* upon an indictment for the ſame offence againſt *Willis*. The verdicts found in both caſes were holden to be bad; becauſe they were found by juries, who had not authority to try the indictments.

Trial *per Pais*, 259. It is in the general true, that if the jury do not, where damages or coſts ought to be aſſeſſed, aſſeſs either, or both, as the caſe may require, the verdict is bad.

2 Lill. Abr. 798. In an action of annuity the jury found, that ſo much of the annuity as the plaintiff claimed was in arrear: but they did not aſſeſs either damages or coſts. The verdict was holden to be defective: and it was likewiſe holden, that the defect could not be made good, by awarding a writ of inquiry to aſcertain the damages and coſts. But if in a caſe, wherein damages, or coſts, or both, ought to be aſſeſſed, the jury omit to aſſeſs either, or both, as the caſe may require, it is in the power of the plaintiff to make the verdict good, by releaſing the damages, or coſts, or both.

Str. 873. Broom v. Rice. The declaration in an action of treſpaſs charged the ſelling of the plaintiff's goods. The defendant pleaded, that the goods, which he had diſtrained for rent in arrear, were purſuant to the direction of the 2 *W. & M. c.* 5. appraiſed by two perſons ſworn by the headborough; and that the ſurplus of the money for which they were ſold was, after deducting the rent and charges of the diſtreſs, left in the hands of the conſtable. The plaintiff replied, *De injuriâ ſuâ propriâ abſque tali cauſâ*. Iſſue being joined upon the replication, a verdict was found for the defendant. The verdict was ſet aſide; a verdict was ordered to be entered for the plaintiff; and a writ of inquiry was awarded for aſcertaining the damages: and by the court—The preſent verdict ought not to ſtand; becauſe it appears from the defendant's own ſhewing, that the ſelling of the goods is not juſtifiable; for, as the conſtable was preſent, the headborough had no power to adminiſter the oath to the two appraiſers.

Cro. Ja. 473. Dent v. Parſo. In an action of replevin, the defendant avowed the taking of the goods, for the ſum of thirty-ſix pounds in arrear for rent. The plaintiff as to twelve pounds, parcel of the thirty-ſix pounds, pleaded payment; and as to the reſidue he pleaded, that it was not in arrear. Iſſue being joined upon both pleas, the firſt iſſue was found for the plaintiff, the ſecond for the defendant. Judgment was given for the defendant: and by the court—If one iſſue in an action of replevin be found for the defendant, he is entitled to a return of the goods; and, conſequently, the finding of another iſſue for the plaintiff is nugatory.

3 Lev. 254. Rex v. Hunter. In an indictment upon the ſtatute againſt ſtabbing, tried at the Old Bailey, the jury found a ſpecial verdict, in which the queſtion ſubmitted to the court was, Whether the priſoner was ouſted of the

the benefit of the clergy? The verdict being by the command of the king referred to the judges, it was argued before them at Serjeants Inn. Six of the judges were of opinion, that the prisoner was ousted of the benefit of the clergy; but the other five were of a contrary opinion; and the recorder was likewise of opinion, that the prisoner was not ousted of the benefit of the clergy. The king being himself of the same opinion, the prisoner had the benefit of the clergy.

[It hath been laid down, that the court will not alter a general verdict, unless it clearly appear upon the face of it, that the alteration will be agreeable to the intention of the jury; the proper remedy in such case being a new trial. Spencer v. Goter, 1 H. Bl. 78.

But, where it appeared from the affidavit of eight of the jurors, that the foreman had made a mistake in the delivery of the verdict, and had reported both issues to befound for the defendant, whereas they had agreed to find one of them for the plaintiff, the court intimated a disposition to grant a rule to shew cause, (but the case was not afterwards moved,) why the verdict should not be amended and set right according to the truth of the finding. Cogan v. Ebden, 1 Burr. 383.

When a considerable time has elapsed after the trial, *the court will not amend the* postea *by increasing the damages* given by the jury, although all the jurors join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived the verdict they had given was calculated to give him such increased sum. The proper time for such an explanation is at the trial.] Jackson v. Williamson, 2 Term Rep. 281.

Visne or Venue.

(A) Venue, what.

(B) In what Cases Venue is necessary.

(C) How the Want of a Venue may be aided.

(D) What deemed a proper Laying of the Venue.

(E) From whence the Venue shall come.

(F) In what Cases Venue may be changed. Wherein.

1. When the Motion for changing the Venue must be made.

2. The

2. The Certainty required in the Affidavit on which the Motion is made.
3. Caſes in which the Venue cannot be changed.

(A) Venue, what.

THE *venue*, in Latin *vicinetum* or *viſnetum*, is the place from whence a jury are to come for the trial of cauſes, which is generally ſome neighbouring place, *locus quem vicini habitant*, from whence it is called *vicinetum* or *venue*.

(B) In what Caſes Venue is neceſſary.

THE moſt general rules reſpecting the neceſſity of a *venue* are —That a *venue* is neceſſary in all caſes where the matter is traverſable, or where it affects the *right* of the action; where it merely regards the *perſon*, or concerns damages only, there, a *venue* is not neceſſary. But theſe rules will be better underſtood by conſideration of the following caſes.

2 Ld.Raym. 1243. Pie v. Cooper. The reaſon of this diſtinction is, becauſe that every plea concerning the perſon which is pleaded in abatement is triable where the action is brought; but, where ſuch plea is pleaded in bar of the action, the *venue* ſhall be alleged, becauſe ſuch plea is not to the *perſon* but to the *right*. 2 Ld. Raym. 853. Weſt v. Sutton.

In an action on the caſe the defendant pleaded in abatement, that the plaintiff was an alien enemy, and laid no *venue:* and on demurrer it was adjudged to have been well pleaded, and the plaintiff might have replied, that he was born in *England* generally. But, if ſuch a matter is pleaded in bar, it muſt be pleaded with a *venue*, and the plaintiff ſhould reply, that he was born in ſuch a place in *England*, and in the principal caſe judgment was given, *quod billa caſſetur*.

2 Ld.Raym. 1172, 1173. Scawen v. Garret.

Matters touching the perſon, as privilege of attorney, may be pleaded without a *venue*, and be tried where the writ is brought.

Per cur. Carth. 256. Huckle v. Wye.

In covenant againſt one as aſſignee, there is no need of laying any *venue*, becauſe an aſſignment is always intended to be made on the lands aſſigned.

Cro. Eliz. 880. The Lady Shandos v. Simpſon.

But a conſideration executory is *traverſable*, and therefore a *venue* muſt be laid.

1 Lutw.235. Remington v. Tailor.

Where the judgment is upon a *nil dicit*, the want of a *venue* is not material to ſet it aſide, becauſe the inquiry is not to be of any thing beſides damages, which may be inquired by any jurors in the county.

Emery v. Fell, 2 Term Rep. 30.

[In debt for goods ſold and delivered, the plaintiff declared that the defendant *at* Weſtminſter *in the county of* Middleſex, *was indebted to him* in a certain ſum for goods ſold and delivered, but alleged no expreſs contract, or place where the contract was made. On

On a ſpecial demurrer for theſe cauſes, the court held, the contract and *venue* well laid.

In a replication to a plea of *ne unques accouple* in a writ of dower, alleging a marriage in *Scotland*, it is not neceſſary to ſtate by way of *venue* that the marriage was had at any place in *England*. In point of ſubſtance, the queſtion on the marriage in *Scotland* ariſing incidentally in a ſuit in dower, of which the court have original juriſdiction, is for the purpoſe of the cauſe within their juriſdiction without the aſſiſtance of a fiction, and the *venue* for the mere purpoſe of trial, being neceſſarily the *venue* laid in the declaration, the inſerting it in the replication would be nugatory, and the want of it therefore cannot be taken advantage of even on a ſpecial demurrer.] Ilderton v. Ilderton, 2 H.Bl.145

(C) How the Want of a Venue may be aided.

IT is a general principle, that the want of a *venue* is only curable by ſuch plea as admits the fact for the trial whereof it was neceſſary to lay a *venue*; or by a verdict.—Thus the 6 Mod.222. Boiſloe v. Bailey, 3 Salk. 381. Anon.

Want of a *venue* is aided by pleading over; as, where in treſpaſs the defendant pleaded a ſubmiſſion to an award, and that an award was made, which he had performed, but laid no *venue* where the performance was. The plaintiff replied another award, and the defendant tendered iſſue upon it, whereupon plaintiff demurred. *Holt*, Ch. J. ſaid, that the want of a *venue* was aided by the pleading over. 2 Ld.Raym. 1039. Purſlow v. Baily.

So, in debt upon bond, though no *venue* is laid where the bond was made, yet, if the defendant pleads a releaſe, this admits the bond, and aids the want of a *venue*; *per Holt*, Ch. J. But, if defendant had demurred, the want of a *venue* had been ill. *Ibid.*

By the 16 & 17 *Car.* 2. *c.* 8. the want of a *venue* is aided after verdict; and this in caſes not only where there is a wrong *venue*, but alſo where the cauſe is tried in a wrong county, as appears from the caſes in the margin. 16 & 17 Car 2. c. 8. 1 Saund. 246. Craft Boite, S. C. Raym. 181.

by the name of Craft v. Winter. And it is there added, that the defendant might have demurred upon it.

(D) What deemed a proper Laying of the Venue.

MANY niceties which were formerly to be obſerved with reſpect to laying the *venue*, are now removed by the 4 & 5 *Ann. c.* 16. which enacts, "That every *venire facias* for "the trial of any iſſue in any action or ſuit, ſhall be awarded of "the body of the proper county where ſuch iſſue is triable." For example, 4 & 5 Ann. c. 16. and ſee 24 G. 2. c. 18. which extends this act to trials of iſſues on penal ſtatutes.

The *venue* in the declaration was laid at *Leek*, and not at *Leek* in the county aforeſaid. Defendant demurred, and ſhewed the want of a proper *venue* for cauſe, plaintiff joined in demurrer, and upon argument Barnes, 481. Spooner v. Milward.

argument the court gave judgment for the plaintiff. It was held ſufficient according to the courſe of the court to lay the *venue* at *Leek*, which has reference to the county in the margin; and ſince by act of parliament the *venire facias* is to be awarded *de corpore comitatûs*, it is not neceſſary that any particular place in the county be laid.

It is a general rule likewiſe, that the county in the margin of a declaration will help the *venue* laid in the body of it, but will not hurt it, as appears from the following caſe:

Barnes, 483. Howſe v. Haſelwood. In the margin ſtood the word *Norfolk*, in the body of the declaration the *venue* was laid at the city of *Norwich*, in the county of the ſame city throughout. The plaintiff executed a writ of inquiry of damages, directed to the ſheriffs of the city of *Norwich*. Had no *venue* been laid in the body of the declaration, reference muſt be had to the margin; but where a proper *venue* is laid in the body of the declaration, *the word in the margin ſhall not vitiate it*, for it is a *jeofail* which is helped by the 4 & 5 *Ann. c.* 16.

Mellor v. Barber, 3 Term Rep. 387. [In debt upon bond by an adminiſtrator, the declaration alleged, that adminiſtration was granted by the Biſhop of *Lichfield* and *Coventry*, and the *venue* in the margin was laid in *London*, but the bond was ſtated to be made at *Derby*, which is within the dioceſe. The plaintiff demurred generally. The court held it well enough on a general demurrer, though there poſſibly might have been ſome doubt on a ſpecial demurrer. The *venue* being laid at *Derby* in the body of the declaration, the addition of *London* in the margin did not vitiate it.

Sutton v. Fenn, 3 Wilſ. 339. Shirley v. Sackville, Cro. Eliz. 465. Where the proper *venue* is ſtated in the margin of a declaration, and the *venue* in the body of the declaration is laid at *D.*, without ſhewing in what county *D.* is, or, at *D.* in the *county aforeſaid*, when the next antecedent county is *S.*, in either of theſe caſes the reference ſhall be to the *venue* in the margin.]

Quarles v. Searle, Cro. Ja. 96.

2 Lill. Abr. 782. It is to be obſerved however, that in all *real* actions the *venue* ought to be laid in that county where the thing is for which the action is brought; for being *local*, it is only triable there; whereas matters which are *tranſitory* may be tried in any county, as will more particularly appear, when we come to conſider in what caſes the *venue* may be changed. So likewiſe,

2 Lill. Abr. 782, 783. 1 Wilſ. 165. In an action of debt brought for rent due for land upon a leaſe under hand and ſeal, where there is no privity of contract, as againſt an aſſignee, &c. the *venue* muſt *not* be laid out of the county where the land lies for which the rent is due; for the action is, for want of privity of contract, become a *local* action, *ratione terræ*, out of which the rents are iſſuing, and *not tranſitory*: but, where the action is brought by the leſſor againſt the leſſee, there being privity of contract, the action is *tranſitory*, and the demiſe may be laid to be made in any other county than that where the land lies.

21 Jac. c. 4. With reſpect to criminal caſes, it is ordained by the ſtat. 21 *Ja.* 1. *c.* 4. that all informations on penal ſtatutes ſhall be laid in

in the counties where the offences were committed. And upon this ſtatute the following points have been adjudged.

In an information on the 5 & 6 *Ed.* 6. *c.* 14. for buying and ſelling live cattle contrary to the ſtatute, it was inſiſted, that the information ought to have been brought in *Norfolk* where the offence was committed, and not in *Middleſex*. And *Holt*, Chief Juſtice, ſaid, that ten judges had agreed in the following reſolutions:

Firſt, That the 21 *Jac.* 1. *c.* 4. does not extend to any offence created *ſince* the ſtatute, ſo that proſecutions on ſubſequent penal ſtatutes are not reſtrained thereby, but that ſtatute is as to them as it were repealed *pro tanto*. 1 Salk. 372, 373. The King v. Gaul.

Secondly, That all informations, and popular actions on penal ſtatutes made *before* that act, muſt by force of 21 *Ja.* 1. *c.* 4. be laid, brought, and proſecuted in the proper county where the fact was done. Again,

An information was laid on the 12 *Car.* 2. *c.* 32. for carrying wool on board in order to export it; and it was objected, that it ought to have been laid where the offence was committed. But the Lord Chief Baron ſaid, that the ſtatute *Jac.* 1. does not extend to any offence created ſince; and therefore it muſt now ſtand on the ſtatute *Car.* 2.; there are no negative words in it, ſo it does not take away the prerogative of the crown to lay it any where, and this at the common law would be *tranſitory;* and he over-ruled the objection. Bunb. 236. Attorney General v. Browſe. But ſee 4 Inſt. 173. where Lord Coke in his comment on this act ſays, that it is but in affirmance of the true inſtitution of the common law: For *vicini vicinorum facta præſumuntur ſcire,*

It is ordained likewiſe by the ſtatute 21 *Jac.* 1. *c.* 12. that all actions brought againſt any officers of juſtice ſhall be laid in the county where the fact was committed. 22 Jac. 1. c. 12. for the conſtruction on this act, ſee Vaughan, 113. and *ſequent.*

It is obſervable, however, that the action is only confined to the proper county where the officer is acting in execution of his office. 1 Str. 446.

[The 9 *G.* 2. *c.* 35. § 26. which enacts, that proſecutions for aſſaults on revenue officers may be tried in any county, is confined to aſſaults on them merely as officers, and whilſt they are officiating as *ſuch*. And therefore where a defendant had been acquitted on all the counts in the indictment, which charged him with aſſaulting the proſecutor, a revenue officer, in the exerciſe of his office, and found guilty only on that which charged him with a common aſſault, judgment was arreſted, though the proſecutor in that count was deſcribed to be an exciſe officer, the offence being laid in *Surry*, and the *venue* in *Middleſex*. 4 Term Rep. 490. Rex v. Cartwright.

If an act of parliament directs, that officers ſhall be ſued for any act they may do under *that* act in the county where the fact is committed, and a ſubſequent act gives thoſe officers ſeveral of the privileges conferred by the preceding act, but does not require, as the preceding act does, that the action ſhall be brought in the Bazing v. Skelton, 5 Term Rep. 16.

county where the fact was committed; this privilege will not attach upon the ſubſequent act, unleſs there be a reference from the one act to the other, ſo as to incorporate them.]

(E) From whence the Venue ſhall come.

1 Inſt. 125. a. 4 & 5 Ann. c. 16. 24 G. 2. c. 18. Before theſe ſtatutes, where the venue could not come from a vill, hamlet, or locus conus, there it might have been *de corpore comitatûs.*

THE general rule of law as laid down by Lord *Coke* is, that every trial ſhall be out of that town, pariſh, or hamlet, or place known out of the town, *&c.* within which the matter of fact iſſuable is alleged, that is moſt certain and neareſt thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact. But the learning on this head is greatly abridged by the ſtatute 4 & 5 *Ann. c.* 16. and 24 *G.* 2. *c.* 28. which are taken notice of under the laſt head. For by theſe ſtatutes it is enacted, that every *venire facias* for the trial of any iſſue in any action or ſuit, or upon any penal ſtatute, ſhall be awarded of the body of the proper county where ſuch iſſue is triable. It may therefore be ſufficient to conſider,

2 Lill. Abr. 786.

Out of what county the *viſne ſhall come*, where part of the matter to be tried is part in one county and part in another.

This will depend on the giſt of the iſſue, as may be collected from the following caſes.

Br. Viſne, pl. 94.

An action was brought for goods eſloined, and received by the defendant, and the tort of the eſloining is alleged in one county, and the receipt of them by the defendant in another county, and they are at iſſue if he received them or not; there, the *viſne* ſhall be of the county where the receipt is ſuppoſed.

Br. Viſne, pl. 117. It may be added as a general rule, that in all caſes where the action is founded upon two things, both of which are material or traverſable, and the one without the other will not maintain the action, there, the plaintiff may bring the action in which of the counties he will.

In treſpaſs, the defendant aſſumed in *London* to cure the wound of the plaintiff, *&c.* and applied contrary medicines in *Middleſex*, by which the plaintiff was impaired. *Per Thirn*—If they take iſſue upon the *aſſumpſit*, *viſne* ſhall be of *London*, and if of the contrary medicines then of *Middleſex*.

7 Rep. 2. a. Bulwer's caſe. [2 Term Rep. 238. S. P.]

In ſome caſes however, the *venue* ſhall come out of both counties. For which, ſee *Br. Confeſſ. & Avoid. pl.* 30. or 38 *H.* 6. *p.* 25. where the caſe is more full and correct.

2 Roll. Abr. 603. pl. 8.

But, where both counties cannot join, there, it is ſaid, it may be tried in either county.

(F) In what Caſes the Venue may be changed.

[Vol. 1. p. 58.]

THE general principles with reſpect to the changing of the *venue* may be found under *Actions local and tranſitory* [B]. It may be neceſſary however to conſider farther.

1. When

1. When the Motion for changing the Venue muſt be made.

It has been held that the defendant muſt move to change the *venue* before he pleads; and that the plaintiff in like manner muſt move to diſcharge the rule, on his undertaking to give material evidence, before defendant replies. But — 2 Str. 858. Dickenſon v. Fiſher.

A judge's ſummons or order for time to plead, ſhall be no bar to a motion for changing the *venue*. So likewiſe, — *Per cur.* Barnes, 489. Dennis v. Fletcher.

Where after a rule to ſhew cauſe why the *venue* ſhould not be changed, and before it was made abſolute, the defendant by inadvertence put in a plea, yet the court held that this was no waiver of the rule: and they allowed defendant to withdraw his plea on payment of coſts, and made the rule abſolute for changing the *venue*. — Barnes, 492. Herbert v. Flower *et al'*.

Neither is a judge's order for an imparlance any bar to a motion for changing the *venue*. — Barnes, 487. Blackſtock v. Payne.

[The *venue* may be changed, after an order for time to plead, though upon the terms of pleading iſſuably; but not after an order for time to plead, where the terms are to plead iſſuably and take ſhort notice of trial at the firſt ſittings in *London* or *Middleſex*, becauſe there a trial would be loſt. — Cowp. 511. Barnes, 493. 1 Wilſ. 245. contr.

The plaintiff was allowed to bring back the *venue* to the county where it was originally laid, upon the uſual undertaking, though the cauſe had gone down to trial, and been a remanet for want of jurors.] — Cowp. 409. Bruckſhaw v. Hopkins.

2. The Certainty required in the Affidavit on which the Motion is made.

With reſpect to the affidavit it muſt be poſitive and certain. It is not ſufficient that it be affirmative, but it muſt alſo contain negative words; that is, it is not enough for defendant to ſwear that the *cauſe of action*, if any, did ariſe in the county to which he would have the *venue* changed, but he muſt likewiſe add that it did *not* ariſe in the county laid in the declaration, or *elſewhere* out of the county to which he would have the *venue* changed. — Barnes, 478. Belſhaw v. Porter. The words *cauſe of action* are indiſpenſably neceſſary, for it would be inſufficient to ſwear that the promiſes in the declaration were made in ſuch a county. Barnes 477. Cole v. Gouing. S. P. 2 Barnardiſt. 74. White v. Love. [3 Ter. Rep. 495.]

Where there are ſeveral defendants, the affidavit of one is ſufficient to ground a motion for changing the *venue*. — Barnes, 482. Box v. Read.

3. Caſes in which the Venue cannot be changed.

With regard to the caſes in which the *venue* cannot be changed, though it has been held that the *venue* may be changed in all actions of a tranſitory nature, yet there are divers exceptions, as in caſes of privilege, ſpecialty, promiſſory note, or bill of exchange. To which may be added, that even in the caſe of perſons privileged in this reſpect, ſuch as barriſters or attornies, if they are — *Per cur.* Barnes, 491. Everett v. Sanſum. 1 Str. 610. Townſend v. Duppa & al'.

joined in an action with unprivileged perſons, they cannot change the *venue*.

Barnes, 488. Richardſon v. Walker. *Id.* 489. Lewis v. Aſkham. *Id.* 481. Craſter v. Cockerell.

Neither is the *venue* in any caſe ever changed into a *county palatine*. The court have likewiſe refuſed changing it into *Durham*: and have alſo rejected a motion for changing it from *Yorkſhire* into the city of *York*.

Cameron v. Gray, 6 Term Rep. 363.

[In an action for infringing a patent, the *venue* cannot be changed from *Middleſex* to another county, becauſe it is impoſſible for the party applying to make the neceſſary affidavit, that the cauſe of action aroſe wholly in ſuch other county, and not elſewhere, it being manifeſt that the ſubſtratum of the action, namely, the patent, is at *Weſtminſter*.]

Univerſities.

(A) Univerſities, what.

(B) Of their Courts and Privileges of Juriſdiction. Wherein.

1. How they are to demand Conuſance.
2. By whom it may be demanded.
3. At what Time it may be demanded.

(C) Of their Privileges with regard to their Right of Preſentation to the Livings of Papiſts. Wherein.

1. In what Caſes they ſhall preſent.
2. Whom they ſhall preſent.
3. How their Right of Preſentation may be prevented.
4. How Truſts made to prevent their Right of Preſentation may be diſcovered.
5. How their Right of Preſentation may be diveſted.
6. How it may be avoided.

(A) Univerſities, what.

BY univerſities in general, we underſtand thoſe ſeminaries of learning where youth are ſent to finiſh their education, and to be inſtructed in the liberal ſciences. With us, by univerſities, are more particularly denoted thoſe two learned bodies of *Oxford* and *Cambridge*, which are inveſted with ſeveral peculiar privileges.

[It

[It is indeed from their being inveſted with ſuch privileges, or rather, from their being incorporated, (for they would not otherwiſe be capable of receiving them,) that they were called *Univerſities, Univerſitas* being the proper *Latin* word for a corporation. Conſidered as corporations, theſe learned bodies are merely the creatures of the crown. The power of granting degrees flows from that ſource; for, if the crown erects an univerſity, the power of conferring degrees is incident to the grant; and in point of fact, they never affected to confer degrees till they were incorporated. They were formerly conſidered as *eccleſiaſtical*, or at leaſt, as *clerical*, corporations; for they were compoſed chiefly of eccleſiaſticks, and *denominatio ſumenda a majori*; and they had, as eccleſiaſtical bodies, *ab initio* eccleſiaſtical juriſdiction. Hence the claim of the Archbiſhop of Canterbury to viſit them *jure metropolitico*, which was allowed in the reigns of *R.* 2. *H.* 4. and *Car.* 1. and eſtabliſhed by parliament in the reign of *H.* 4. It is now ſettled, however, that they are merely *lay* corporations, and as ſuch, ſubject to no viſitation, properly ſo called; the appeal, if any one feels himſelf aggrieved, being to the court of King's Bench; which court, as its judgments are reviſable by the Lords in Parliament, ſeems to want that definitiveneſs of ſentence which is eſſential to viſitatorial power. The Univerſities being bodies corporate by preſcription, it follows, that it is not competent to the crown, of itſelf, and without their conſent, to make any innovations in their conſtitution, or to abridge any of thoſe rights which they enjoy either by preſcriptive uſage or under old charters; and that they may, like other civil corporations under theſe circumſtances, accept a new charter, in part, and upon ſuch terms as they may think proper.]

See Sir. P. Yorke's argument, 1 Burn's E. L. 420. See alſo 8 Mod. 163.

3 Burr. 1656. 1 Bl. Rep. 547.

1 Bl. Com. 481.

(B) Of their Courts and Privileges of Juriſdiction.

EACH of the Univerſities had ſeveral powers and privileges by charters from the kings of this realm, particularly one in the eighth of *Hen.* 4. whereby they were authorized to hold plea of all cauſes ariſing withing the Univerſity according to the courſe of the *civil law*: but in the opinion of all the judges of *England* the grant was held not to be good, for that the king could not by his grant alter the law of the land. To remedy this and other defects reſpecting their powers and privileges, a ſpecial act of parliament was made in the 13 *Eliz.* confirming all former letters patent, and all manner of liberties, franchiſes, *&c.* which they had held, or of right ought to have enjoyed, *&c.*

4 Inſt. 227. Godb. 201. pl. 287. Archbiſhop of York v. Sedwick.

By letters patent (not confirmed by parliament) dated 30 *March* 11 *Car.* 1. granted to the Univerſity of *Oxford*, their old privileges are explained, and larger granted.

1 Mod. 164. Magdalen College caſe. Wood's Inſt. 548.

Their courts are called the *Chancellour*'s Courts. The chancellours are uſually peers of the realm, and are appointed over the whole Univerſity. But their courts are kept by their vice-chancellours,

Id. ibid. By charter of 14 Hen. 8. The Chan-

cellour, his commissary, and his deputy

cellours, their assistants or deputies; the causes are managed by advocates or proctors.

that is the pro-vice chancellour, are justices of the peace for the vill of Oxon, county of Oxon and Berks; and their authority does not depend on the common commission only; they being justices of the peace by virtue of their offices.

Id. ibid. and Cro.Car.73. Wilcocks v. Bradell. But see the petition against the grant of Hen. 4. in Prynn's Animadv. p. 368, 369.

These courts have jurisdiction in all causes ecclesiastical and civil (except mayhem (*a*), felony, and freehold) where a scholar, servant, or minister of the University is one of the parties in suit.

[(*a*) The trial of treason, felony, and mayhem, is committed in both Universities to the university-jurisdiction in another court, namely, the court of the *Lord High Steward* of the University. The cognizance of offences of this nature has not been claimed by this court in either University for many years, though instances have unhappily occurred in which the claim might have been made.]

Cro.Car.73. Wilcocks v. Bradell. Hetley 25. Thomas Wilcock's case. Hard. 508. Castle v. Litchfield.

Their proceedings are in a summary way according to the practice of the civil law; and in their sentences they follow the justice and equity of the civil law, or the laws, statutes, privileges, liberties, and customs of the Universities, or the laws of the land at the discretion of the chancellour.

Wood's Inst. 549. 2 Ld. Raym. 1346. The King v. the Chancellour, &c. of Cambridge.

If there is an erroneous sentence in the chancellour's court of the University of *Oxford*, an appeal lies to the congregation, thence to the convocation, and from thence to the king in Chancery, who nominates judges delegates to hear the appeal (*b*). The appeal is of the same nature in *Cambridge*.

[(*b*) According to Sir Wm. Blackstone, the appeal in the first instance is to delegates appointed by the congregation; thence to other delegates of the house of convocation; and if they all three concur in the same sentence it is final, at least by the statutes of the University, according to the rule of the civil law. But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates appointed by the crown under the great seal in Chancery. 3 Bl. Comm. 85. (*c*) The appeal from the Vice-Chancellour's court in Cambridge is to certain delegates appointed by the senate; but the editor is informed, that from the sentence of these delegates there is no appellate University jurisdiction.]

Cro.Car.73. Wilcocks v. Bradell. Hard. 505, 508. Castle v. Litchfield. There is some disagreement in the books as to the recital of this charter; in Cro. Car. they are said to have conusance, *ita quod justiciarii de banco regis sive de communi banco, vel justiciarii de assisis non se intromittant.* In Hard. it is said, that conusance is given them of all suits, &c. depending before the justice of the King's Bench, Common Pleas, and others there mentioned, and before any other judge, though the matter concern the king. These latter words would, no doubt, warrant the resolution in the case of Castle v. Litchfield; for it is said, that no charter of exemption shall be allowed without these or the like words, *licet tangat nos.* But see Hardr. 189. where it is affirmed, that the exemption granted to the University hath not these words, *licet tangat nos.* And see the following authorities, by which it is held, in opposition to the case of Castle v. Litchfield, That—

As by charter confirmed, as above mentioned, by act of Parliament, cognizance is granted to the University of all suits arising any where in law or equity against a *scholar*, *servant*, or *minister* of the University, depending before the justices of the *King's Bench*, *Common Pleas*, and others there mentioned, and before any other judge, though the matter concern the king; if an *indebitatus assumpsit* is brought by *quo minus* in the *Exchequer* against a scholar or other privileged person, the University shall have conusance, for the court of *Exchequer* is included in the general words.

Hard. 189. Wilkins v. Shalcroft,

If a debtor and accountant to the king sues a scholar by bill in equity in the *Exchequer*, or, if an attorney sues a scholar by writ of

of privilege, the Univerſities ſhall not have conuſance, for a general grant ſhall not take away the ſpecial privilege of any court. Lit. Rep. 304. Oxford Letters

Patent S. P. 3 Leon. 149. The Lord Anderſon's caſe. 2 Danv. Abr. 164.

But in caſes where privilege is allowable, a ſcholar, *&c.* cannot waive his privilege, and have a prohibition in the courts of *Weſtminſter*, for the Univerſity by right has the conuſance of the plea, where one is a privileged perſon; and a ſtranger is forced to ſue a privileged perſon in their courts by reaſon of that right veſted in them. Cro. Car. 73. Wilcocks v. Bradell. Hetl. 28. Thomas Wilcocks's caſe. This privilege was granted to ſcholars, that their ſtudies might not be interrupted by their being forced to attend ſuits in other courts.

But a ſcholar ought to be reſident (*a*) in the Univerſity at the time of the ſuit commenced, and no other ought to be joined in the action with him; for in ſuch caſes, he ſhall not have privilege. Hetl. 28. Thomas Wilcock's caſe.

[(*a*) Actual reſidence muſt be certified by the chancellour, Hayes v. Long, 2 Wilſ. 310. and his certificate muſt be ſupported by affidavit. Paternoſter v. Graham, 2 Str. 810. 1 Ld. Raym. 428. S. C. Boot v. Graham, 1 Barnardiſt. K. B. 49. 65.]

Though it is ſaid that ſervants of the Univerſity are privileged, yet it has been holden, that a bailiff of a college was not capable of privilege. Brownl. 74. Carrell v. Paſke.

Neither is a townſman entitled to privilege, to exempt him from an office in the town, if he keeps a ſhop and follows a trade, though he is matriculated as ſervant to a ſcholar (*b*). 2 Vent. 106. The City of Oxford's caſe.

[(*b*) That a townſman ſo circumſtanced was not entitled to the privileges of the Univerſity, this caſe did not determine; for the deciſion turned upon the matriculation having been colluſive, merely for the purpoſe of procuring an exemption from a corporate office. And it has been lately adjudged, that a college barber at Oxford, though he reſides in the city out of the college, is entitled to the privileges of the Univerſity. Rex v. Rowledge, Dougl. 531.]

It is to be obſerved, that though *mayhem*, *felony*, and *freehold* appear as above, to be the only cauſes excepted in their charter; yet it has been held, that in actions for the recovery of the poſſeſſion of a term, without claiming title to the freehold, they ſhall have no privilege, becauſe the freehold may come in queſtion. Cro. Car. 87, 88. Hayley's caſe. Litt. Rep. 252. Cripps v. Webb's caſe.

[Although the charter of the Univerſity extends to actions ariſing in any part of *England*, yet it cannot intend that ſcholars, as plaintiffs, ſhall have the liberty of ſuing in the Univerſity in cauſes of action ariſing in any part of *England*; but, when they are defendants, this privilege extends all over *England*.] *Per* Lord Camden, 2 Wilſ. 311.

It hath been diſputed how far the words of the grant entitled them to privilege in matters of equity. And the general principle of conſtruction ſeems to be that where chattels only are concerned, or where damages only are to be given, there, their privilege is allowable; but, where the ſuit is for the thing itſelf, there, their privilege cannot be allowed. As in the following caſes.

A bill was brought ſetting forth a contract under ſeal with the defendant, for making a leaſe of certain lands in *Middleſex*, and to have execution of the agreement. The defendant pleaded the privilege of the Univerſity, to proceed in all quarrels in law and equity, 2 Ventr. 362. Draper v. Crowther.

equity, except concerning freehold; and concluded to the juriſdiction of the court. But Lord Keeper *Guildford* over-ruled the plea, becauſe in this caſe they can only excommunicate or impriſon, but cannot ſequeſter lands in *Middleſex*, and ſo can give no remedy; and becauſe the charter of the Univerſity of *Oxford*, empowering them to proceed in all pleas and quarrels in law and equity, *&c.* ought properly to be extended to matters at common law only, or to proceedings in equity that might ariſe in ſuch caſes, and not to mere matters of equity, which are originally ſuch, as to execute agreements in ſpecie.

Fin. R. 45. Williams v. Roberts.

So likewiſe on a bill in Chancery to be relieved againſt a bond of the penalty of 100 *l.* given by the plaintiff's father to the defendant, who pleaded his privilege, that he is a doctor in divinity, ſcholar and reſidentiary ſtudent in the Univerſity of *Oxford*, and that he ought not to be ſued but before the chancellour of that Univerſity, or his deputy or commiſſary for the time being; the plea on debate was over-ruled.

Fin. Rep. 162. Buſhby v. Croſs.

But, on a bill to have a bond delivered up of 100 *l.* penalty, the money being paid, defendant pleaded, that he was a privileged perſon of the Univerſity of *Oxford*, *viz.* a doctor of laws, and reſident there, which the chancellour certified, and demanded conuſance of the matter in queſtion as determinable before him, or before the vice-chancellour, *&c.* and not elſewhere. The court diſmiſſed the bill and allowed the plea.

Fin. Rep. 292. Powell v. Hine and Adams.

So likewiſe on a bill by adminiſtrator for an account of inteſtate's eſtate which defendants had got in their poſſeſſion, on pretence of ſome debts due to them from the inteſtate; defendants pleaded, they are privileged perſons of the Univerſity of *Oxford*, and there reſident; which the chancellour certified, and demanded conuſance of the matter as examinable before him, his vice-chancellour, *&c.* and not elſewhere. And the plea was allowed.

Per Harcourt, Chan. MS. Rep. Trin. 12. Ann. in Chan. Aldridge v. Stratford. Vin. Abr. V. 22. p. 11.

Laſtly, on a bill brought in this court for a diſcovery of the perſonal eſtate of Dr. *Aldridge* deceaſed, and an injunction granted thereupon, the Univerſity of *Oxford* claimed *conuſance* of the cauſe, for that both plaintiff and defendant were ſcholars of the Univerſity. And *Harcourt*, C. ordered the bill to be diſmiſſed, and allowed an excluſive conuſance in equity *touching chattels* to the Univerſity.

Wood's Inſt. 549.

It is ſaid, that the chancellour of the Univerſity of *Oxford*, or his vice-chancellour, may inflict eccleſiaſtical cenſures of the greater excommunication on offenders even for temporal offences, and certify the excommunication into the High Court of Chancery to obtain the writ *de excommunicato capiendo*, as if the offender had been excommunicated in an eccleſiaſtical cauſe and certified by a biſhop. The Univerſity of *Cambridge* hath alſo this privilege.

3 Leon. 214. But ſee 12 W. 3. c. 11. § 19. which re-

In the conſtruction of their privileges with reſpect to the aſſize of beer and ale, it has been conteſted that they have not *aſſiſam ipſam*, that is, they cannot appoint another aſſize than what is ſet down by ſtatute, but that they have only *cuſtodiam aſſizæ*, that is, a power

power to enforce the execution of it, as well in the price as in the meaſure.

cognizes the right of the two Univerſities to ſize and mark meaſures for ale and beer; and by a grant of the 29th Ed. 3. the Univerſity of Oxford hath the aſſize and eſſay of wine and ale, as well as the cuſtody of it. Wood's Inſt. 550.

[On a motion for a prohibition to a ſuit in the vice-chancellour's court againſt certain brewers, for ſelling ill beer and falſe meaſure, the particular exceſs of juriſdiction alleged was, the exacting of juratory caution; and it was inſiſted, that though they have the aſſize of bread and beer by charter, yet a power to puniſh by fine, and proceed according to the civil law, cannot be by charter. *Holt*, Ch. J.—Before the 14 *H.* 8. the Univerſity had the juriſdiction of a leet, and exerciſed it in the vice-chancellour's court; but the charter grants them the power of treſpaſſes, and that over all perſons whomſoever, if a ſcholar be party. *Adjournatur.*]

Ruſh v. Chancellour, &c. of Oxford, Salk. 343. That both the Univerſities have the juriſdiction of a leet, has been acknowledged in ſubſequent caſes, 3 Burr. 1647. 1 Bl. Rep. 547. Dougl. 537.: but, whether a tradeſman of Oxford, entitled to the privileges of the Univerſity as a college ſervant, but reſiding without the walls of the college in the city, be therefore exempt from ſerving the office of conſtable for the city, is a queſtion which has been moved, but not abſolutely determined. Rex v. Routledge, Dougl. 530. It ſhould ſeem, however, from the language of the court, and the ſubſequent conduct of the proſecutors in that caſe, that there can be little doubt that the law is in favour of the exemption.

Such are their general privileges of juriſdiction; it remains now to conſider,

1. How they are to demand Conuſance.

It is ſaid that conuſance may be demanded by *certificate* only, without ſpecial pleading upon an *indictment* of a privileged perſon for an aſſault and battery.

Wood's Inſt. 550.

But it has been holden, that the claim of conuſance ought to be entered upon a roll, and an affidavit made to verify the certificate.

2 Str. 810. Paternoſter v. Graham. *Per cur.* S.P. 1 Barnard. 49, 65. under the name of Boot and Graham. [The charter, the act of parliament which confirms it, and all the proceedings ſo far as they have gone, muſt be entered on the roll, and therefore where the charter and ſtatute were ſhortly but not fully ſet forth, and the declaration which had been delivered in the cauſe was wholly omitted, the claim was diſallowed as not made in due form. Leaſingby v. Smith, 2 Wilſ. 406. See the caſe of Woodcock v. Brooke, Ca. temp. Hardw. 241. an inſtance of a claim allowed.]

In equity however a bill being filed againſt defendant, a fellow of *Exeter* College in *Oxford*, for an account of ſeveral ſums of money; the chancellour of *Oxford claimed* privilege by inſtrument in writing. But the Lord Keeper diſallowed the claim, ſaying it muſt be put in by way of plea. He declared nevertheleſs that it ſhould *not* (*a*) be on oath, but that it ſhould be ſufficient to aver the defendant to be a ſcholar reſident, *&c.*

1 Caſes in Can. 237. Prat. v. Taylor. Lord Keeper added, that in caſe of outlawry defendant ſhould not be put to aver the plea on oath. [(*a*) Mitf. Ch. Pl. 231. acc.]

In ſome caſes the claim of conuſance by plea ought to conclude with a traverſe: as, in treſpaſs for an aſſault and battery at *B.* in *com. Hertford*, the defendant pleads, that he was ſervant to a ſcholar in Saint *John*'s College, *Cambridge*; and that they are to have conuſance

3 Bulſt. 282. Payn v. Worth.

sance there. The plaintiff demur, because the defendant take no *traverse*, that he was culpable in any place *extra universitatem Cantabrigiæ*, that thereupon they might have taken issue. The whole court were clearly of opinion, that the defendant here ought to have concluded his plea with a traverse.

2. By whom it may be demanded.

Hard. 505, 510. Castle v. Litchfield. 2 Danv. Abr. 374.

The vice-chancellour by his attorney or deputy appointed in writing may demand it, though the vice-chancellour is but a deputy himself; for a bailiff may properly demand conusance, and upon notice of the patent the court ought to supersede.

3. At what Time it may be demanded.

3 Bl. Com. 298. 2 Wilf. 406. 5 Burr. 2823.

The rule is that conusance must be demanded the first day; [On the return of the writ, if the cause of action appears therein; if not, then upon the first day given upon the declaration. After full defence made or imparlance prayed, it is too late.]

2 Ld. Raym. 1339. in case of the King v. Cambridge University, alias Dr. Bentley's case, cited as so held Hil. 11 Ann. B. R. Perne v. Manners.

In an action on the case against a member of the University, the bill was of *Easter* term 11 *Ann.*, and the defendant had an imparlance till the first day of *Trinity* term following; after which, and before plea pleaded, the University of *Cambridge* by their attorney demanded conusance, and the claim was disallowed because it was not made the first day.

[See the cases of Leasingby v. Smith, 2 Wilf. 406, and Rex v. Agar, 5 Burr. 2823., where claims of conusance were disallowed as not made in due time.]

(C) Of their Privileges with regard to their Right of Presentation to the Livings of Papists.

1. In what Cases they shall present.

3 Jac. 1. c. 5 § 19.

ENACTS, that every papist recusant convict, during the time that he shall remain a recusant convict, shall from and after the end of this present session of parliament be disabled to present to any benefice or ecclesiastical living, or to nominate to any free school, hospital, or donative; and shall likewise be disabled to grant any avoidance to any benefice.

The chancellour and scholars of the University of *Oxford* shall have the presentation, *&c.* to every such benefice, school, hospital, and donative, in the counties of *Kent*, *Middlesex*, *Sussex*, *Surry*, *Hampshire*, *Berkshire*, *Buckinghamshire*, *Gloucestershire*, *Worcestershire*, *Staffordshire*, *Warwickshire*, *Wiltshire*, *Somersetshire*, *Devonshire*, *Cornwall*, *Dorsetshire*, *Herefordshire*, *Northamptonshire*, *Pembrokeshire*, *Carmarthenshire*, *Brecknockshire*, *Monmouthshire*, *Cardiganshire*, *Montgomeryshire*, the city of *London*, and in every city and town being a county of itself, within the limits of the counties aforesaid.

The

The chancellour and ſcholars of the Univerſity of *Cambridge* § 20.
ſhall have the preſentation, &c. to every ſuch benefice, ſchool, hoſpital and donative in the counties of *Hertfordſhire, Cambridgeſhire, Huntingdonſhire, Suffolk, Norfolk, Lincolnſhire, Rutlandſhire, Leiceſterſhire, Derbyſhire, Nottinghamſhire, Shropſhire, Cheſhire, Lancaſhire, Yorkſhire, Durham, Northumberland, Cumberland, Weſtmoreland, Radnorſhire, Denbyſhire, Flintſhire, Carnarvonſhire, Angleſey, Merioneth, Glamorganſhire*, and in every city and town, being a county of itſelf, lying within the limits of the counties laſt mentioned.

By the 1 *W. & M. cap.* 26. § 2. every perſon refuſing to make, or to appear for the making the declaration againſt tranſubſtantiation, and whoſe name ſhall be recorded at the quarter ſeſſions, is diſabled to make any preſentation, donation, or grant of avoidance of any eccleſiaſtical living, as fully as if he were a popiſh recuſant convict, and the chancellour, &c. of the Univerſities ſhall have the preſentation in the reſpective limits mentioned in the act of 3 *Jac.* 1. *c.* 5.

And farther by 12 *Ann. c.* 14. papiſts and their children under the age of 21 years, not being proteſtants, though not convicted, and their mortgagees and truſtees ſhall loſe their preſentations; and the reſpective Univerſities ſhall preſent.

2. Whom they ſhall preſent.

By 3 *Jac.* 1. *c.* 5. § 21. it is provided, that neither of the Univerſities ſhall preſent to any benefice, any ſuch perſon as ſhall then have any other benefice with *cure of ſouls*; and ſuch preſentation ſhall be void.

It was agreed that a layman may be preſented to a prebend, for *non habet curam animarum*, Cro. Eliz. 79. And for the ſame reaſon a dean, archdeacon, prebendary, &c. may be preſented or nominated by the Univerſity; for their promotion is not a benefice with cure of ſouls. Vin. Abr. V. 2. p. 5. But ſee 3 Inſt. 155. *contra*.

3. How their Right of Preſentation may be prevented.

If patron recuſant grants the patronage in fee to another, in ſuch caſe the Univerſity ſhall not have the preſentment; and in the ſame manner, if he grants it in tail for life or years, during the continuance of this grant, he is not patron in poſſeſſion, and therefore the Univerſity ſhall not preſent by the words of the ſtatute of 3 *Jac.* 1. *c.* 5.

Sir William Jo. 19. Standen v. the Univerſity of Oxford and Whitton.

But, if a patron makes a leaſe for years of an advowſon, and afterwards becomes a recuſant, the Univerſity ſhall have the preſentation, as a future intereſt given to them.

Sir William Jo. 26. Standen v. Univerſity of Oxford and Whitton, S. P. arg. 10 Rep. 56. a.

So likewiſe, if a patron acknowledges a ſtatute merchant, and after becomes recuſant convict, and then the ſtatute is extended, the Univerſity notwithſtanding ſhall have the preſentment. *Id. ib.*

[It was determined by Lord *Hardwicke*, on the ſtatute of *Anne* hereafter mentioned, that that ſtatute doth not make the whole truſt Cottington v. Fletcher, 2 Atk. 155.

truſt void, but only the turn upon an avoidance, ſo that if the party conforms before any avoidance happens, nothing can veſt in the Univerſities.]

4. How Truſts made to prevent their Right of Preſentation may be diſcovered.

Where ſecret truſts are made to prevent their right of preſentation, the following ſtatutes point out a method for diſcovering ſuch truſts.

By 1 *W. & M. c.* 26. § 3. Truſtees of recuſants are diſabled to preſent or grant any avoidance of any eccleſiaſtical living, free ſchool, or hoſpital, and the reſpective Univerſities are to have the preſentations.

And if any truſtee, mortgagee, or grantee of any avoidance ſhall preſent, *&c.* to any ſuch eccleſiaſtical living, *&c.* where the truſt ſhall be for any recuſant convict, or diſabled, without giving notice of the avoidance in writing to the vice-chancellour of the Univerſity, to whom the preſentation ſhall belong, within three months after the avoidance, he ſhall forfeit 500 *l.* to the Univerſity to which the preſentation, *&c.* ſhall belong.

§ 7. Perſons making the declaration, and taking the oaths before the juſtices at the quarter ſeſſions, where their names are recorded, ſhall be diſcharged of the diſability.

Farther, by 12 *Ann. ſt.* 2. *c.* 14. § 2. preſentor is to be examined by the ordinary, whether he be a papiſt or a truſtee for ſuch.

§ 3. Preſentee is to be examined upon oath by the ordinary, if he knows, or believes the preſentor to be a papiſt, or a truſtee for a papiſt, or for the children of ſuch, or any other perſon; and if he anſwers not directly, the preſentation to be void.

§ 4. Univerſities and their preſentees may bring a bill in Chancery for diſcovery (*a*), and upon neglecting to anſwer, the bill to be taken *pro confeſſo*.

[(*a*) A bill founded upon this ſtatute can only be for diſcovery, not for relief. So determined by Lord Talbot, *ſupra*, vol. 5. p. 272.

§ 5. Patrons and their clerks, conteſting the right of the Univerſity in *quare impedit*, may be examined in court, or by commiſſion or affidavit, as the court ſhall think proper, as to ſecret truſts; and if upon diſcovery who is the *ceſtui que truſt*, he ſhall, upon a rule made for him to come into court, or before commiſſioners, to make the declaration againſt tranſubſtantiation, neglect ſo to do, he ſhall be eſteemed convict in reſpect to his preſentation.

It was moved in a *quare impedit*, that the plaintiff claiming right of patronage might be examined upon oath touching ſecret truſts for papiſts purſuant to this act, and a commiſſion for ſuch examination was ordered to iſſue, directed to the three prothonotaries, or any two of them. Barnes, King v. Biſhop of Carliſle, and Maſters and Scholars of the Univerſity of Cambridge. See likewiſe where the court ordered a commiſſion for the like purpoſe, and directed the prothonotary to ſtrike the commiſſioners' names, and to ſettle the interrogatories. Barnes, Rutter v. Biſhop of Hereford and the Univerſity of Cambridge.

§ 6. And the anſwer of ſuch patrons, and the perſons for whom they are intruſted, and his and their clerks, and their examinations and affidavits taken as aforeſaid by order of any court, or by

the ordinary, ſhall be allowed as evidence againſt ſuch patron ſo preſenting, and his clerk.

§ 8. No lapſe ſhall incur, nor plenarty be a bar, till three months after the anſwer put in, or the bill taken *pro confeſſo*, or the proſecution deſerted, provided ſuch bill be exhibited before any lapſe incurred.

§ 10. Upon confeſſion or diſcovery of truſt, the production of deeds may be enforced.

Laſtly, The 11 *Geo.* 2. *c.* 17. § 5. enacts, That every grant of any advowſon of any eccleſiaſtical living, ſchool, hoſpital, or donative, and every grant of any avoidance thereof, by any papiſt or perſon making profeſſion of the popiſh religion, or any mortgagee or perſon intruſted for any papiſt, *&c.* ſhall be void, unleſs ſuch grant ſhall be made *bonâ fide*, and for a full conſideration, to a proteſtant purchaſer, and only for the benefit of proteſtants; and ſuch grantee ſhall be deemed a truſtee for a papiſt, and they and their preſentees ſhall be compelled to make ſuch diſcovery relating to ſuch grants and preſentations as by the act 12 *Ann. ſt.* 2. *c.* 14. is directed. And every deviſe to be made by any papiſt of any ſuch advowſon, *&c.* with intent to ſecure the benefit thereof to the heirs or family of ſuch papiſt, ſhall be void; and ſuch deviſees and perſons claiming under ſuch deviſees, and their preſentees, ſhall be compelled to diſcover whether ſuch deviſees were not made with the ſaid intent.

5. How their Right of Preſentation may be diveſted.

When once the preſentation *pro hâc vice* is veſted in the Univerſity, though the recuſant conforms himſelf afterwards or dies, yet the Univerſity ſhall preſent. 10 Rep. 58. a. in the Chancellour, &c of Oxford Univerſity's caſe.

So likewiſe, if a recuſant is attaint of felony or *præmunire*, the intereſt of the Univerſity ſhall not be diveſted. *Per* Hutton, Sir William Jo. 26. in the caſe of Standen v. the Univerſity of Oxford and Whitton.

6. How it may be avoided.

The 1 *W. & M.* enacts, that the benefice to which perſons are preſented by the Univerſities for the recuſancy of the patron, ſhall become void in caſe of abſence from the ſame above the ſpace of 60 days in any one year. 1 W. & M. ſeſſ. 1. 26. § 6.

Void and Voidable.

IN the law ſome acts are abſolutely void, and others are voidable only; for the better underſtanding whereof, it is neceſſary to conſider,

(A) The Diſtinction between void and voidable.

(B) What Acts are void; wherein, of the Degrees in which Acts may be void, as,

1. What Acts are abſolutely void as to all Purpoſes.
2. What void as to ſome Purpoſes only.
3. What as to ſome Perſons only.
4. How Acts void by Operation of Law may be made good by ſubſequent Matter.

(C) What Acts are voidable only.

(D) How voidable Acts may be made good.

(E) How they may be avoided.

(F) By whom they may be avoided.

(A) The Diſtinction between void and voidable.

2 Lill. Abr. 807. [The doctrine in the text as to voidable acts is far from being univerſally juſt.

A Thing is void which was done againſt law at the very time of the doing it, and no perſon is bound by ſuch an act; but a thing is only voidable which is done by a perſon who ought not to have done it, but who nevertheleſs cannot avoid it himſelf after it is done; though it may by ſome act in law be made void by his heir, &c.

It does not hold in the caſe of infants. An infant when he comes of age may himſelf avoid a voidable act done by him in his infancy.]

(B) What Acts are abſolutely void.

Cart. 19. Keite v. Clopton.

ACTS, it is ſaid, may be void in ſeveral degrees, according to the particular circumſtances of the caſe; it will be proper therefore to conſider,

1. What

1. What Acts are abſolutely void as to all Purpoſes.

Bond of a feme covert and infant are void. Br. Obligation, pl. 26.

This however with regard to the infant muſt be underſtood with ſome reſtriction; for if an infant gives a bond without a penalty for neceſſaries, it is good; and the reaſon why it is void, if with a penalty, ſeems to be that the law gives validity to every act of the infant's which may be for his benefit; but it cannot be preſumed to be for his benefit to enter into a penalty. Noy, 85. Delaval v. Clare. Cro. Eliz. 920. Ayliff v. Archdale, S. C. Moor, 679. 1 Inſt. 172. *a.* 1 Roll. Abr. 729. 1 Lev. 87, Ruſſel v. Lee. [A warrant of attorney given by an infant is merely void, Saunderſon v. Marr, 1 H. Bl. 75.]

So likewiſe the bond of a perſon *non compos mentis*, after office found, is abſolutely void. 4 Co. Rep. 128. Beverley's caſe.

It is ſaid the reaſon why the bond of an infant or perſon *non compos* is void, is, becauſe the law has appointed no act to be done to avoid it; and the only reaſon why the party cannot plead *non eſt factum* is, that the cauſe of nullity is extrinſick, and does not appear on the face of the deed. 2 Salk. 675. Thompſon v. Leach. And ſee *poſt*. What acts are voidable only.

And in general all bonds which are given for a purpoſe *malum in ſe*, as to kill or rob another, are void. See *ante*, tit Obligation (D) and (E).

Likewiſe bonds given for the performance of a *malum prohibitum*, as for *maintenance*.—

And bonds to oblige perſons to neglect their duty to the king and kingdom, are abſolutely void.

If a future leaſe be made to commence after the death of tenant in tail, it is merely void in its creation; for it is not to commence till the title of the iſſue commences, and that is an elder title concurring with it; and if the law ſhould make it otherwiſe than void, the law would make him a treſpaſſer. 2 Salk. 620. Machil v. Clerk. See *poſt*. (C).

If a biſhop grants adminiſtration, and there are *bona notabilia*, ſuch adminiſtration is abſolutely void, as well as to the goods within his own dioceſe as elſewhere, becauſe he hath in ſuch caſe no juriſdiction whatever. 5 Rep. 30. Prince's caſe. 8 Rep. 135. Sir John Needham's caſe. Noy, 96. Croſſman v. Hume. And ſee *poſt*. (C).

So likewiſe a judgment, given by perſons who have no good commiſſion for that purpoſe, is void. 3 Inſt. 231. And it may be added, that in general all acts done by miniſters of juſtice without authority are void. 10 Rep. 76. *b*. And ſee *poſt*. (C).

2. What Acts are void as to ſome purpoſes only.

Void things are good to ſome purpoſes.—As, if Leſſee for 20 years take a leaſe for 10 years, to begin preſently, upon condition that if a certain thing be not done the leaſe ſhall be void; in that caſe, though the ſecond leaſe be void on the breach of the condition, yet the ſurrender remains good. Finch's Law, 62.

So likewiſe if a feoffment be made, to be void on the non-performance of a certain condition, yet, after the feoffor's entry for the condition broken, the feoffee ſhall have an action for a treſpaſs done by the feoffor before. *Id. ibid.*

Arg. Hard. 47. Jones v. Clerk. Alſo, if tenant at will grants over his eſtate, though the grant be void, yet it determines his will.

But, if an act be made void by a ſtatute, it ſhall avail to no purpoſe whatever: Therefore a ſimoniacal preſentation does not ſo much as amount to a claim. Arg. *ibid.* [A bill of exchange or promiſſory note for money loſt at play is void in the hands of an indorſee, though without notice, and for a valuable conſideration. 1 Salk. 344 2 Burr. 1077. The like law, where it is given on an uſurious contract. Dougl. 736. A leaſe of a rectory by a rector is void by his non-reſidence for eighty days, 2 Term Rep. 749. An annuity deed not enrolled purſuant to the directions of the 17 G. 3. c. 26. is abſolutely void. *Id.* 603.]

3. What Acts are void as to ſome Perſons only.

Per Anderſon, Cro. Eliz. 445. Upton v. Baſſet. A *fraudulent gift* of goods is not void againſt all, for it remains good againſt the donor, and is only void againſt his creditors.

Cro. Eliz. 445. Upton v. Baſſet. So likewiſe, a feoffment upon maintenance or champerty is not void againſt the feoffor, but againſt him that hath right: *per Beamond*, J.

Bro. Obligation, pl. 26. 1 Roll. Rep. 41 Winſcombe v. Pigott. Alſo, where a feme covert or infant are bound in an obligation with others, though the bond is void as to the feme covert or infant, yet it is good as to the others, who ſhall be ſued alone, and the writ ſhall not abate.

And ſee there whether it is neceſſary to aver the declaration, that the other is a feme covert or infant.

4. How Acts void by Operation of Law may be made good by ſubſequent Matter.

Chan. Caſes, 209. Ld. Cornbury v. Middleton. In equity the conſent of the heir makes good a void deviſe.

Chan. Caſes, 267. Anon. So likewiſe, a deviſe void by miſnoſmer of the corporation was decreed to be a good appointment of a charitable uſe, within the 43 *Eliz.*

(C) What Acts are voidable only.

Arg. 3 Bulſt. 272. cites Plow. Com. 65. Browning v. Beeſton. IF a leaſe be made by the huſband of the wife's land, and the huſband die, the leaſe is not void, but voidable by the wife's entry.

[Though a leaſe by the huſband of a feme covert's eſtate (even not within 32 H. 8. c. 28.) is only *voidable*, yet a mortgage of a feme covert's eſtate, though in form of a leaſe, is void, Dougl. 53, 54.]

2 Salk. 620. Machil v. Clark. See *ante*. Likewiſe, if tenant in tail make a future leaſe for years, which by poſſibility may be to commence during the life of tenant in tail, it is not void, but voidable as to the iſſue.

2 Brownl. 248. Plomer v. Hockhead. So, if an infant make a feoffment or a leaſe, and deliver it with his hand, it is voidable only.

It is there added, that if the feoffment or leaſe be executed by letter of attorney, it is a diſſeiſin to him. It has been ſaid likewiſe, that if the infant reſerve a ſmall rent, as one penny, where the land is worth 100 *l. per ann.* ſuch leaſe is void. 2 Leo. 216, Humfreſton's caſe.

It

It is ſaid likewiſe, that a deed of exchange entered into by an infant, or one *non ſanæ memoriæ*, is not void, but may be avoided by the infant when arrived at age, or by the heir of him who is *non ſanæ memoriæ*. Perk. 281.

Alſo, an infant's bond of ſubmiſſion to an arbitration ſeems only voidable. Noy, 93. Stone v. Knight.

An infant's contract of marriage likewiſe is only voidable. 2 Str. 938. Holt v. Ward, Clarencieux.

So likewiſe, the deed of a perſon *non compos mentis*, before office found, is voidable only, but cannot be avoided by the party himſelf. 4 Rep. 124. Beverley's caſe. The reaſon why their acts cannot be avoided by themſelves, is, becauſe it is a maxim in law, that no man of full age ſhall be admitted to ſtultify himſelf. *Id. ibid.* and ſee *ante* (B).

A preſentation, inſtitution, and induction of a layman is not void, but only voidable by ſentence. *Per* Popham. Cro. Eliz. 315. Pratt v. Stocke.

Likewiſe, if the archbiſhop of a province grant adminiſtration, where there are not *bona notabilia* to warrant a prerogative adminiſtration, yet ſuch adminiſtration is only voidable; becauſe the archbiſhop hath a general juriſdiction over all the dioceſes in the province. Cro. Eliz. 467. Bingham v. Smeathwick. See *ante* (B), note the difference.

So alſo, if letters of adminiſtration be granted to one, and after granted to another, by this the firſt are not avoided, except by judicial ſentence. Cro. Eliz. 315. Pratt v. Stocke.

An order of the juſtices likewiſe, being a judicial act, is not abſolutely void, but voidable only, and continues to be an order till it is avoided. 2 Salk. 674. Hall v. Biggs.

So likewiſe, the judgment of a ſuperior court is not void, but only voidable by plea or error. 2 Salk. 674. Prigg v. Adams, S. C. Carth. 274.

Thus, an erroneous attainder is not void, but voidable by writ of error. 2 Inſt. 184. 2 R. 3 fo. 21, 22.

Though the ſtatute of *Weſtm.* 2. 13 *Ed.* 1. *c.* 1. ſays, *finis ipſo jure ſit nullus*, yet it is not void againſt the party, or his iſſue, or him in reverſion; but the iſſue and he in reverſion have remedy to avoid it; and the words of the ſtatute *ſit nullus* are conſtrued to mean that it *is as good as void*, in reſpect of the defeaſableneſs of it. Arg. 1 Roll. Rep. 158, 159 Warren v. Smith, *alias* Magdalen College's caſe.

So, where the ſtatute of additions ordains, that if any be outlawed without addition, the outlawry ſhall be clearly void and of no effect, yet it ſhall not be void without writ of error. Arg. Rol. Rep. 159. Smith v. Warren.

(D) How voidable Acts may be made good.

3 Rep. 64. b. Thus in the caſe above put,

WHERE a leaſe is voidable, acceptance of the rent will make it good: but, where it is void, no acceptance or other act can make it good.

where tenant in tail makes a future leaſe which may poſſibly commence in his own life, though it is voidable as to the iſſue, yet it may be made good by the iſſue's acceptance of rent. Arg. 3 Le. 271, Butler v. Baker.

(E) How they may be avoided.

5 Rep. 119. a. Whelpdale's caſe.

A Deed being voidable, is to be avoided by ſpecial pleading; and where an act of parliament ſays, that a deed, *&c.* ſhall be void, it is intended that it ſhall be by pleading.

5 Rep. 119. a. Whelpdale's caſe. But, if the ſeal be broken, defendant may

Where a deed is a voidable deed at the time of pleading; as, if an infant ſeal and deliver a deed, or one of full age deliver a deed by dureſs, *&c.* the obligor muſt not plead *non eſt factum;* becauſe when the action was brought it was his deed, and muſt be avoided by ſpecial pleading (*a*).

plead *non eſt factum*, for though it was once a deed, yet at the time of the plea, it was not his deed. *Id. ibid.* [(*a*) The reaſon why the defendant in this caſe muſt plead ſpecially, and not merely rely on the *plea of non eſt factum*, is, not becauſe the inſtrument is in *form* a deed, but becauſe it has an operation from the *delivery*. For the delivery of a deed cannot be void, but is only voidable; ſo that deeds which *take effect by delivery* can be only *voidable*; whilſt thoſe which do *not ſo take effect* are abſolutely *void*, 3 Burr. 1804. 1 H. Bl. 75. But it is not becauſe the deed may be avoided by ſpecial pleading, that it is therefore voidable, but being only voidable, the party is bound to diſcloſe that matter in his plea which ſhall avoid it; for *primâ facie* it is good; it paſſeth an intereſt; it is capable of confirmation; its validity therefore ſhall not be queſtioned without giving the other party an opportunity of ſupporting it in his replication.]

3 Rep. 65. a. Pennant's caſe. Poph. 100. Goodale v. Wyatt.

But a feoffment or leaſe for life, which is declared to be void on breach of a condition, muſt nevertheleſs be made void by re-entry, it being a freehold conveyed by livery: whereas a leaſe for years on breach of the condition is abſolutely void, and there needs no re-entry.

(F) By whom they may be avoided.

2 Le. 218. in Humpherſton's caſe.

OF a void act or deed every ſtranger may take advantage, but not of a voidable one; as, if there are two joint-tenants within age, and one makes a leaſe for years, and dies, the other ſhall avoid it, for the leaſe is utterly void: but, if the one leaſes for life, and makes livery in perſon, and dies, the other ſhall not avoid it. *Per Wray*, Ch. J.

Uſes and Truſts.

A Uſe at common law was an equitable right which he, who conveyed a legal eſtate to another, reſerved to himſelf, upon truſt and confidence that the perſon to whom he ſo conveyed it, would nevertheleſs ſuffer him to take the rents and profits of the land, and that he would execute eſtates according to his direction. Gil. Law of Uſes, 175. 1 Rep. 122. Chudleigh's caſe.

The *feoffee* therefore, or *terretenant*, (that is, the perſon to whom the legal eſtate was conveyed,) had the freehold or ſole property in him; and the perſon who had conveyed the legal eſtate to him, (that is, the *ceſtui que uſe*,) had neither *jus in re*, nor *ad rem;* for if he had entered upon the land without the conſent of the feoffee, he had been a treſpaſſer; ſo that nothing remained in him but a bare confidence or truſt, for which, if it was broken, he had no remedy, but by ſubpœna in Chancery.

But this equitable right extended itſelf to all perſons who claimed in privity under the feoffee, that is, who came into the ſame eſtate which the feoffee had in the uſe, and by contract with *him:* for a *diſſeiſor* came into the ſame eſtate, but not by contract or agreement, and therefore claiming not *by* or *from* the *feoffee*, he, conſequently, did not claim the eſtate as it was ſubject to the uſes, but he claimed an eſtate above that free from and diſcharged of the uſes; and it would in a manner have defeated his title, ſhould he have been compelled to ſtand ſeiſed to a uſe, when he did not claim the eſtate which was charged with the uſe: for confidence in the perſon was requiſite as well as privity of eſtate.

Confidence in the perſon, was either expreſs or implied; as, if a feoffee to a uſe had, for *good conſideration*, enfeoffed one who had *no notice* of the uſe, the uſe was deſtroyed; for the perſon enfeoffed not knowing that there were any uſes, no truſt could be repoſed in him to let the *ceſtui que uſe* take the profits; but, if he had notice, a truſt might well be ſaid to be repoſed in him, ſince he took the land, knowingly, charged with the uſes. So alſo, if the feoffment had been made *without conſideration*, though the perſon enfeoffed had *no notice* of the uſe, yet he would nevertheleſs have ſtood ſeiſed to the uſe, for the law in that caſe would have implied notice of the uſe, and, conſequently, the truſt would have remained.

Hence it may be collected, that to every uſe at common law there were two inſeparable incidents; a privity in eſtate, and a confidence in the perſon; and where either of theſe failed, the uſe was ſuſpended or deſtroyed.

But for the better underſtanding of the law relative to this head, we ſhall conſider,

(A) The Origin and firſt Introduction of Uſes.

(B) The ſeveral Properties of an Eſtate in Uſe at Common Law, which are,

1. That it is alienable; wherein, of the Power of *Ceſtui que Uſe.*
   1. *At Common Law.*
   2. *By the Statute of* 1 R. 3. c. 1.
2. That it is deſcendible; wherein,
   1. *Of the Deſcent of a Uſe in Poſſeſſion.*
   2. *Of the Deſcent of a Uſe in Reverſion.*
3. That it is deviſable.
4. That it is not extendible, or Aſſets.
5. That it is not forfeitable.
6. That a Woman is not dowable of a Uſe.

(C) The Inconveniences of Uſes.

(D) The Alterations introduced with reſpect to Conveyances to Uſes by the 27 *H.* 8. *c.* 10.

(E) The ſeveral Sorts of Conveyances to Uſes; wherein, 93.

1. Of thoſe which raiſe Uſes by Way of Tranſmutation of Poſſeſſion, ſuch as, 1. Feoffment. 2. Fines. 3. Recoveries. *Of which before under their reſpective Titles: But herein farther,* 93.

   Of Deeds declaring the Uſes of Feoffments, Fines, and Recoveries; wherein,
   1. *Who may declare Uſes.*
   2. *To whom they may be declared.*
   3. *In what Manner they may be declared.*
   4. *At what Time they may be declared.*
   5. *In what Caſes Averments may be made of Uſes.*
2. Of thoſe Conveyances which raiſe Uſes without Tranſmutation of Poſſeſſion; ſuch as,
   1. *Covenants to ſtand ſeiſed to Uſes; wherein,* 93.
   2. *Who may covenant to ſtand ſeiſed, and to whom.* 93.

2. *What*

2. *What Conſideration is neceſſary to a Covenant to ſtand ſeiſed, and how far it extends.* 96.
3. *By what Words a Man may covenant to ſtand ſeiſed.* 100.
4. *The Effect of a Covenant to ſtand ſeiſed.* 101.

2. *Of Bargain and Sale;* of which before, under its proper Title.

(F) What Kind of Property may be conveyed by Way of Uſe. 108.

(G) The ſeveral Kinds of Uſes executed by the Statute, ſuch as, 105.

1. Uſes *in eſſe.*
2. Uſes in Poſſibility; wherein,

1. *Of executory Fees; and the Difference where they riſe by way of Uſe, and where by Deviſe.*
2. *Of contingent Remainders,* of which before under Title *Remainder:* But herein farther,

1. *In what Manner they are to be executed.*
2. *How they may be defeated.*

1. Where there is no Power of Revocation.
2. Where there is an expreſs Power of Revocation.

3. *How they may be ſuſpended, revived, or extinguiſhed.*

(H) The Caſes out of the Statute; as, 121.

1. Where Uſes are limited upon Uſes.
2. Where Terms are raiſed and limited in Truſt; wherein,

1. *Of Terms which wait on the Inheritance.*
2. *Of Terms in Groſs.*

3. Where Lands are limited to Truſtees to pay over the Rents and Profits.

(I) Reſulting Uſes, or Uſes by Implication. 125.

(K) Second or ſhifting Uſes.

(L) The Manner of pleading Uſes.

(A) The Origin and firſt Introduction of Uſes.

THE original of uſes was from a title under the civil law, which allows of an uſufructuary poſſeſſion, diſtinct from the ſubſtance of the thing itſelf; and it was brought over to us from thence by the clergy, who were maſters of the civil law. For Gil. Law of Uſes, 3.

when they were prohibited from taking any thing in mortmain, after ſeveral evaſions by purchaſing lands of their own, tenants ſuffering recoveries, and purchaſing lands round the church and making them church-yards by bull from the Pope, at laſt this way was invented of conveying lands to others to their own uſe; and this being proper matter of equity, it met with a very favourable conſtruction from the judge of the Chancery court, who was in thoſe days commonly a clergyman; and the clergy thought this a ſtatute contrary to natural juſtice, and ſo could eaſily tolerate any act for evading it. Thus this way of ſettlement began; and was often uſed for other fraudulent purpoſes, as to defeat juſt debts, wardſhips, eſcheats, *&c.* but it more generally prevailed among all ranks and conditions of men, by reaſon of the civil commotions between the houſes of *Lancaſter* and *York*, to ſecrete the poſſeſſions, and to preſerve them to their iſſue, notwithſtanding attainders.

Sir William Jones, 127. Lord Willoughby's caſe.

(B) The ſeveral Properties of an Eſtate in Uſe at Common Law.

UNDER this head it will be ſufficient to obſerve in general, 1. That at common law a uſe is alienable; 2. that it is deſcendible; 3. that it is deviſable; 4. that it is not extendible, or aſſets; 5. that it is not forfeitable; 6. that a woman is not dowable of an uſe.

1. That it is alienable; wherein, of the Power of *Ceſtui que Uſe*.

1. At Common Law. 2. By the Statute of 1 *R.* 3. *c.* 1.

1. *At Common Law.*

It has been ſaid in the definition of a uſe, that *ceſtui que uſe* had neither *jus in re*, nor *ad rem*; for, if the feoffee broke his truſt, he had no remedy againſt him but by ſubpœna in Chancery.

Kelw. 42. b. 46. b.

This ſubpœna commenced in the time of *E.* 3. but it was always againſt the feoffee in truſt himſelf, and was never allowed againſt his heir till *H.* 6. and in this point was the law changed by *Forteſcue*, Ch. J. So that, if the feoffee had died, his heir was ſeiſed to his own uſe, as the law was taken to the time of *Hen.* 4. till at length the ſubpœna was granted both againſt the heir, and the feoffee of the feoffee, about the time above mentioned, or, according to ſome, later.

Gil. Law of Uſes, 26.

But, though at common law *ceſtui que uſe* had no power over the land, yet might he alien the uſe, becauſe every one may diſpoſe of the rights that were in him; or he might prefer a bill in Chancery to make the terretenant execute the uſe in himſelf.

Plow. 352. b. The feoffees upon their re-entry would, it ſeems, ſtand

But, at common law, if *ceſtui que uſe* had entered and made a feoffment in fee of the lands, this had not been good to paſs the eſtate to the feoffee; becauſe *ceſtui que uſe* had not the freehold in him, and ſo could not paſs it to another; but by his entry he was a diſſeiſor: yet in this caſe, if the feoffees

feoffees of *ceſtui que uſe* had re-entered upon the purchaſer, the feoffees would not have had the lands to their own uſe; and they would not have ſtood ſeiſed to the uſe of *ceſtui que uſe*, becauſe he had transferred the uſe to another. ſeiſed to the uſe of the laſt feoffee. See Plow. *loc. cit.*

If *ceſtui que uſe* make a leaſe for years, rendering rent, the reſervation is void, unleſs it be by deed; for the rendering of rent to a man is an acknowledgment of the holding of lands from him; but here the lands are not held of *ceſtui que uſe*, but of the feoffees who have the reverſion. But, if the reverſion be by deed, the feoffees ſhall not have the rent reſerved, but *ceſtui que uſe* ſhall have it. Bro. F. to Uſes, 338. f. 23. 339. f. 26.

If *ceſtui que uſe* make feoffment, with a letter of attorney to give *livery*, and the attorney give livery accordingly; *qu.* whether the feoffment was good; or whether it was not a diſſeiſin? Bro. F. to Uſes, 339. f. 28.

But by the ſtatute of 1 *R.* 3. *c.* 1. a power was annexed to a uſe, that *ceſtui que uſe* ſhould alien the lands.

The reaſon of that ſtatute was, becauſe *ceſtui que uſe* in poſſeſſion often aliened the lands, and then the feoffees entered, which cauſed a great deal of vexation and Chancery ſuits; and therefore the ſtatute gave *ceſtui que uſe* an immediate power of alienation, without the concurrence of the feoffees; which leads us more particularly to examine the power of *ceſtui que uſe*, Gilb. Law of Uſes, 27.

2. *By the Statute of* 1 R. 3. c. 1.

The ſtatute of 1 *R.* 3. *c.* 1. enacts, that *every eſtate, feoffment, gift, releaſe, grant, leaſe and confirmation of lands, tenements, rents, ſervices, or hereditaments, made or had, or hereafter to be made or had, by any perſon or perſons, being of full age, of whole mind, at large, and not in dureſs, to any perſon or perſons; and* (*a*) *all* (*b*) *recoveries and executions had or made, ſhall be good and effectual to him to whom it is ſo made, had, or given, and to all other to his uſe, againſt the ſeller, feoffor, donor, or grantor thereof, and againſt the ſellers, feoffors, donors, or grantors, his or their heirs, claiming the ſame only as heir or heirs to the ſame ſellers, feoffors, donors, or* (*c*) *grantors, and every of them, and againſt all others having or claiming any title or intereſt in the ſame* (*d*), *only to the uſe of the ſame ſeller, feoffor, donor, or grantor, ſellers, feoffors, donors, or grantors, or his or their ſaid heirs, at the time of the bargain, ſale, covenant, gift, or grant made* (*e*): *ſaving to every perſon or perſons ſuch right, title, action, or intereſt, by reaſon of any gift in tail thereof made, as they ought to have had, if this act had not been made.*

(*a*) By this word (all) feint recoveries, as well as recoveries upon good title, are comprehended. But they are good only againſt the grantors, &c. and their heirs claiming only as heirs to ſuch grantors, &c. So that they are not good againſt him that claims as heir to the grantor and his feme in tail *per formam doni*. Arg. Pl. C. 4. a. b Mich. 6 Eliz. in Manxell's caſe. (*b*) If a man recovers by erroneous judgment, and makes feoffment to his uſe, and the other brings writ of error, and reverſes the judgment, he may enter without *ſcire facias* againſt the feoffees; for it is a recovery, and therefore it ſhall bind him and his heirs and feoffees by the ſtatute 1 R. 3. Bro. Feoffment to Uſes, 337. § 3. (*c*) Yet if *ceſtui que uſe* grants a rent-charge, and the feoffees are diſſeiſed, the grant ſhall be good againſt the diſſeiſor; and yet he does not claim only by the *ceſtui que uſe*, Arg. 2. Le. 153. pl. 185. in caſe of Cordel's executors v. Clifton. (*d*) This ſtatute did not take away the power of feoffees; for they may yet make feoffments; but enlarge the power of *ceſtui que uſe*, who may now make feoffments likewiſe. Godb. 303. in caſe of Lord Sheffield v. Ratcliff. (*e*) It was agreed *per cur.* that theſe words are taken for tenant in tail in poſſeſſion, and not tenant in tail in uſe; for *ceſtui que uſe* in tail has no right or intereſt. Bro. Feoffment al. Uſe, 339. b. § 40.

Here

Godb. 318. Lord Sheffield's caſe. 2 Roll Rep. 334. S. C.

Here it is obſervable, that there is a difference between a feoffment according to this ſtatute, and a feoffment at common law. In caſe of feoffments at the common law, the feoffor ought to be ſeiſed of the lands at the time of the feoffment: but, if a feoffment be according to the ſtatute of 1 *R.* 3. in ſuch caſe the feoffor did not need to be in poſſeſſion. Feoffments at the common law give away both eſtates and rights; but feoffments by the ſtatute of *R.* 3. give the eſtates, but not the rights. In caſe of feoffments at common law, the feoffee is in in the *per*, *viz.* by the feoffor; but in caſe of feoffments by the ſtatute of *R.* 3. the feoffees are in in the *poſt*, *viz.* by the firſt feoffees.

Gil. Law of Uſes, 180. cites Pl. C. 350.

Another difference likewiſe is taken in *Plowden* between the feoffment of the feoffees and of *ceſtui que uſe*; for, if the *ceſtui que uſe* for life or in tail made a feoffment in fee, either with or without conſideration, all the old uſes were diſcontinued, and the ancient eſtate which the feoffees had, is gone, and a new eſtate created ſubject to theſe new uſes raiſed by the feoffment; for when *ceſtui que uſe* makes a feoffment in fee, which by this ſtatute he might lawfully do, he paſſeth an uſe in fee-ſimple to the feoffee; which being a new uſe to the feoffee, all the old uſes are diſcontinued, and, conſequently, the eſtate of the feoffee muſt be altered. For were it the ancient eſtate, it were ſtill ſubject, by the former and elder limitation of uſes, to the old uſes; therefore have the feoffees, by conſtruction, a new eſtate to the new uſes. But, if the feoffees themſelves had made a feoffment without conſideration, the feoffees had ſtood ſeiſed to the old uſes, for here was no uſe nor new eſtate.

Gil. Law of Uſes, 27. Plow. 351.

By the ſtatute *ceſtui que uſe* has no power of alienation, when he has a naked right to a *uſe*, and not a uſe *in eſſe*; unleſs it be in order to confirm an eſtate in being; becauſe the intent of the ſtatute was only to give *ceſtui que uſe* a greater power to tranſfer his eſtate, and not any other remedy to regain and reveſt it; and unleſs he has the *uſe*, he cannot paſs the *uſe*, much leſs the poſſeſſion to another.

Plow. 351. For by the words of the act, the releaſe is good

But, if the feoffee to a uſe in fee be diſſeiſed, and *ceſtui que uſe* releaſe to the diſſeiſor, this extinguiſhes the uſe, and, by the ſtatute, bars the entry of the feoffee.

against all claiming any title or intereſt to the uſe of releaſor. *Id. ibid.*

Gil. Law of Uſes, 28.

Alſo, where feoffees to a uſe are diſſeiſees, and after the diſſeiſor enfeoffs *ceſtui que uſe*, who enfeoffs a ſtranger; this is good, and ſhall bind the feoffees; for the feoffment is good to paſs the poſſeſſion, and right of the uſe, which he had in him; and the feoffees cannot enter to revive a uſe, which the party himſelf by his own act has extinguiſhed.

The ſtatute likewiſe is to be underſtood of *ceſtui que uſe* that has a *uſe in eſſe*, in oppoſition to him that has only a reverſion or remainder of an uſe.

Gil. Law of Uſes, 28. Plow. 350.

If a feoffment be made to the uſe of *A.* for life, remainder to *B.* in fee, *A.* may alien in fee, becauſe the feoffees claim the whole eſtate for the uſe of *A.* during his life, and he has the whole

whole advantage of it; and the ſtatute that gives the preſent poſſeſſor of the uſe a power of alienation, has provided an immediate remedy for the remainder-man.

But, if the tenant for life of a uſe aliens in fee, and dies, the feoffees may enter on the alienee; for, by the words of the ſtatute, the alienation is good againſt *ceſtui que uſe* and his heirs, and perſons claiming only to his uſe. So, when feoffees claim to the uſe of the remainder-man, the feoffment of tenant for life, according to the authority given by the ſtatute, is no longer valid to bar the feoffees of the entry; for their right is by the common law. Gil. Law of Uſes, 29. Plow. 348. Delamere and Barrard's caſe, the point reſolved.

If there be a feoffment in fee to the uſe of *A.* for life, the remainder to *B.* in fee, *B.* has no power of alienation by the ſtatute, during the continuance of the eſtate for life, becauſe the poſſeſſion is, as is ſaid, to the uſe of *A.* only, during his life, and ſo the remainder-man has nothing to do with the poſſeſſion; and if the remainder-man ſhould enter on the feoffees and make a feoffment, either the uſe of tenant for life would be deſtroyed, or the feoffees muſt re-enter and create a particular eſtate to themſelves, without being ſubject to dower; for by the common law, every particular eſtate is derived out of the fee-ſimple by the agreement of the parties in intereſt; but here are no parties to ſuch agreement, and the ſtatute has not altered the law in this caſe. Gil. Law of Uſes, 29. Plow. 350. 1 Co. 128. b. But, though B. cannot make a feoffment during the continuance of the eſtate for life, yet, it ſeems, he may ſell his remainder during the life of *A.* Br. Feoff. to Uſes, 339. b. 44.

But, if there be a feoffment for life, remainder in fee, he in remainder may make a leaſe for years, or grant a rent-charge to begin after the death of tenant for life; for he cannot enter and take the poſſeſſion out of the feoffee; but it is an executory contract on which the ſtatute operates after the death of tenant for life. Gil. Law of Uſes, 30. Plow. 350. b.

So, likewiſe, if a leaſe for life is made to the uſe of *A.*, and afterwards the reverſion is granted to another for life to the uſe of *B.*, and attornment is had, and afterwards the reverſion is granted to another in fee to the uſe of *C.* in fee, and attornment is had; in this caſe *A.* may give the firſt eſtate for life to whomſoever he pleaſes, and *B.* may grant the reverſion for life to whomſoever he pleaſes, and *C.* may grant the reverſion in fee to whomſoever he pleaſes. Plow. 350. The reaſon is, that here the eſtates are ſeveral, and the uſes go out of the ſeveral eſtates, whereas in the caſe of a feoffment to the uſe of one for life, &c. all the ſeveral uſes iſſue out of one eſtate, viz. out of the fee-ſimple, which is one ſame eſtate without diviſion, and the ſeveral poſſeſſors of the ſeveral uſes cannot ſever the eſtate which is entire. Plow. *loc. cit.*

Where a feme covert was *ceſtui que uſe*, and ſhe and her baron made feoffment; this was good but during the life of the baron only by equity and reaſon, though the ſtatute of 1 *R.* 3. ſays nothing of a feme covert. Plow. 350.

It is to be obſerved farther, with regard to the power given over eſtates in uſe, that if *ceſtui que uſe* makes a feoffment in fee upon condition, and after enters for the condition broken, he ſhall be Gil. Law of Uſes, 32. 1 Inſt. 202. a. But, if huſ-

band ſeiſed in right of his wife make ſuch

be ſeiſed of the eſtate in the land; for the whole eſtate is diveſted out of the feoffee by the feoffment, and they cannot enter for the condition broken, becauſe no parties to it.

feoffment, and re-enter for the condition broken, there, he ſhall be ſeiſed in right of his wife, as before. Bro. Feoff. to Uſes, 338 b. § 23.

Bro. F. al Uſes, 337. ſ. 2. 338. ſ. 22.

But, if *ceſtui que uſe* in tail aliens the land by leaſe and releaſe, or feoffment; this only binds the feoffees during his life, becauſe he has no longer power of alienation. If the *ceſtui que uſe*, however, aliens by fine, this is good, and bars the entry of the feoffees after his death, for that would diſpoſſeſs the eſtate in tail by the ſtatute of 4 *H.* 7. Yet if he aliens by recovery, it does not bind the *iſſue*, becauſe he is not *tenant to the præcipe;* ſo that would be no bar at common law: and this is not helped by any ſtatute: for though a recovery here be expreſsly mentioned, and ſo it bind the party himſelf, yet the right of the eſtate in tail is ſaved.

Ibid. § 7. Gil. Law of Uſes, 32.

1 Ch. Caſ. 49. 213. 2 Ch. Caſ. 63, 64.

If tenant in tail of a truſt levy a fine, or ſuffer a recovery, this is an equitable bar of the eſtate, though the truſtee does not join in the recovery to make a legal tenant to the *præcipe;* for as the fine and recovery paſs the entail in a legal eſtate at common law, ſo they paſs the entail of a truſt in the court of equity.

1 Ch. Caſ. 119, 126.

But, if tenant in tail of a truſt makes a mortgage, or acknowledges a judgment or ſtatute, and then levies a fine and ſettles a jointure, the jointreſs ſhall hold it ſubject to the mortgage or judgment, in the ſame manner as if the mortgagor or conuſor had been tenant in tail of the legal eſtate, and after the mortgage or judgment had levied a fine and made a jointure; becauſe the ſubſequent declaration of the uſe of the fine is merely the act of tenant in tail, and he cannot by any act of his own make a ſubſequent conveyance take place of one precedent; and the rather, becauſe the feme claims under that fee which tenant in tail got by the recovery or fine; and that fee was ſubject to all the charges he had laid upon it.

Bro. Feoff. to Uſes, 337. ſ. 6. 338. ſ. 18.

If *ceſtui que uſe* makes a leaſe for years, reſerving a rent, he ſhall have an action upon the contract; but he ſhall not *avow*, becauſe the legal eſtate of the reverſion is ſtill in the feoffees, ſince he has put the eſtate out of them but for a term; but the equitable eſtate is in him, and he may diſpoſe of it, and the rent paſſes; but the feoffees ſhall puniſh for *waſte* done by the tenant, and enter for a forfeiture, *&c.*

Bro. F. al Uſes, 338. b. ſ. 18. 23. & 39. Gil. Law of Uſes, 34.

Alſo, if *ceſtui que uſe* makes a leaſe for years, reſerving a rent, this ſhall go to his heirs; for ſince the ſtatute has given him power to make eſtates at law, they are governed by the rules of common law.

Br. F. to Uſes, 338. ſ. 18.

So, likewiſe, if *ceſtui que uſe* makes a leaſe for years, reſerving a rent with a clauſe of re-entry for non-payment of the rent, and the rent is behind, *ceſtui que uſe* may enter; for he only can take advantage of his own condition. And ſince the ſtatute allows the

the act of re-entry by allowing him power to make leaſes, he ſhall for ever keep the poſſeſſion againſt the feoffees. *Quære tamen.* Gil. Law of Uſes, 34.

A gift of land for years, or of a leaſe for years, to a uſe, is good, notwithſtanding the ſtatute of *R.* 3. For the ſtatute is intended to avoid gifts in chattels to uſes, to defraud creditors only; and ſo is the preamble and intent of this ſtatute. Bro. Feoff. to Uſes, 340. f. 60.

But the ſtatute does not give *ceſtui que uſe* any power to deviſe the land. The next property is, Gil. Law of Uſes, 32.

2. That it is deſcendible; wherein,

With reſpect to the deſcent of uſes, we muſt conſider,

1. *Of the Deſcent of a Uſe in Poſſeſſion.*
2. *Of the Deſcent of a Uſe in Reverſion.*

Concerning the firſt, it is a principle, that if a uſe be limited to a man and his heirs, the court of Chancery will direct it to go to ſuch perſons as the common law has appointed to repreſent him, for the Chancery cannot alter the common import of words, or ſet up rules of property oppoſite to the rules of law. Gil. Law of Uſes, 16.

As the court of Chancery cannot alter the deſcent of the land, ſo it cannot alter the law and cuſtom of a place; for all immemorial uſages are part of the laws of the land: and ſo if a man makes a feoffment in fee of lands in gavelkind or Borough *Engliſh*, without a conſideration, to the uſe of the feoffor and his heirs, this ſhall go to all the ſons, or to the youngeſt, according to the cuſtom. Samme's caſe. See Hob. 31. Counden v. Clerke. 1 Rep. 101. Shelley's caſe. Dy. 179. 2 Ro. Ab. 780. 1 Inſt. 23. 13 Rep. 56. Bro. Feoff. to Uſes, 339. f. 32.

So alſo, if there is a cuſtom, that lands ſhall go to the eldeſt daughter only, where there is no ſon, and a truſt in equity deſcends upon the heir, it ſhall go the eldeſt daughter only. 2 Ro Ab. 780. 10 Car. Jones v. Reaſby. It was in the ſame term decreed in Chancery accordingly. *Ibid.*

As the Chancery is governed by rules of inheritance, therefore none can make himſelf heir, but he that repreſents the perſon that was laſt in poſſeſſion; for he that laſt poſſeſſed it had the entire dominion and property, which none elſe can have but by ſtanding in his place; and no man can ſtand in his place but one of the whole blood. 1 Inſt. 14. 4 Rep. 22. Copyhold Caſes.

Thus, if lands deſcend on the part of the mother, and the party makes a feoffment in fee, without conſideration, or reſerving this uſe to him and his heirs, the uſe ſhall deſcend to the heirs of the part of the mother; for the land would have gone to the heirs of the part of the mother, and a uſe is but an eſtate in equity, part of the eſtate in the land; for the rule of law that tends to the eſtabliſhment of families and encouragement of induſtry, is, that thoſe that take benefit as repreſentatives ſhall convey it all along in the blood of the firſt purchaſer, from whom the benefit was derived: and the uſe and poſſeſſion was derived from the mother, and the uſe was never parted with, but the poſſeſſion 1 Inſt. 13. a. 2 Ro. Ab. 780. 13 Rep. 56. Samme's caſe. Bro. F. to Uſes, 338, a. f. 10. But ſee Hob. 31. Counden v. Clerke, and Dy. 134.

ſion only; ſo the uſe muſt be all along conveyed to the heirs on that ſide.

Gil. Law. of Uſes, 18. 1 Rep. 131. Chudleigh's caſe.

It is to be obſerved likewiſe, that there is a *poſſeſſio fratris* of a uſe, which follows the analogy of deſcents at law; and ſo if a man ſeiſed in fee of a uſe had iſſue a ſon and a daughter by one venter, and a ſon by another venter, and deviſes it for years, and dies, and the ſon dies during the term, the daughter ſhall have it, and not the ſon: otherwiſe it had been, if he had deviſed it for life.

Bro. F. to Uſes, 337. b. 4 1 Rep. 100. b. Shelley's caſe. Gil. Law of Uſes, 17, 18.

Alſo, if a man for a valuable conſideration purchaſes lands, or the uſe of them to himſelf, they ſhall deſcend to his heirs; for there wants not the word heirs to create an inheritance in a uſe; for it is equity that a perſon, who gave a conſideration for the fee, ſhould have it; and that is not ſetting up any other rules of property oppoſite to the rules of law, but mitigating and diſpenſing with the rules of law, in particular caſes, where they ſhould happen to ſhelter diſhoneſty and oppreſſion: but now, ſince the ſtatute, no inheritance can be raiſed without the word heirs, becauſe now the uſes, as will be ſhewn, are transferred into poſſeſſion, and muſt be governed by the rules of poſſeſſion at common law, as to the words that create new eſtates.

2. *Of the Deſcent of a Uſe in Reverſion.*

In regard to deſcents of this kind, they are governed by the following rules.

Where a man has an eſtate in himſelf, and limits an eſtate to his right heirs, he is ſeiſed of the whole eſtate.

1 Vent 380. Pibus v. Mitford. Gil. Law of Uſes, 19.

In the ſame manner, where a man has a uſe in himſelf, and limits a uſe to his own right heirs, the ſame uſe is in him ſtill. The reaſon is, becauſe anceſtor and heir are correlative; and ſo whoever repreſents me as to my eſtate veſted in him after my death, I repreſent him during my life as to that eſtate; and, conſequently, giving an eſtate, already in me, to my heir, is not departing with it, for it is a diſpoſition, in other words, to myſelf, and ſo all things remain *in ſtatu quo*.

1 Inſt. 22. b. Gil. Law of Uſes, 20.

Thus, if a man ſeiſed of lands made in fee, makes a gift in tail, or a leaſe for life, remainder to his own right heirs, they take by deſcent, as in the old reverſion.

Gil. Law of Uſes, 20.

Alſo, if *A.* ſeiſed of lands in fee, grants them by fine during his own life, the remainder to his own right heirs, the reverſion is in him, and he may grant it.

Id. ibid. Dy. 237.

So likewiſe, in the caſe of a fine *ſur conuzance de droit que il et ſa feme ad de ſon done* to the huſband, with a remainder to the conuſor for life, remainder to the right heirs of the huſband, they are in of the old reverſion, and the wife ſurviving ſhall have it for life.

E. of Bedford's caſe. Pop. 3. 1 Moor, 718, 719. S. C.

Alſo, if a man makes a feoffment without a valuable conſideration, to the uſe of himſelf, for forty years, the remainder to *B.* in tail, the remainder to his own right heirs; the feoffor is in of the old reverſion, and he may deviſe it, for a feoffment without conſideration

conſideration does not diſpoſe of the uſe thereof; the old uſe is in him ſtill. 1 Rep. 130. Chudleigh's caſe.

But it hath been held, that if the feoffment were made upon a valuable conſideration, inaſmuch as that it is a diſpoſition of the uſe, there is an eſtate in the feoffees to retain it till the death of the feoffors; and this is an eſtate of freehold, and affords a tenant to the *præcipe*, and an eſtate to ſupport a contingent remainder. 1 Inſt. 22. b. 23 a. Gil. Law of Uſes, 21.

Alſo, where I limit a uſe, already in me, to my own repreſentatives, and add a qualification to thoſe repreſentatives; though this be no departing with the eſtate, becauſe there are not words to convey it out of myſelf, yet there is an alteration of the eſtate in myſelf, and the uſe ſhall alter and deſcend to my heirs that came under that particular diſtinction and qualification; becauſe the uſe has always been changed and modified according to the intent of the parties who have the intereſt; and ſuch a particular eſtate ſhall be ſuppoſed in them, as may beſt anſwer the intent, *ut res valeat*. Gil. Law of Uſes, 20.

It is to be obſerved likewiſe with reſpect to *remainders*, that where a man limits an eſtate of freehold to me for life, with a remainder to my heirs, though after ever ſo many particular eſtates, the remainder is veſted in me for three reaſons. Firſt, Becauſe otherwiſe you conſtrue the grant moſt in favour of the grantor, and let him into the reverſion during the contingency, to puniſh waſte and enter for the forfeiture. Secondly, Becauſe the whole advantage muſt be intended to me when I am firſt named to take the ſame ſort of eſtate in the conveyance, and the benefit is not deſigned to any other particular conveyance, but to all other perſons that bear the character of my repreſentatives; ſo that the limitation is for my ſake, and only intends to enlarge my eſtate after the particular eſtates are worn off, yet cannot be conſtrued in the ſame manner as where an eſtate is limited to *A.*, the remainder to the right heirs of *B.*, becauſe there is nothing in the laſt caſe to lead the mind to ſuch an interpretation; for there is no benefit originally deſigned to *B.*, but to his heirs primarily, and ſo the heir takes as a purchaſer. But, if the ſame ſort of eſtate be not limited to the anceſtor as to the heir, the heir muſt take by purchaſe; for it is plain the donor deſigned him an original benefit, quite different from what he deſigned the anceſtor. Thirdly, Becauſe when the particular eſtates are worn off, they are as if they had never been; and ſo the heir ſhould claim by deſcent, as in his better title, and as of the dying ſeiſed of his anceſtors. Another reaſon of this law is, becauſe it muſt be a contingent remainder, or a remainder veſted; but it would not be a contingent remainder, becauſe of neceſſity it muſt be in the anceſtor, and the perſon that repreſents him, and ſo conſtrued a remainder veſted.—Thus, 1 Vent. 372. to 382. Gil. Law of Uſes, 21.

If *J. S.* makes a feoffment to the uſe of *A. L.*, the remainder to *B. F.*, the remainder to the right heirs of *A.*, the remainder is veſted in *A.*, and his heirs claim by deſcent. Gil. Law of Uſes, 23. Cro. Car. 24. a.

But,

Moor, 720. Earl of Bedford's caſe. Gil. Law of Uſes, 23.

But, if *J. S.* makes a feoffment to the uſe of *A.* for a term of years, the remainder to *B. T.*, the remainder to the right heirs of *A.*; the remainder is not veſted in *A.*, but his right heirs take by purchaſe.

1 Inſt 22. b. 2 Rep. 91. b. cites Fenwick v. Mitford.

If an eſtate be limited to *A.* for life, remainder to the heirs males of the body of *A.* and to the heirs males of ſuch heir male, there is a truſt executed in *A.* becauſe this is within the rule; for here an eſtate is limited to *A.* for life, with a remainder to his heirs; and ſo the word heirs is not a name of purchaſe, but of limitation.

1 Rep. 66, 67 Archer's caſe. Gil. Law of Uſes, 24. 1 Inſt. 22. b.

But, if an eſtate be deviſed, or, *per Hale*, be conveyed to *A.* for life, the remainder to his next heir male, and to the heirs males of the body of ſuch heir male; there is an eſtate only for life in *A.* and a contingent remainder in his heir, as a purchaſer, which veſts *eo inſtante* that the particular eſtate determines; for though there be an eſtate for life in *A.* yet the remainder is limited to his heir only, in the ſingular number only, and heir in the ſingular number only is a word of purchaſe, and not of limitation.

Gil. Law of Uſes, 24. 1 Inſt. 8. b.

Likewiſe, if an eſtate be limited to a man *and* his heir, he has only an eſtate for life; for it cannot go in perpetual poſſeſſion, becauſe no more repreſentatives than one only is expreſſed. The heir cannot take by way of remainder, becauſe it is limited by a conjunction copulative; and a joint-tenant he cannot be, becauſe *nemo eſt hæres viventis*.

Id. ibid.

But, if one *deviſes* an eſtate to a man and his heir, a fee-ſimple paſſes, and heir there is taken as *nomen collectivum*, to anſwer the intent of the party, which appears to be, that he intended to paſs a fee, as if it had been limited to the deviſee and his heirs for ever.

Gil. Law of Uſes, 24. 2 Vent. 311. Burchett v. Durdant.

So, if an eſtate be deviſed to *A.* during the life of *B.* in truſt for *B.*, and after the deceaſe of *B.* to the heirs males of the body of him the ſaid *B.* now living; that is a remainder veſted in the heirs of *B.* for heir now living, in that deviſe, muſt be taken as a periphraſis of the heir apparent, who is called heir in law, as may be obſerved by the words *quare filium & hæredem rapuit.*

The next property of a uſe is,

3. That it is deviſable.

Treatiſe of Tenures 77. 1 Rep. 123 b. Gil Law of Uſes, 35. But by 32 H. 8. c. 1. and 34 H. 8. c. 5. Lands, &c. are deviſable by will.

The reaſon why lands were not originally deviſable, was, becauſe the ceremony of *livery* was required to the tranſmutation of the poſſeſſion, which is not neceſſary to the diſpoſal of a uſe; for livery is to give notice againſt whom the *præcipe* is to be brought, and the *præcipe* is only of an eſtate of freehold.

6 Rep. 18. Sir Edw. Clere's caſe. 1 Inſt. 111. b. Bulſ. 200. Semain's caſe.

If a man makes a feoffment in fee to the uſe of his laſt will, the feoffor has it to the uſe of himſelf and his heirs; for until a man has actually diſpoſed of the uſe, the uſe is in him only; and if he deviſes, the parties muſt claim their intereſt by the deviſe.

But,

But, if a man makes a feoffment in fee to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates as he ſhall appoint by his laſt will; there, by the words of the conveyance he has a *qualified fee*, till declaration and limitation according to his power reſerved; and it is only the office of the will to nominate; for the intereſt is transferred and diſpoſed of by the feoffment. But, where there are no words of diſpoſition, *&c.* in the feoffment, there, the parties muſt claim by the deviſe. 6 Rep. 18. Sir Edw. Clere's caſe. 1 Inſt. 111. b. Gil. Law of Uſes, 33.

If a copyholder ſurrenders to the uſe of his laſt will, the land is ſtill in the copyholder, and he may diſpoſe of it by an act in his lifetime; if he does not by any will, it ſhall go to his heirs; if he makes a will it paſſes by the ſurrender, and not by the will; for the property of the copyhold is not altered by a private act of the tenant, but by an open and ſolemn act in the lord's court. But at common law, the uſe of the land may paſs by a deviſe, as is ſaid; and the freehold itſelf ſince the ſtatute. 4 Rep. 23. Copyhold caſes. 1 Leon. 174. Bulleyn and Graunt's caſe. Cro. Eliz. 441. Fitch v. Hockley.

Alſo, if a man ſuffers a recovery to the uſe of his laſt will, he may diſpoſe of the eſtate by a *conveyance de novo* during his life; but he cannot during his life limit new *uſes* on the *old recovery*, ſo as to be thereby bound from any alteration; becauſe the whole intereſt of the recovery was declared to be to the *uſe* of his *will*; which is changeable in its nature. Hob. 349. Earl of Ormond's caſe. Gil. Law of Uſes, 36.

Likewiſe, if a man makes a feoffment in fee to the uſe of his laſt will, and in the deed he expreſſes the *uſe* of the will to be to himſelf for life, and then to his ſon in tail, and afterwards makes a leaſe for years, and dies; this ſhall bind the ſon; for it being expreſsly declared to the uſe of his will, it ſuppoſes a power in him to change it. Bro. F. al. Uſes, 337. § 1. 19 H. 8. c. 12. But, where the uſe is declared upon the livery without the word will, there, he cannot alter his will. Bro. *loc. cit.*

If *ceſtui que uſe* deviſes, that his feoffees may alien the land to *J. S.*, the feoffees may enfeoff *B.*, and *B.* may alien to *J. S.* B. F. 338. § 12.

Likewiſe, if *ceſtui que uſe* deviſes, that his feoffees ſhould alien the land for payment of his debts, the creditors may compel him in the court of Chancery to do it. *Ibid.*

So alſo, if *ceſtui que uſe* deviſes, that his feoffees ſhould alien the land, the heir ſhall take the profits till alienation, and if they do not alien, he ſhall have the land for ever. *Ibid.*

4. That it is not extendible, or Aſſets.

The reaſon why a uſe was not extendible is, becauſe there is no proceſs at law but upon eſtates at law; and uſes are merely creatures of equity, on which the common law can award no execution; and they were not *aſſets*, becauſe they go in the courſe of inheritance, and not to executors. 1 Rep. 121. b. Chudleigh's caſe. 1 Ch. Caſes, 14. Bennet v. Box. *Id.* 128. Pratt v. Colt.

But, if a term be limited to attend a fee-ſimple, this ſhall be aſſets for the payment of juſt debts; for the court of Chancery will not carry it out of its due courſe, where there is any prejudice or inconvenience. Hardr. 489. The Attorney General v. Sir Geo. Sands.

Bro. F. al. Uſes, 339. § 25. 1 Co. 131. b. Chudleigh's caſe.

Likewiſe by the ſtat. of *R.* 3. it is held extendible upon a ſtatute ſtaple or merchant; for this is in the nature of a grant, or leaſe for years; and grants of leaſes are made good againſt *ceſtui que uſe* and the *feoffees*, by the ſtatute.

1 Chan. Rep. 128. Pratt v. Colt. Gil. Law of Uſes, 38.

But ſince the ſtatute of frauds and perjuries, uſes ſeem to be aſſets in the heir for the payment of juſt debts, the heir being obliged to pay all juſt debts out of a real eſtate that deſcends from the anceſtor.

5. That it is not forfeitable.

Hard. 466. 7. 488, 489. Gil. Law of Uſes, 38.

A uſe in fee could not be forfeited for felony; for in caſe of felony the lands are caſt on the lord of whom they are holden, for want of heirs; but a uſe is holden of no body.

Hard. 492. 495. Gil. Law of Uſes, 39. But the law in this point is altered by 26 H. 8. c. 13. 33 H. 8. c. 20.

Neither could it be forfeited for treaſon; for all tenures are forfeited by the breach of fidelity and duty owed to the lord; for under that condition the tenants take their eſtates, and conſequently all breaches of allegiance forfeit the eſtate to the king, ſince it originally came from, and is ſtill holden of him; but a uſe is holden of no body.

And ſee Hale's P. C. vol. 1. 240. 247. *& ſequent.*

Allen, 16. Holland's caſe. Hard. 466. 495. Gil. Law of Uſes, 39.

But, if a term be limited in truſt, and *ceſtui que truſt* commit treaſon or felony, the term is forfeited; for the perſonal property goes with the perſons; and when the poſſeſſion is forfeited, the party is incapable of perſonal property, conſequently, the right is in the publick, and the king has the uſe of the term in this caſe.

Hard. 495. Attorney General v. Sands. Gil. Law of Uſes, 39.

Yet, if a term be limited to attend the inheritance in truſt, it is not forfeited for felony, becauſe it does not veſt in his perſon and go to his executors, but belongs to the inheritance, like the charters which are not forfeited.

And. 294. Pl. 302. Sir Francis Inglefield's caſe.

But no uſe can be forfeited at this day, unleſs it be of a chattel or a leaſe; for all uſes of franktenement are, by the ſtatute of 27 *H.* 8. executed in poſſeſſion, as will be ſhewn hereafter; and ſo there is no uſe which can be forfeited, and it would be in vain to give uſes where no uſe exiſts at the time.

6. A Woman is not dowable of a Uſe.

1 Rep. 122. a. Gil Law of Uſes, 25. Neither can a huſband be tenant by the curteſy of an uſe. 1 Rep. 122.

A feme was not dowable of a uſe, for the privilege of dower was only to freeholders' wives; now a uſe, being no freehold, was not within that law, and the Chancery allows the feoffees to be ſeiſed to nobody's uſe, but thoſe that are particularly named in the truſt.

4 Rep. 1 b. Vernon's caſe. After the 27 H. 8.

And that being the caſe, it became a practice for the father and friends of the woman to procure the huſband to take an eſtate from the feoffees, or others ſeiſed to his own uſe, for life; and then

then to the uſe of his wife, for life, before or after the marriage; which was the original of jointures. for transferring uſes into poſſeſſion,

the wives would have been entitled to their dower of the huſband's ſeiſin, as well as to their jointure, which occaſioned the adding of the branch concerning jointures to the 27 H. 8. See title *Jointure*, vol. 3. p. 220.

(C) The Inconveniences of Uſes.

SUCH was the nature, property, and operation of uſes at common law, and ſince the ſtat. of *R.* 3. And though theſe uſes had a very equitable beginning; yet, like all new models of general ſchemes of ordering property, they introduced a great many unforeſeen inconveniences, and ſubverted in many inſtances the inſtitution and policy of the common law. For—

Eſtates paſſed by way of uſe, from one to another, by bare words only, without any ſolemn ceremony or permanent record of the tranſaction; whereby a third perſon that had right knew not againſt whom to bring his action. 1 Rep. 123, 4. 1 And. 323. Poph. 73. See the preamble to ſtat. 27 H. 8. c. 10.

Uſes likewiſe paſſing by will, the heirs were diſinherited by the inadvertent words of dying perſons. Lords alſo loſt their wardſhips, reliefs, marriages, and eſcheats; the truſtees letting *ceſtui que uſe* continue the poſſeſſion, whereby the real tenants that held the lands could not be diſcovered. The king likewiſe loſt the eſtates of aliens and criminals; for they made their friends truſtees, who kept poſſeſſion, and ſecretly gave them the profits ſo as the uſe was undiſcovered. Purchaſers were inſecure; for the alienation of *ceſtui que uſe* in poſſeſſion was at common law a *diſſeiſin*, and though the 1 *R.* 3. *c.* 1. gave him power to alien what he had; yet the feoffees might ſtill enter to reveſt a remainder or contingent uſe, which were never publiſhed by any record or livery, whereby the purchaſer could know of them. Eſtates likewiſe created by law in conſideration of marriage, ſuch as tenancies in dower and by curteſy, were defeated, notwithſtanding the 1 *R.* 3. Add to theſe, that the uſe was not ſubject to the payment of debts, and that many loſt their rights by perjury, in averment of ſecret uſes. And laſtly that *uſes* might be allowed in mortmain. Gil. Law of Uſes, 72.

To remedy theſe inconveniences, the legiſlature framed the ſtat. of 27 *H.* 8. *c.* 10. which leads us to conſider,

(D) The Alterations introduced with reſpect to Conveyances to Uſes by the 27 *H.* 8. *c.* 10. which

ENACTS that, *Where any perſon* (*a*) *or perſons ſtand or be* (*b*) *ſeiſed, or at any time hereafter ſhall happen to be ſeiſed of or in any honours, caſtles, manors, lands, tenements, rents, ſervices, reverſions, remainders, or other hereditaments* (*c*), *to the uſe, confidence, or truſt of any other perſon or perſons, or of any body politick, by reaſon of any bargain, ſale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwiſe by any manner of means whatſoever it*

(*a*) 27 H. 3. c. 10. The word (perſon) excludes all corporations. Ld. Bacon's Reading on the Statute

of Uſes, 334, 335.

be; in every ſuch caſe, all and every ſuch perſon and perſons, that have or ſhall have any ſuch uſe or truſt in fee-ſimple, tail, for life, or years, or otherwiſe, or any uſe, confidence, or truſt in (d) remainder or reverter, ſhall from henceforth ſtand and be ſeiſed, and be deemed and judged in lawful ſeiſin, eſtate, and poſſeſſion (e) of and in the ſame honours, &c. to all intents, &c. of and in ſuch like eſtate as they had or ſhall have in the uſe, &c. of and in the ſame; and the eſtate, title, right, and poſſeſſion of ſuch perſon or perſons as were or hereafter ſhall be ſeiſed of any lands, tenements, or hereditaments, to the uſe, confidence, or truſt, of any ſuch perſon or perſons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter ſhall have any ſuch uſe, confidence, or truſt, after ſuch quality, manner, form, and condition as they had before in or to the uſe, confidence, or truſt that was in them.

(b) This word (ſeiſed) excludes chattels and rights. It likewiſe excludes contingent uſes, becauſe the ſeiſin cannot be but to a fee-ſimple of a uſe; and when that is limited, the ſeiſin of the feoffee is ſpent. Ld. Bacon's Reading on the Statutes of Uſes, 335. (c) This word (hereditaments) is to be underſtood of thoſe things whereof an inheritance is *in eſſe*; for if I grant a rent-charge *de novo* for life to a uſe, this is good enough; yet there is no inheritance in being of this rent. It likewiſe excludes annuities and uſes themſelves; ſo that a uſe cannot be to a uſe. Ld. Bacon's Reading on the Statute of Uſes, 335. (d) The ſtatute having ſpoken before of uſes in fee-ſimple, in tail, for life or years, addeth, or otherwiſe (in remainder or reverter), whereby it is manifeſt, that the firſt words are to be underſtood of uſes in poſſeſſion. Lord Bacon's Reading on the Statute of Uſes, 337. (e) The words (lawful ſeiſin, ſtate, and poſſeſſion) intended not a poſſeſſion in law only, but a ſeiſin in tail; not a title to enter into the land, but an actual eſtate. Ld. Bacon's Reading on the Statute of Uſes, 338.

§ 2. *Where divers perſons ſhall be jointly ſeiſed to the uſe or truſt of any of them, thoſe which ſhall have ſuch uſe or truſt ſhall be adjudged to have only ſuch eſtate, poſſeſſion, and ſeiſin of the lands,* &c. *as they had in the uſe or truſt, ſaving to all perſons other than thoſe which be ſeiſed to any uſe or truſt, all right,* &c.

§ 3. *Alſo ſaving to all thoſe perſons which ſhall be ſeiſed to any uſe, all ſuch former rights as they might have had to their own proper uſe.*

Upon this ſaving clauſe the following caſe has been determined. The huſband being ſeiſed in fee made a leaſe to *O.* and *S.*, but it was in ſecret confidence for the preferment of his wife; and afterwards he made a feoffment to *O.* and others of the ſame land to other uſes. It was decreed by the advice of Wray, Anderſon, and Manwood, that the term was not extinguiſhed by this feoffment, by reaſon of the proviſo; and becauſe *O.* had this leaſe to his own uſe, it is not extinguiſhed by the feoffment which he took to the uſe of another. Mo. 196. pl. 345. Cheyney's caſe. 2 And. 102. pl. 9. S. C. ſays, the leaſe was made really in truſt to the uſe of the wife, and education of their ſons and daughters, notwithſtanding that divers covenants were therein contained, and a rent was reſerved; and ſays that the feoffment made afterwards was to the uſe of the huſband himſelf and his ſaid wife for their lives, with remainder over; and that the ſame was held accordingly.

§ 4, 5. *Where any be ſeiſed to any uſe or intent that another ſhall have a yearly rent out of the ſame lands,* ceſtui que uſe *of the rent ſhall be deemed in the poſſeſſion thereof of like eſtate as he or ſhe had that uſe.*

A man, in conſideration of natural love and affection, covenanted to ſtand ſeiſed to the uſe of himſelf for life, the remainder to *B.* his ſon in tail, and to the intent that *B.* ſhould have a rent iſſuing out of the lands, during the life of *A.*; *B.* the ſon dies, and his executors brought debt for the arrears of the rent. It was reſolved and adjudged, that by theſe words of the ſtatute *B.* in this caſe had a good rent, as well upon covenant as by a feoffment, or bargain and ſale. Sir W. Jo. 179. Rivetts v. Godſon.

Vaugh. 50. Dixon v. Harriſon. Notwithſtanding this

The deſign of this law was utterly to aboliſh and deſtroy that pernicious way of conveyance to uſes. And the means they took to do it was to make the poſſeſſion fall in with the uſe in the ſame manner as the uſe was limited; and where they were all

all freeholds, it was thought they would be then ſubject to the rules of common law. But the method has not anſwered the legiſlature's intent; for it has introduced ſeveral ſorts of conveyances quite oppoſite to the rules of common law; for now, wherever a *uſe* is raiſed, the ſtatute gives *ceſtui que uſe* the poſſeſſion; ſo that it is only neceſſary to form a *uſe*, and the poſſeſſion paſſes, without any livery or record, and the reverſions, without the attornment of particular tenants; and now the uſe (by the name of truſt, which were one and the ſame before the ſtatute) remains ſeparately in ſome perſons, and the poſſeſſion ſeparately in others, as it did before the ſtatute, and are not brought together but by decree in Chancery, or the voluntary conveyance of the poſſeſſor of the land to *ceſtui que truſt*. So that the principal uſe of the ſtat. of 27 *H.* 8. eſpecially upon fines levied to uſes, is not to bring together a poſſeſſion and uſe, but to introduce a general form of conveyance, by which the conuſors of the fine, who are as donors in the caſe, may execute their intents and purpoſes at pleaſure, either by transferring their eſtates to ſtrangers, by enlarging, diminiſhing, or altering them, to and amongſt themſelves, at their pleaſure, without obſerving that rigor and ſtrictneſs of law for the poſſeſſion of the conuſee, as was requiſite before the ſtatute.

ſtatute, there are, as will be ſhewn more particularly, three ways of creating a uſe or a truſt which ſtill remain as at common law, and is a creature of the courts of equity, and ſubject only to their controul and direction.

1ſt, Where a man ſeiſed in fee raiſes a term for years, and limits it in truſt for *A.* for this the ſtatute cannot execute,

the termor not being ſeiſed. 2dly, Where lands are limited to the uſe of *A.* in truſt, to permit *B.* to receive the rents and profits; for the ſtatute can only execute the firſt uſe. 3dly, Where lands are limited to truſtees to receive and pay over the rents and profits to ſuch and ſuch perſons; for here the lands muſt remain in them to anſwer theſe purpoſes; and theſe points were agreed to. 1 Abr. Eq. Caſes, 383. Simpſon v. Turner.

But before we conſider the particular alterations introduced in the mode of conveying property by the 27 *H.* 8. it may be neceſſary to premiſe in general, that, ſince the ſtatute, the limitation of uſes is, in many caſes, governed by the rules of law. As, if a feoffment is made to the uſe of *J. S.* and his heirs males lawfully begotten, with remainder over; this does not paſs an eſtate *tail*, but a *fee-ſimple*, ſince the ſtatute; for ſince the ſtatute has brought uſes into poſſeſſion, they ought to be governed by the rules of eſtates in poſſeſſion, as to the words that are eſſential to the creating of ſuch uſes. Now if there be no words eſſential to the creating of an eſtate, there is no ſuch eſtate at common law, and the ſtatute has not abrogated the common law ſo far as to allow an eſtate in being, without words neceſſary to create it; and here nobody is limited from whence the heirs of the tail may proceed. Alſo, no fee-ſimple can be created in uſes, without the word heirs, ſince the ſtatute, for the ſame reaſon.

Gil. Law of Uſes, 75. 1 Rep. 87. b. Before the ſtatute the word *heirs* was not neceſſary to create an inheritance in a uſe, but now uſes are turned into poſſeſſion, they are governed by the rules of poſſeſſions at common law. See *ante*, with reſpect to the deſcent of uſes.

So, if a man makes a feoffment to the uſe of himſelf for years, the remainder to *B.* in tail, remainder to his own right heirs, and after *B.* dies without iſſue, living the feoffor; the remainder to his right heirs is void, becauſe it being contingent, there is no eſtate of freehold to ſupport it, for there is no *tenant to the præcipe*, and the not having a perpetual tenant to the *præcipe* was an inconvenience

2 Roll. Abr. 791. Gil. Law of Uſes, 76. Gilbert makes a Q. whether to make this

remainder contingent, the limitation ſhould not be to the uſe of *A.* for years, remainder to *B.* in tail, remainder to the right heirs of *C.*, for the caſe as above reported in Rolle does not appear to be contingent remainder.

venience the ſtatute expreſsly deſigned to redreſs, and conſequently to this rule the ſtatute has ſubmitted all uſes.

Gil. Law of Uſes, 77. But ſee 10 & 11 W. 3. c. 10. for preſerving contingent remainders to after-born children.

Likewiſe, if a man makes a feoffment in fee to the uſe of *A.* for life, the remainder to his firſt ſon in tail, the remainder to *B.* in fee; if *A.* dies, his wife being *privement enſient*, and a ſon is afterwards born, he ſhall take nothing; for if the remainder does not veſt at the determination of the particular eſtate, it ſhall never veſt; for, as it is ſaid before, the ſtatute does not change the nature and being of eſtates that were ſettled at common law, and a remainder *ex vi termini* ſuppoſes a particular eſtate, of which it doth remain.

1 Rep 138 a. Chudleigh's caſe. Gil. Law of Uſes, 77. If ſuch a limitation were good, the inheritance would be in nobody.

So, if a man makes a feoffment in fee to the uſe of *A.* his ſon for life, and afterwards to the uſe of every perſon that ſhall be his heir, for life only, it is not good to the heir; for it is againſt the rules of common law, that a perpetual freehold for life only ſhould deſcend, becauſe it creates a perpetuity. But it ſeems in this caſe, as if the Chancery (ſince there is ſuppoſed a good conſideration) would have executed a fee in *A.* according to the intent of the parties.

In ſome caſes, however, the ſtatute operates againſt the rules of law. As,

Gil. Law of Uſes, 78.

If a man makes a feoffment in fee, to the uſe of *A.* in fee; but upon payment of 100*l.* or any other contingency, to the uſe of *B.* in fee, if the contingency happens, the fee ſhall be executed in *B.*; for though, according to the rules of common law, a fee cannot be limited on a fee, becauſe a fee-ſimple is the largeſt eſtate than can be limited, and therefore will not bear a remainder over, by way of limitation; and though this cannot be conſtrued a conditional eſtate, becauſe to avoid maintenance, the common law allows no ſtranger to take advantage of a condition; yet the neceſſities of commerce and family ſettlements induced the Chancery to paſs by this rule, and the ſtatute has executed the poſſeſſion in the ſame manner and form as the party had the uſe. Now ſince he had but a conditional fee in the uſe before the ſtatute, he cannot have an abſolute and unconditional eſtate, ſince the ſtatute; for that is to ſet up an eſtate directly contrary to the expreſs words of the ſtatute.

It has been obſerved, that the ſtatute of the 27 *H.* 8. introduced ſeveral ſorts of conveyances quite oppoſite to the rules of common law: and this leads us to conſider the ſeveral ſorts of conveyances to uſes, with their reſpective operations.

(E) Of the ſeveral Sorts of Conveyances to Uſes.

2 Sid. 158. Hevns v. Villars.

THERE are but three ſorts of conveyances to uſes; the two firſt of which only will feed a contingent uſe, *viz.* 1. Feoffment, fine, or common recovery to uſes. 2. Covenant to ſtand ſeiſed

ſeiſed to uſes. 3. Bargain and ſale to uſes. By this laſt conveyance only no contingent uſe can be ſupported.

It is to be obſerved concerning the operation of theſe conveyances, that by thoſe under the firſt diviſion, ſuch as *feoffment*, *fine*, or *common recovery*, uſes are raiſed by tranſmutation of poſſeſſion; but by the ſecond and third, that is, by *covenant to ſtand ſeiſed*, and by *bargain and ſale*, uſes ariſe without tranſmutation of poſſeſſion, for the poſſeſſion is ſtill retained by the covenantor or bargainor, but for the uſe of another. Therefore, Plow. 301. Sharrington v. Storton. The covenantee or bargainee cannot have the land, becauſe they had not livery of ſeiſin, therefore reaſon veſts the uſe in them, which is but a right in conſcience to have the profits. Plow. *loc. cit.*

1. Of thoſe which raiſe Uſes by way of Tranſmutation of Poſſeſſion, ſuch as, 1. Feoffment. 2. Fines. 3. Recoveries.

The general nature and effect of theſe ſeveral aſſurances have been already explained under their reſpective titles. It may not be improper here however to take notice of this general rule, *viz.* That

On theſe conveyances which raiſe uſes by way of tranſmutation of poſſeſſion, no conſideration is neceſſary. *Per* Holt, C. J. 12 Mod. 161, 162, and 1 Rep. 176. Mildmay's caſe.

A uſe declared on an eſtate executed, needs no conſideration. Moor, 102. pl. 247. Calthorp's caſe. It may be added, that when a uſe ariſes upon a conſideration, the conſideration muſt be preſently executed. Arg. Cart. 140. in caſe of Garniſh v. Wentworth. On the other hand, it has been argued, that if *J.* covenant to ſtand ſeiſed to the uſe of *J. S.* and his heirs, in conſideration that he ſhall be my counſellour, it is good, and the land paſſed preſently, though it is not executed. Arg. Cart. 142. ſays this caſe was put by Popham in B. R. in one Pepplewell's caſe.

It remains in the next place to conſider,

Deeds declaring the Uſes of Feoffments, Fines, and Recoveries.

And herein it is to be premiſed, that uſes may be declared or averred on a feoffment, fine, or recovery of land; but on a bargain and ſale of land no uſe may be declared or averred, but what the law doth make. 1 Rep. 176. Mildmays caſe.

Likewiſe on a covenant to ſtand ſeiſed to uſes, no uſe may be declared or averred but what is contained within the deed. It remains therefore to conſider, *Id. ibid.* Dyer, 169. pl. 21.

1. Who may declare uſes. 2. To whom they may be declared. 3. In what manner they may be declared. 4. At what time they may be declared. 5. In what caſes averments may be made of uſes.

1. *Who may declare Uſes.*

As the court of Chancery does not ſet up rules of property contrary to the rules of law, they who have not a diſpoſing power by the law cannot raiſe a uſe; and conſequently baron and a feme covert cannot declare uſes upon a feoffment ſo as to bind the wife. Gil. Law of Uſes, 39.

Moor, 197. 2 Rep. 57. a. Beckwith's caſe. 2 Roll. Abr. 793.

But baron and feme may levy a fine which will bind the wife; for here the law allows her a diſpoſing power, becauſe ſhe is privately examined; conſequently, the Chancery muſt allow them to declare what is the deſign of that fine; and therefore ſuch declaration by them both ſhall bind the wife.

2 Rep. 57. a. Roll. Abr. 793.

Likewiſe, if the huſband only declares the uſes, this ſhall bind the wife; for ſince ſhe joins in the fine, ſhe muſt be preſumed to concur in the deſign of that fine, unleſs the contrary appears by ſome manifeſt ſign of diſſent.

2 Rep. 57. Moor, 197. Beckwith's caſe. *Quære* Whether the declaration be not merely void. Gil. Law of Uſes, 40. A fine ſhall bind the wife though ſhe be within age; but it is ſaid that ſuch a fine is reverſable for the nonage of the wife during her nonage. Cro. Ellz. 129. Charnoicke & *Ux.* v. Worſley. 2 Rep. 77. b. Ld. Cromwell's caſe. Gil. Law of Uſes, 41.

But, if the huſband declares the uſes of the fine one way by deed, and the wife another way by deed, this binds the huſband during the coverture, but not the wife afterwards; for the huſband cannot declare the uſes without concurrence of the wife, becauſe he has no eſtate; and ſhe cannot be preſumed to concur where the contrary appears by her deed; and ſhe cannot declare the uſes alone, becauſe during marriage ſhe is not *ſui juris*, and without the huſband ſhe has no diſpoſing power: and if there be no uſe declared upon this fine, it is to the uſe of the wife; for where there is no other intent of a fine declared, it is ſuppoſed to be deſigned as a farther ſecurity to the preſent poſſeſſor; and the uſe is ſtill in the wife, ſince in this caſe ſhe has not departed with it.

2 Rep. 58. a. Beckwith's caſe. So, an infant may limit a uſe upon feoffment, fine, or recovery, and he cannot countermand or avoid the uſe, without firſt avoiding the conveyance. Ld. Bacon on the Statute of Uſes, 355.

A man of *non ſane memory* may declare the uſe of a fine levied.

Id. Ibid.

It is obſervable in general, that every man may declare and diſpoſe of the uſe according to the eſtate and intereſt he has in the land; and therefore if two joint-tenants levy a fine, and declare the uſes ſeverally, each man diſpoſes of his own moiety; but, if they declare no uſes, they are ſeiſed as before.

Id. Ibid.

So, if tenant for life and he in remainder in fee join in a fine, without declaring any uſes, they are ſeiſed as they were before.

3 P. Wms. 210. note B.

[If the remainder-man ſeals, and is party to a deed, wherein the tenant for life *alone* covenants to ſuffer a recovery, &c. to certain uſes, this does not bind the remainder-man, though he in the remainder after join in ſuffering the recovery, &c.

Roe v. Popham, Dougl. 25.

If tenant for life, remainder-man in tail, and reverſioner in fee levy a fine, a declaration of uſes by the tenant for life and remainder-man does not bind the reverſioner, without his privity.]

2 Rep. 58. a.

If *A.* ſeiſed of certain lands, and *B.* a ſtranger join in a fine, without conſideration, it ſhall be to the uſe of *A.*, for ſince there is no conſideration to part with the land, the uſe is ſtill in him.

2 Roll. Abr. 789.

In like manner if *A.* ſeiſed in fee of certain lands, and *B.* a ſtranger join in a common recovery, without declaring any uſes, the uſe ſhall ariſe to him that had the intereſt in the land, and not to the ſtranger.

Lat. 82. Argol v. Cheney.

So, where the father was tenant for life, remainder to the ſon in tail; a *præcipe* was brought againſt the father, who vouched

the ſon, and a common recovery was had; and the indenture recited, that the recovery was made between the father and others: but, inaſmuch as no proof was of the conſent of the ſon to ſuch declaration, nor was he party to the indenture, the court directed the jury to find the uſes according to the eſtate which the parties had at the time of the recovery*. Palm. 405. S. C. Noy, 77. S. C. * See further letter (I) of *Reſulting Uſes.*

[The king may declare uſes upon his letters patent, though indeed the patent of itſelf implies a uſe. But, if the king gives lands to *J. S.* and his heirs by letters patent, to the uſe of *J. S.* for life; here, *J. S.* has only an eſtate for *life*, and the king has the inheritance without any office found; for implication out of matter of record ever amounts to matter of record. Bac. Uſes, 66. Sand. Uſes, 208.

The queen may alſo declare uſes.] *Id. Ibid.*

2. *To whom they may be declared.*

A uſe, it is ſaid, cannot be raiſed to aliens. For an alien could not compel the feoffees to execute a uſe; for it is contrary to the policy of the law that an alien ſhould plead, or be impleaded, touching lands, in any court of the kingdom. Gil. Law of Uſes, 43. By Roll Ch. J. The Chancery cannot compel one to execute a truſt for an alien. Sty. 21. The King v. Holland. All. 15 & 16. But, according to Broke, a feoffment or gift to the uſe of an alien born is good, for a uſe is only a matter in conſcience. Br. Feoffment to Uſes, pl. 29.

The king ſhall have the uſe of an alien; for the advantage which a man receives from his duty can extend no farther than the obligation of that duty reaches; but the allegiance of an alien is temporary, therefore ſo is his property; and ſince he is incapable of perpetual ſubjection, he cannot be protected in any eſtate that is of perpetual continuance; and the inconvenience is the ſame if this be a freehold at law, or a truſt. All. 15 & 16. Sty. 40. Gil. Law of Uſes, 43. But in this caſe it is ſaid, the king ſhall not ſeize the land of an alien, unleſs it be executed in him by a decree in Chancery; for there was no right in *ceſtui que uſe* himſelf to ſeize the lands without a decree, and the king has only the rights of the *ceſtui que uſe*. Sty. 40. Gil. Law of Uſes, 44.

Alſo, though the king cannot have feoffees to his uſe, becauſe he cannot take but by matter of record, yet he may take it when the uſe is found of record, where an office is found of the whole matter. Gil. Law of Uſes, 44.

Likewiſe, the limitation of a uſe to the poor of the pariſh of *Dale* is good, though no corporation: for though they are capable of no property at common law, in the thing truſted, becauſe the rules of pleading require perſons claiming to bring themſelves under the gift; and no indefinite multitude, without publick allowance, can take by a general name; yet they are capable of a truſt; for here the complainants do not derive to themſelves any right or title to the eſtate, but ſhew that it has been abuſed and miſemployed by the owners, contrary to conſcience. Bro. F. to Uſes, pl. 29. 1 Rep. 23, 24, and 25. Gil. Law of Uſes, 44.

3. *In what Manner they may be declared.*

Before the ſtatute of frauds, 29 *Car.* 2. *c.* 3. even a parol declaration of the uſes of a fine was good. And 4 Mod. 269. Jones v. Morley.

Uſes,

7 Mod. 76. Shortridge v. Lamplugh.

Uſes, even ſince that ſtatute, may be declared by writing only without any ſeal.

Moor, 107. pl. 249. Agreed by the juſtices in Andrew's caſe.

If a uſe is declared by indenture, yet the parties may alter the uſe by other indenture at any time till the eſtate is executed, and the laſt indenture ſhall guide the uſe.

Stapilton v. Stapilton, 1 Atk. 2. See Durnford v. Lane, 1 Br. Ch. Rep. 106.

[But ſuch other indenture muſt be by the conſent of *all* the parties intereſted, elſe it cannot controul the firſt indenture. Thus, *A.* was tenant for ninety-nine years, if he ſo long lived, remainder to truſtees to ſupport contingent remainders, remainder to the firſt and other ſons of *A.* in tail, remainder to *A.* in fee. *A.* having two ſons, *B.* and *C.*, they all joined in a leaſe and releaſe of the eſtate to certain uſes, and there was a conveyance to ſuffer a recovery within twelve months to thoſe uſes: afterwards they, with the heir of the ſurviving truſtee, joined in a leaſe and releaſe to make a tenant to the *præcipe*, in order to ſuffer a recovery to the uſes of the firſt indenture; but before any recovery was ſuffered, *B.* the eldeſt ſon died, and after the death of *B.*, and before the recovery was ſuffered purſuant to the above deeds, *A.* and *C.* by another deed covenanted to ſuffer a recovery to certain other uſes; and before the expiration of the twelve months ſpecified in the firſt deed, a recovery was ſuffered. The queſtion was, Whether the firſt deed, declaring the uſes of the recovery, and made by *A.*, *B.*, and *C.*, ſhould ſtand, in preference to that made by *A.* and *C.* alone? Lord *Hardwicke* clearly held, that the firſt deed by *A.*, *B.*, and *C.* was a good deed to lead the uſes of the recovery: that when *A.*, *B.*, and *C.*, and the heir of the ſurviving truſtee, made a tenant to the *præcipe*, they paſſed a defeaſible eſtate to ſerve the uſes of the firſt deed; and that the recovery ſuffered within the twelve months rendered that defeaſible eſtate indefeaſible, though one of the parties was dead before the recovery ſuffered: that the laſt deed was not ſufficient to alter the uſes declared by the firſt deed, becauſe not made by the *agreement* of *all* the parties.]

Comb. 429. Jones v. Morley. This writing was only between the husband of the one part, and the wife of the other part. But the deed was between them and others. Carth. 410. S. C. 2 Salk. 677. S. C. 4 Mod. 261. S. C. Parliament Caſes, 143. S. C.; and judgment affirmed.

Where there is a *deed*, and a *laſt writing* by huſband and wife, the laſt writing, though not a deed, amounts to a ſufficient declaration of uſes upon the fine, the fine being levied at *a time different* from the deed.

Hob. 275. Clanrickard's caſe.

A declaration of the uſe, either *expreſs or in law*, is ſufficient; as, if *A.* covenants with *B.* for money to do all acts which *B.* ſhall require for aſſurance to *B.* and his heirs, and then levies a fine to *B.*, this covenant and fine will give *B.* the whole land.

Moor, 789. pl. 1090. in the Exchequer-chamber, Huſſey's caſe.

Where a baſtard was ſeiſed of a manor and made his will, by which he deviſed the manor; and after he made a feoffment of the ſame manor to the uſe of ſuch perſons, and for ſuch eſtates as he had declared by his laſt will, bearing date, *&c.*, though this was now a *countermanded will*, it was ſufficient to declare the uſe of the feoffment, and ſo no eſcheat.

It

It is not neceſſary in declaring a uſe, if there be a tranſmutation of poſſeſſion, to uſe the very word uſe; any expreſſion whereby the mind of the party may be known, that ſuch an one ſhall have the land, is ſufficient. *Per Holt*, Ch. J. in delivering the opinion of the court. 12 Mod. 162. in caſe of Jones v. Morley.

4. *At what Time they may be declared.*

A declaration of uſes may be made either before, or after the time of making the aſſurance; for a ſubſequent declaration may direct the uſes of a precedent aſſurance; and by

4 & 5 *Ann. c.* 16. § 15. it is enacted, that *all declarations or creations of uſes or truſts of any fines or common recoveries manifeſted by a deed after the levying or ſuffering thereof ſhall be as good in law, as if the act of* 29 Car. 2. c. 3. *for prevention of frauds or perjuries had not been made.*

In an ejectment on a ſpecial verdict the following caſe was determined:—*A.* and *B.* his wife levied a fine, and four years afterwards declare the uſes; in which deed are the words following, viz. "All and every fine or fines levied, or to be levied, ſhall be to the uſes of this deed." Holt, Ch. J. delivered the opinion of the court, that the uſes were ſufficiently declared (the jury having found, that the fine was levied to the uſes therein declared). And that, notwithſtanding the ſtatute of frauds and perjuries, a ſubſequent deed is now as good as it was before the ſtatute. And that it was doubtful, whether the ſtatute extends to *uſes*, becauſe they are not mentioned there, but only *truſts*, yet that they took truſts and uſes to be the ſame, in reſpect of truſts in their larger extent, &c. ſo within the ſtatute of uſes. Holt's Rep. 733. Buſhel v. Burland.

If *A.* covenants to levy a fine before ſuch a day, though the fine levied *differs from the indenture* in time, place, quantity of acres, or in the perſon that occupied it; yet, when the fine is levied, it ſhall be intended to be to the ſame uſes in the indenture. Arg. 3 Bulſt. 251. Hagervil v. Hare cites 2 Rep. 69. Ld. Cromwell's caſe.

But it may in ſuch caſe be averred by parol to be to other uſes. But, if the fine be levied in all things purſuant to the indenture, no averment can be but by writing; for in this caſe, the indenture is *directory to the fine*, and in the other caſe, it is *but evidence*. Cro. Ja. 29. Counteſs of Rutland v. The Earl of Rutland.

If a precedent indenture be made to direct the uſes of a ſubſequent aſſurance, it is but directory till the aſſurance is made, and then the land is bound, and the conuſor or recoveree cannot by any act of his, after the recovery had, charge or avoid it: but, if the declaration be ſubſequent, if in the interim, between the aſſurance had and the declaration of the uſes, the conuſor or recoveree ſells, gives, or charges the lands to others, this ſubſequent declaration will not ſubvert the meſne eſtates, charges, or intereſts, unleſs it can be otherwiſe proved, that by a certain and complete agreement of the parties, the aſſurance was had and made to theſe uſes. 5 Rep. 26. Counteſs of Rutland's caſe. 9 Rep. 10 & 11, &c. Dowman's caſe.

But the diſtinctions between precedent and ſubſequent declarations will beſt appear from the conſideration of the following head, *viz.*

5. *In what Caſes Averments may be made of Uſes.*

With regard to averments it is to be obſerved, that where a uſe is expreſſed upon any feoffment, &c. there, no averment ſhall be 9 Rep. 10. Dowman's caſe.

be received to prove any uſe contrary to the uſe expreſſed; but in caſe no uſe is expreſſed in the aſſurance, there, other uſes than what the law would make upon the aſſurance may be averred, and proved to have been agreed upon, and the aſſurance ſhall be to ſuch uſes.

Gil. Law of Uſes, 6. 1 And. 313. Where the deed is not upon a valuable conſideration, it is looked upon as a fraudulent conveyance againſt the truſt.

If by the words of a deed, upon a valuable conſideration, a man takes it to his own uſe, or to the uſe of another, there can be no averment that he takes it as a truſtee in any other manner; for there is ſuch a ſanction given to all ſolemn acts of contracting, that they cannot be conſtrued directly contrary to their own expreſſions.

Gil. Law of Uſes, 7. * It ſeems at common law a uſe might have been raiſed by word, upon a conveyance that paſſed the poſſeſſion by ſome ſolemn act, as a feoffment; but, where there was no ſuch act, there, it ſeems, a deed declaratory of the uſes was neceſſary; for as a feoffment which paſſed the eſtate, might be made at common law, by parol; ſo by the ſame reaſon might the uſes of the eſtate be declared by parol: but, where a deed was requiſite to the paſſing of the eſtate itſelf, it ſeems it was requiſite for the declaration of the uſes, as upon a grant of rent, or the like. So it ſeems, a man could not covenant to ſtand ſeiſed to a uſe, without a deed, there being no ſolemn act; but a bargain and ſale by parol has raiſed a uſe without, and it has been held to do ſo ſince the ſtatute. In cities exempted out of the ſtatute, it has been held, that if a fine be levied of a rent, no uſe can be limited of it without deed; but now by 29 Car. 2. c. 3. all declarations of truſts, other than ſuch as ariſe by implication of law, are to be in writing, and ſigned by the party, who is by law enabled to declare ſuch truſt, or elſe it muſt be by his laſt will in writing. Gilb. Law of Uſes, 270, 271.

Thus, if a feoffee to uſes makes a feoffment in fee by deed, upon an equitable conſideration, to *J. S.* and his heirs, to the uſe of his heirs expreſsly, *J. S.* ſhall be ſeiſed to his own uſe, though he had notice of the former truſt; for where the deed expreſſes the uſe, an implied one cannot be averred *.

2 Salk. 676. Tregame v. Fletcher.

Where the uſes of a recovery are declared by deed precedent, no new or other uſe can be averred by parol, unleſs there was ſome variance between the deed and the recovery; but in caſe of a deed precedent, if the party ſet up other uſes, he muſt confeſs and avoid: but, where they are by deed ſubſequent, new or other uſes may be averred without ſhewing the deed, though there be no variance, *&c.* becauſe there was an intermediate time when there might be ſuch agreement made, and the uſes ariſe by the recovery according to that agreement; and if a deed ſubſequent be ſet up, the other may traverſe thoſe uſes.

But, where there is a variance between the deed and the recovery or other aſſurance, and no averment of the uſes can be made, there, they muſt be left to the conſtruction of law.

There is a difference likewiſe with reſpect to averments between parties and ſtrangers. Thus,

Comb. 429. Jones v. Morley.

If a declaration of uſes be ſubſequent to a fine or recovery, it is good; but there may be an *averment*, that they were to *other uſes*; yet with this difference, that where the declaration is ſubſequent, there, the heir of the conuſor is *eſtopped to aver* other uſes, but a *ſtranger* is not. But, where the deed is precedent, there, neither the heir nor the ſtranger is eſtopped to aver other uſes, in caſe the *fine varies in any circumſtance*: but, if the fine was levied purſuant to the deed, no proof whatſoever, either by writing or parol, ſhall be

be admitted, that the fine was to other uſes, than what are contained in the deed, that being an eſtoppel to the parties. *Per Holt*, Ch. J.

It has been held, that a deed of uſes *precedent* to a recovery, may be explained by a deed *ſubſequent*, as in the following inſtance— Feme, before the 27 *H.* 8. of uſes, being ſeiſed of land, ſuffered a common recovery, and intending to marry *A. B.*, ſhe, before the marriage, declared by indenture that the feoffees ſhould be ſeiſed *to the uſe of herſelf and* A. B., whom ſhe intended to marry, *and their heirs.* The feoffees executed an eſtate after the marriage to the huſband and wife, and their heirs in fee, without any uſe expreſſed. Afterwards the baron and feme *by other indenture declared, that the firſt indenture was miſtaken*; for that it *ſhould have been to the heirs of their two bodies*, and for default *to the heirs of the wife.* And they covenant, bargain, and *agree, to ſtand ſeiſed to the uſe of* themſelves in ſpecial tail, and after, to the right heirs of the wife; and the huſband covenanted, if the wife died without iſſue, during his life, that he would execute an eſtate accordingly. The wife died without iſſue, and after the ſtatute of uſes the baron died ſeiſed; and it was held, that the *firſt indenture was corrected by the ſecond*, and the firſt uſe is ſufficiently altered without eſtate executed, and the conſiderations are reaſonable and ſufficient, and adjudged for the heir of the wife. Dy. 307. b. pl. 71. Vaſor's caſe.

A conſideration which ſtands with the deed and not repugnant to it, may be averred. 7 Rep. 40. Bedel's caſe.

It now remains to conſider,

2. Thoſe Conveyances which raiſe Uſes without Tranſmutation of Poſſeſſion, ſuch as,

1. *Covenants to ſtand ſeiſed to Uſes.* *And*, 2. *Of Bargain and Sale.*

1. *Covenants to ſtand ſeiſed to Uſes.*

This conveyance not having been hitherto treated of, it will be neceſſary to inquire more fully into its nature and effect.

The original of it was in this manner. Before 27 *H.* 8. when any man covenanted to ſtand ſeiſed to the uſe of another, the remedy was two-fold. Gil. Law of Uſes, 110.

Firſt, By action at common law upon the covenant, and thereby damages only were recovered. *Id. ibid.*

Secondly, In Chancery; and there the remedy aroſe thus:— When any man covenants to do a thing, the party is firſt bound in conſcience to perform the thing itſelf; and if that cannot be, then to render damages for not doing it; therefore the Chancery that examines the conſcience of men's actions requires a ſpecifick performance of the thing itſelf, where it can be had: but the common law could not carry this covenant ſo far without offering violence to its own rules; for the common law requires livery; and to allow an action for a ſpecifick performance makes the agreement binding without it; but by the 27 *H.* 8. theſe uſes are executed,

cuted, and therefore no action lies; for there can be no complaint for not transferring the thing, when the ſtatute transfers it to the party himſelf.

For the more clear underſtanding of the nature and effect of this aſſurance, we will conſider,

1. Who may covenant to ſtand ſeiſed, and to whom.
2. What conſideration is neceſſary to a covenant to ſtand ſeiſed, and how far it extends.
3. By what words a man may covenant to ſtand ſeiſed.
4. The effect of a covenant to ſtand ſeiſed.

1. *Who may covenant to ſtand ſeiſed, and to whom.*

Poph. 72. Dillon v. Fraine. Hard. 468. Pawlett v. Attorney General. 1 Roll. Rep. 332.

The king cannot be ſeiſed to a uſe, becauſe there is no means to compel him to perform; for the Chancery has only a delegated power from the king over the conſciences of his ſubjects; and the king, who is the univerſal judge of property, ought to be perfectly indifferent, and not take upon him the particular defence of any man's eſtate, as a truſtee.

Cooper v. Franklin and another. But ſee Vern. 439. *per* Maſter of the Rolls, in caſe of Ld. Kildare v. Euſtace, relating to the Iriſh forfeitures, where he ſays, he takes the king to be in nature of a truſtee, notwithſtanding the general received opinion to the contrary.

The king cannot be ſeiſed to a uſe, becauſe he cannot be obliged to execute the poſſeſſion to the uſe by a ſubpœna, ſince if he diſobeys he cannot be compelled to obedience by impriſonment. Jenk. 195. pl. 1. [The king cannot be ſeiſed to a uſe; no, not where he taketh in his natural body, and to ſome purpoſe as a common perſon; and therefore if land be given to the king, and *J. D. pour terme de ſon vies*, this uſe is void for a moiety. Bac. Uſes, 56. Like law is, if the king be ſeiſed of land in the right of his duchy of Lancaſter, and covenant by his letters patent under the duchy ſeal to ſtand ſeiſed to the uſe of his ſon, nothing paſſeth. *Id.* 57. Like law, if King Richard the Third, who was feoffee to divers uſes before he took upon him the crown, had, after he was king, by his letters patent granted the land over, the uſes had not been renewed. *Id. ibid.* The king ſhall not ſtand ſeiſed to a uſe, for all the lands he is ſeiſed of, he is ſeiſed *in jure coronæ* for the maintenance and ſupport of his crown and dignity, and the well-government of the commonwealth, which is a uſe the law deſigned him *primitus*, and, conſequently, it is excluſive of all other uſes. Neither can it be imagined that the king ſhould in point of honour ſtand ſeiſed of lands only to the benefit and advantage of another, and ſo be a ſort of bailiff to him. Gilb. Uſes, 170, 171.]

Ld. Bacon on the Statute of Uſes, 347.

The queen (ſpeaking not of an imperial queen, but by marriage) cannot be ſeiſed to a uſe; for though ſhe be a body enabled to grant and purchaſe without the king, yet, in regard to the government and intereſt the king hath in her poſſeſſion, ſhe cannot be ſeiſed to a uſe.

Gil. Law of Uſes, 5. 1 Rep. 122. Pop. 72.

Bodies politick are not capable of a uſe or truſt, becauſe they are bodies framed at the will of the king, and are no further capable than he wills them; and it is his will that they ſhould purchaſe for the common benefit, and for the ends of their creation, and not that they ſhould take any thing in truſt for others. Beſides, being incorporate, the Chancery had no proceſs on the perſons to compel them to diſcharge their truſt (*a*).

[(*a*) But bodies politick may be truſtees, and in ſuch caſe are conſidered in a court of equity as individuals. Mayor, &c. of Coventry v. the Attorney General, 2 Br. P. C. 236. 2 Vez. junr. 46.]

Gil. Law of Uſes, 5. 1 Rep. 122. Pop. 72.

Aliens, and perſons attainted, are not capable of a uſe, for they can take for no man's benefit but the king's.

The king ſhall have the uſe of an alien, becauſe as his allegiance is temporary, ſo ought his property to be. All. 15 and 16. Sty. 40. Gil. Law of Uſes, 43.

1 Rep. 122. a 139. b.

A diſſeiſor, abator, or intruder, cannot be ſeiſed to a uſe, for they take it under no truſt, but defeat the eſtate to which the truſt was

was ſubjoined; and the Chancery had no power to try the right of inheritance between them, for the right of that title is triable only at common law. But, if he who has the uſe exhibits a bill againſt the feoffee to a uſe, the Chancery will order him to try the title with the diſſeiſor at common law.

A lord by eſcheat ſhall not be ſeiſed to a uſe, becauſe he is in by a title paramount, and ſeiſed of an eſtate antecedent to that to which the uſe is annexed. Lord of a villain, a lord that enters for mortmain, or recovers by *ceſſavit*, or a tenant by the curteſy cannot be ſeiſed to a uſe, for they claim by the general laws and ſtatutes of the kingdom, which the Chancery has no power to alter, and do not take as ſubſtitutes under thoſe private contracts, to which truſts are annexed, and ſo cannot be puniſhed as corrupt breakers of that truſt which they never undertook. 1 Rep. 122. a. Bro. Feoff. 138. a.

Tenant in tail cannot covenant to ſtand ſeiſed ſo as to change a uſe, unleſs during his own life. Cro. J. 400. Cooper v. Franklin.

Het. 110. Bromfield's caſe None can be ſeiſed to the uſe of another, but ſuch as can execute an eſtate according to the directions of *ceſtui que uſe*, which tenant in tail cannot; for it was the intent of the ſtatute *de donis* that he ſhould have the lands and the profits of them; and if he ſhould execute an eſtate to a uſe, his iſſue would be entitled to their formedon. Br. Feoff al Uſes, pl. 40. 2 Roll. Abr. 780. 1 Inſt. 19. b. Gil. Law of Uſes, 11. and 205, &c. [Whether tenant in tail can ſtand ſeiſed to a uſe, has been *vexata quæſtio*, and indeed does not appear to be quite ſettled even at this time. On the one hand, Lord Coke, (Co. Litt. 19. b. 2 Co. 78. a.) Sir G. Croke, (Cro. Ja. 400, 401.) Bulſtrode, (3 Bulſtr. 186.) Sir F. Moore, (Moore, 848.) and Rolle, (1 Ro. Rep. 384. 2 Ro. Abr. 780.) expreſsly tell us, that it was ſettled in the caſe of Cooper and Franklyn, that a tenant in tail neither *before* nor *ſince* the ſtatute could ſtand ſeiſed to the uſe of another perſon, expreſsly, or impliedly. Whilſt on the other hand, Godbolt directly aſſerts, that the caſe of Cooper and Franklyn was determined quite the contrary, viz. that a tenant in tail could ſtand ſeiſed to an *expreſs uſe*, though not to an *implied one*, (Godb. 269). And Lord Bacon, in his Reading on the Statute of Uſes, gives it as his decided opinion, that a tenant in tail may ſtand ſeiſed to an *expreſs uſe ſince* the ſtatute; for the ſtatute, ſays he, does not ſave the right of tenant in tail; and the reaſon why a contrary conſtruction was had before the ſtatute, was, becauſe the right of tenant in tail was expreſsly ſaved by 1 R. 3. c. 1. (Bac. Uſes, 57.) Of this opinion ſeem alſo Perkins, (Perk. § 534. 537.) Manwood in Walſingham's caſe, (Plowd. 555.) and Dyer, (Dy. 311. b. 312. a.) and Mr. Sanders inclines to the ſame opinion, in his Eſſay on the Nature and Laws of Uſes and Truſts, (Sand. 144, 145, &c.]

If tenant in tail by indenture, on conſideration of marriage, covenants with another that *A.* and *B.* ſhall be ſeiſed to his uſe for term of his life, and after his deceaſe to the uſe of his ſon and heir apparent; by this covenant there is no uſe changed, unleſs only during the life of tenant in tail. *Per cur.* Het. 110. Bromfield's caſe.

So, if tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to his eldeſt ſon in tail; ſince he had only the power of diſpoſing of an eſtate for life by the ſtatute *de donis* which he hath not paſſed out of himſelf, it is ſtill in him as it was before; and the remainder is void in its creation, and therefore can be no execution of it, for the execution muſt be immediate by the ſtatute of uſes; and therefore a fine afterwards levied cannot help it. Cro. Eliz. 895. Bedingfield's caſe.

But, if tenant in tail covenants to ſtand ſeiſed (*a*) to the uſe of *A.* and his heirs, or to the uſe of *A.* for life (*b*), remainder to *B.* in fee; the covenant is not void, but puts the eſtate out of the covenantor. *Per Holt*, Ch. J. in delivering the opinion of the court. 2 Salk 620. Machil v. Clark.

(*a*) The covenant is good, and paſſes a baſe fee to *A.* *Per* Holt, Ch. J. Comyns's Rep. 121. pl. 84. S. C. [Stapilton v. Stapilton, 1 Atk. 8. S. P. Goodright v. Mead, 3 Burr. 1703. S. P.] (*b*) And the remainder is good, though the tenant

tenant in tail dies during the life of *A.*, until it is avoided by the iſſue. Comyns's Rep. 121. *Per* Holt, Ch. J. in S. C.

2 Salk. 620. Machil v. Clark. 7 Mod. 26.

Yet, if tenant in tail covenants to ſtand ſeiſed to the uſe of *A.* and his heirs after his death, it is void. S. C. & P. becauſe it is to commence at a time when the right of the eſtate out of which it would iſſue, is in another perſon by a title paramount the conveyance, viz. *per formam doni.*

2 Salk. 620. Machil v. Clark. 7 Mod. 18 to 28. S.C. accordingly.

So, if tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to *J. S.* and his heirs, it is void; for the remainder is to take effect after his death, when by his death the title of his iſſue commences; and the covenant, as to the eſtate for life to himſelf, is void in this caſe, becauſe there is no tranſmutation of poſſeſſion. Such a covenant is in any caſe good only in reſpect of the remainders; and ſince the remainders are void, the covenant and the firſt eſtate are likewiſe void.

Jenk. 195. pl. 1.

Likewiſe a tenant for years, ſince the ſtatute of uſes, cannot be ſeiſed to any uſe; for a tenant for years has only a poſſeſſion, and not a ſeiſin which the ſtatute requires.

Hard. 469. Co. Lit. 239. 4 Rep. 122. *contra.* Br. F. to Uſes 338. § 40. On this point we find ſeveral contradictory opinions in the books. Some ſay that tenant in dower claims in the *per*, that is, by or from her huſband; according to others, ſhe is in, in the *poſt*, and claims by diſpoſition of law, and does not come in by privity of eſtate. Therefore *Qu.*; and conſult the authorities in the margin; and ſee farther, Gilb. Law of Uſes, pl. 11. and 171.

But a tenant in dower may be ſeiſed to a uſe, for a tenant in dower claims by the marriage agreement, and a ſufficient proviſion is made for her by law, which is a third part of her huſband's eſtate; and ſince a private contract is the original of her title, ſhe continues the eſtate of her huſband as he purchaſed it, and under the ſame truſt and agreement.

Hard. 468. But ſee Bro. Feoff. to Uſes 338. a. f. 10. *contra.*

An occupant alſo may be ſeiſed to a uſe, for an occupant continues the eſtate of tenant for life, as his ſubſtitute, and ſo muſt take it as he had it.

3 Lev. 306. Barrington v. Crane.

It is a rule, that a man cannot covenant that another ſhall ſtand ſeiſed of lands whereof the ſeiſin is in himſelf, for this will not raiſe any uſe, but will ſtand merely on covenant. Thus, where *A.* ſeiſed in fee, in conſideration of the marriage of *B.* his ſon, and a marriage portion, covenanted to levy a fine to *B.*, and that *B.* ſhould ſtand ſeiſed to the uſe of *A.* the father, and his heirs, till the marriage had, and after to *B.*'s own uſe in tail, with divers remainders over; and *A.* covenanted in the ſame deed, that he was ſeiſed in fee, and ſo ſhould be till the uſe veſted in *B.* the ſon; it was reſolved by *Powell* and *Rookſby*, J. the only judges then in court, that *A.* could not covenant that the ſon ſhould ſtand ſeiſed of lands whereof the father is ſeiſed; and the ſubſequent covenant was intended againſt incumbrances only, as is uſual in ſuch caſes, and not to raiſe any uſe.

2. *What Conſideration is neceſſary to a Covenant to ſtand ſeiſed, and how far it extends.*

Cart. 143. Garniſh v. Wentworth.

It has been already ſhewn, that on thoſe conveyances by which uſes are raiſed by tranſmutation, no conſideration is neceſſary; but

but conveyances by covenant to ſtand ſeiſed, or by way of bargain and ſale, will not operate to uſes without a conſideration (*a*).

(*a*) Conſiderations to raiſe uſes are threefold, as conſiderations of blood or of marriage, (which, as will be ſhewn, are good conſiderations on covenants to ſtand ſeiſed,) and conſideration of money, which is the only good conſideration on a bargain and ſale. See title *Bargain and Sale*, Letter (D).

Ld. Bacon ſays, there is no reaſon in the law why a deed ſhould not raiſe a uſe without any conſideration. But he adds, that it is a reaſon of Chancery, becauſe no court of conſcience will enforce *donum gratuitum*. But, where money is paid whereby a man's fortune is leſſened, or, where it is for the eſtabliſhment of his family, then it is good in Chancery. Ld. Bacon's Read. on Stat. of Uſes, 310, &c. 3

With reſpect to covenants to ſtand ſeiſed, conſiderations of blood or of marriage are good conſiderations to raiſe uſes.

And, 1. Of conſideration of blood. If a man parts with any lands in advancement of his iſſue, and to provide for the contingencies and neceſſary ſettlements of his family, it is fit the Chancery ſhould make them good conveyances, though they want the ceremonies of law; for it is the deſign and intent of the court of equity to mitigate the ſeverities of law, ſo as they may beſt comply with the peace of families; for their eſtabliſhment is part of the nature and end of government. Gil. Law of Uſes, 47. Cart. 139. Garniſh v. Wentworth.

Therefore if a man, in conſideration of natural love and affection, covenants to ſtand ſeiſed to the uſe of his ſon or brother, this is a good uſe. *Id. ibid.*

A conſideration of natural affection expreſſed to one child will, by conſtruction of law, be extended to others. Thus, if a man, having iſſue three ſons, covenants in conſideration of natural affection to the eldeſt ſon, to ſtand ſeiſed of certain land to the uſe of himſelf for life, and after to his eldeſt ſon, and the heirs male of his body; and for default of ſuch iſſue, to the uſe of his ſecond ſon, and the heirs male of his body; and for default of ſuch iſſue, to the uſe of the third ſon, *&c.*; this is a good conſideration to raiſe the uſe to his younger ſons; for though the conſideration of natural affection be limited only to the eldeſt, yet this is equal to all the ſons, and therefore the law will ſupply it without expreſſion; for if nothing had been expreſſed, it had been a good conſideration by implication of law. 2 Roll. Abr. 782, 783. between Bond and Edmonds; *per curiam.*

The conſideration of natural affection is good likewiſe to raiſe an uſe to children unborn. Thus, conſideration of affection to the heirs male of the covenantor which he ſhould beget on the body of *A.* his wife, is a good conſideration to raiſe a uſe by way of covenant to the ſaid heirs of his body, for every one is bound in nature to provide for his children. Plow. Rep. 303. Sharington *&* *al.* v. Stiotton.

So, for advancement of his heirs male, a man may covenant to ſtand ſeiſed to the uſe of himſelf and the heirs male of his body; and thus ſhall raiſe a good eſtate-tail; for though all the eſtate-tail is in himſelf, yet this is for the benefit of the heir male though it is *in futuro*, and not *in præſenti*, for none can know who ſhall be his heir; for *ſolus Deus facit hæredes*. 7 Rep. 13. b. [14. a.] Englefield's caſe. The reaſon is, for that a man may modify a fee that continues in him, though he cannot take a fee as *de novo* when he has the old one in him. Gilb. Law of Uſes, 209.

But, if a man in conſideration of his care and love which he bears to *J. S.*, called, named, and *reputed* one of his ſons, (where 2 Roll. Abr. 785. Dyer, 374.

pl. 16. Worſeley's caſe. The reaſon is, for that in law he is not ſuppoſed to be of the blood of his father, but is conſidered as a mere ſtranger, for whom no one is preſumed to have a natural affection. See the caſe laſt mentioned, and ſee Gil. Law of Uſes, 48 and 206. But a baſtard may take by feoffment, though not by covenant to ſtand ſeiſed in conſideration of natural affection, 1 Leo. 197. Lord Pagett's caſe.

he was his baſtard ſon,) covenants to ſtand ſeiſed to the uſe of the ſaid *J. S.*, this is no good conſideration to raiſe any uſe.

2 Roll. Abr. 785. between Frampton and Gerard. But, if a man covenants, in conſideration of natural love and affection, blood and marriage of his baſtard daughter, to levy a fine, and that the conuſee ſhall ſtand ſeiſed to the uſe of the baſtard daughter, though this be not a ſufficient conſideration to raiſe a uſe upon a covenant, yet it is expreſſive of the intent of the party, and therefore ſhall ſerve as a ſufficient declaration of a uſe upon the fine, where there needs no conſideration, Gilb. Law of Uſes, 207.

So likewiſe, if a man covenants, in conſideration of blood and of the marriage of his baſtard daughter, to ſtand ſeiſed to the uſe of the baſtard daughter, this is not a good conſideration to raiſe a uſe, becauſe in the law ſhe is not his daughter, but *filia populi.*

Roll. Abr. 785. cites Pl. C. 307. Sher and Pled v. Stratton.]

Fraternal love, and continuance of the land in ſuch of the blood of the covenantor, is a good conſideration to raiſe a uſe by way of covenant; for this is a conſideration of blood, and the brother is one of the next degrees after his parents and children, and they who are next in blood, are next in love, by intendment of the law.

2 Roll. Abr. 783. S. C. Cro. Car. 529. by the name of Smith v. Riſley & *al.* S. C. Sir Wm. Jo. 418. by the name of German v. Riſley.

Thus, if *A.* by indenture made between him of the one part, and *B.* his brother, (naming him ſo in the deed) and *C.* and *D.* who are ſtrangers to him, in conſideration of love and affection which he bears towards his wife and children, and for their maintenance and ſtay of living, and to the intent to ſettle his land in his name and blood, covenants with the ſaid *B.*, *C.*, and *D.* to ſtand ſeiſed to the uſe of himſelf for life, and after to his wife for life, and after to the ſaid *B.*, *C.*, and *D.*, and their heirs upon truſt, that they ſhould make ſuch uſes as he himſelf ſhall appoint, and after to raiſe portions for his children, and after to *G.* his ſecond ſon in tail, *&c.* though no uſe can ariſe by this indenture to *C.* and *D.*, who are ſtrangers to the conſideration of blood, and ſo this is void as to them; yet the uſe ſhall ariſe for all to *B.* who is his brother, and ſo named in the deed, which is within the conſideration. *Trin.* 14 *Car.* This was a ſpecial verdict between *Fox* and *Wilcocks*, and argued at bar, but it abated by death. And after upon a new ſpecial verdict between *Smith* and *Buſbie*, it was adjudged *per curiam*, that the uſe ſhall well ariſe to *B.* to perform the truſts ſpecified in the indenture.

2 Roll. Abr. 783.

But conſideration of ancient acquaintance, or of being chamber fellows, or entire friends, ſhall not raiſe any uſe. Agreed *per cur.* between *Ward* and *Tuddingham.*

2 Roll. Abr. 783. adjudged between Ward and Lumbard.

Alſo, if a man, in conſideration that *B.* was bound in a recognizance for him, bargains and ſells land to the other, that is not good.

Jenk. 81. pl. 60.

Neither will the conſideration of a ſurname raiſe a uſe, as was reſolved in Sir *Chriſtopher Hatton*'s caſe, who had a ſiſter's ſon called *Newport*, and in conſideration of his changing his name to *Hatton*, he covenants by deed to raiſe a uſe to him, this conſideration was adjudged not ſufficient to raiſe a uſe.

2. With

2. With reſpect to conſiderations of marriage—A man may covenant to ſtand ſeiſed to the uſe of *A.* his wife, and the conſideration that ſhe is his wife will raiſe a good eſtate to her, for this is a good conſideration in law.

Thus, if in an indenture between *A.* and his wife of the firſt part, and *B.* their ſon of the ſecond part, and *C.* their ſon of the third part, the ſaid *A.* in conſideration of natural affection and paternal love which he has to his ſaid ſons, and for their better advancement, and to the intent that the lands ſhould continue in his name and blood, covenants to ſtand ſeiſed to the uſe of himſelf for life, the remainder to his ſaid wife for life, the remainder to his ſaid ſons; here, the uſe limited to the wife imports a conſideration of itſelf. 7 Rep. 40. Bedell's caſe.

Likewiſe a man may covenant to ſtand ſeiſed to the uſe of *A.* the wife of his brother, in conſideration that ſhe is the wife of his brother, and this ſhall raiſe a good eſtate to her; for the love which he bears towards his brother, extends in his right to his wife. Plow. Rep. 307. Sharington v. Strotton.

So alſo, the conſideration of marriage *to be had*, will raiſe a uſe, becauſe the preſent eſtate is to the baron, and what is limited to the feme, is only a remainder; *per Twiſden*, J. Sid. 83. in caſe of Stephens v. Brittridge.

Likewiſe, if a man covenants in conſideration of natural love and affection to his ſon, to ſtand ſeiſed to the uſe of his ſon for life, the remainder to ſuch wife as the ſon ſhall afterwards have for life, the remainder to the firſt ſon of the ſon and wife begotten, *&c.*; though the wife be a ſtranger to the conſideration, (admitting it,) yet the eſtate limited to her is well raiſed for the ſubſequent eſtate, which is within the conſideration. 2 Roll. Abr. 786. between Bould and Winſton. Noy, 122. S. C. The wife is within the conſideration, becauſe the covenantor intended the advancement of his poſterity, and without a wife, the ſon cannot have a lawful poſterity.

But, if a man, in conſideration that *B.* ſhall marry his daughter, covenants to ſtand ſeiſed to the uſe of *B.* and his daughter, the remainder to *C.*, this is a void remainder to *C.*, becauſe he is a ſtranger to the conſideration. Plow. Rep. 307. Sharington v. Strotton.

It is to be obſerved farther with regard to the extent of theſe conſiderations, that if a man covenants upon conſideration to be ſeiſed to the uſe of himſelf for life, and after to the uſe of his ſon; but he ſays farther, that his meaning is, that his wife ſhall have it for her life; *per Periam*, J.—This is not a void clauſe but good to the wife. Ow. 85. in Carter v. Kingſted.

So alſo, where *A.* in conſideration of love, and for ſettling the land in his name and blood to his eldeſt ſon, covenants to convey before *Eaſter* in truſt for himſelf for life, remainder to *B.* his eldeſt ſon in tail, *&c.* and alſo covenants to ſtand ſeiſed from and after *Eaſter*, of ſo much of the ſaid lands as ſhould not be ſufficiently conveyed, to the ſaid ſeveral uſes, intents, and purpoſes, and no aſſurances were made before *Eaſter*; it was reſolved, that the uſes and eſtate raiſed by this covenant being in conſideration of love to his ſon, *&c.* (no eſtate at all being executed before *Eaſter*) the covenant extended to all: though it was objected that the words being, that of ſo much of the lands, *&c.* the intent was that he would ſtand ſeiſed when part was executed and ſufficiently Cro. Ja. 180. pl. 19. Croſs v. Fauſtenditch.

ciently conveyed, but when no part was executed, it was not his intent that all ſhould be raiſed by covenant; but this was not allowed, for the conſideration being ſufficient, the covenant well extends to all, there being nothing conveyed by the eſtate executed.

1 Leon. 195. & *ſequent.* Ld. Paget's caſe. But ſee Plow. Com. 307. *contra.* And a diſtinction is there taken, that if the limitation to the ſtranger precedes the limitation to the blood of the covenantor, there, it is good to the ſtranger, but that if it is ſubſequent, it is void. Therefore Q. Gil. Law of Uſes, 113.

There is a difference between a covenant to ſtand ſeiſed and a feoffment; for if a man covenants to ſtand ſeiſed to the uſe of *A.* a ſtranger for years, *&c.* remainder to *B.* his ſon in tail, this is void as to *A.* for want of a conſideration, and the uſe veſts immediately in *B.*, and a void uſe is as if no uſe be limited; and if no uſe be limited, *B.* muſt take immediately, and not by way of remainder, elſe he cannot take at all; for a remainder *ex vi termini* ſuppoſes a particular eſtate, and *B.* muſt not be excluded, becauſe uſes being creatures of equity, the intent of the parties muſt be made good as far as poſſible, where there is a juſt and good ground for any part of the conveyance.

1 Leon. 197. Ld. Paget's caſe.

But, if a man makes a feoffment in fee to the uſe of *A.* and a ſtranger, or baſtard for life, the remainder to his ſon in tail, this is good to *A.*; for upon a feoffment there needs no conſideration to raiſe the uſe as has been ſaid.

1 Rep. 176. b. Mildmay's caſe.

There is another difference likewiſe obſervable; for if a man raiſes uſes upon a fine, feoffment, or recovery, he may reſerve to himſelf a power of making leaſes; but he cannot do it on a covenant to ſtand ſeiſed, or on a bargain and ſale; for upon a fine, feoffment, or recovery, a uſe may be raiſed without a conſideration, and therefore will ariſe to the leſſees without conſideration; and the former eſtates which were raiſed without conſideration, may be defeated without it; but in a bargain and ſale, and covenant to ſtand ſeiſed, no uſes will ariſe without conſideration, therefore not to the leſſees; for where the perſons are altogether uncertain, and the terms unknown, there can be no conſideration; for which reaſon the former eſtates, raiſed upon good conſideration, cannot by ſuch leſſees be defeated.

Per Wilſon, J. 2 Ves. jun. 226.

[Where there is a feoffment by deed to a relation and his heirs, but nothing can paſs by the feoffment for want of livery of ſeiſin; yet as there is an agreement by deed, and the parties are relations, the law holds that a conſideration for raiſing a uſe, and conſtrues it a covenant to ſtand ſeiſed to the uſe of the perſon ſpecified in fee; and the eſtate paſſes, not by feoffment, as the deed ſays, but by virtue of the ſtatute of uſes; and *ut res magis valeat*, &c. that inſtrument called a feoffment ſhall operate as a covenant to ſtand ſeiſed.]

3. *By what Words a Man may covenant to ſtand ſeiſed.*

March, 50.

It is a general rule, that words ſhall be conſtrued ſo that the deed may ſtand, if poſſible. Thus,

Vent. 138. & *ſequent.* Croſſing v. Scudamore.

If a man, in conſideration of natural love, and for augmentation of his daughter's portion, gives, grants, bargains, and ſells, aliens, enfeoffs, and confirms certain lands to *J. S.* his daughter, with

with a ſpecial warranty, and the deed is enrolled, this enures by way of covenant to ſtand ſeiſed, in reſpect to the conſideration.

But, if the conſideration be not expreſſed in the deed, it ſeems no uſe ariſes. Gil. Law of Uſes, 115.

Likewiſe if a man, in conſideration of marriage of his ſon's daughter, covenants that his land ſhall deſcend, come, and remain to him or her, this is only a covenant executory, upon which an action lies, and the force of the covenant is not to alter the deſcent; but it is no covenant to ſtand ſeiſed, whereby he may be entitled in Chancery to a ſpecifick performance. Moor, 122. pl. 267. Cro. Eliz. 279. Blitheman v. Blitheman. Gil. Law of Uſes, 115. Here the ſeiſin of the father is not appropriated to the ſeveral uſes, but only a remainder limited after the father's death, which cannot be without a particular eſtate, nor that without a particular contract, and no man can contract with himſelf. Gil. Law of Uſes, 60.

Alſo, if a man ſeiſed of a *reverſion expectant* upon an eſtate for life, gives, grants, and confirms the ſame to his ſon in fee, in conſideration of natural love and affection expreſſed in the deed, to the uſe of himſelf for life, the remainder to his ſon in tail, the remainder to a daughter, without attornment or enrolment, this conveyance is void, and cannot enure by way of covenant to ſtand ſeiſed, for if it enures by way of covenant to ſtand ſeiſed, the legal eſtate, out of which the uſes riſe, remain in the covenantor: but the intent of the conveyance is to raiſe the uſes by way of tranſmutation of poſſeſſion, and to transfer the freehold, out of which the uſes are to riſe to the ſon; but this conveyance will not paſs that freehold for want of attornment, and ſo the uſes can never ariſe by this deed. 2 Vent. 318. Samon v. Jones. Sid. 25. Hore v. Dix. Gil. Law of Uſes, 115.

So, where *A.*, ſeiſed of land in poſſeſſion and in uſe, covenanted on the marriage of his ſon with the daughter of *J. S.* that the ſon, immediately after his deceaſe, ſhould have in poſſeſſion or in uſe all his lands according to the ſame courſe of inheritance they then ſtood in; and that all perſons then ſeiſed, or thereafter to be ſeiſed, ſhould be ſeiſed to the ſame uſe and intent; it was held, that the fee-ſimple of the uſe was not out of the father, nor was it changed, and that, as it was, it was only a covenant: but perhaps it might be otherwiſe, had the words been, that immediately after his deceaſe the land ſhould enure and remain to the ſon. Dy. 55. Ld. Burgh's caſe.

So, where the father, in conſideration of marrying his ſon, covenants, *&c.* that he, *&c.* has not made, nor ſhall make any grant, *&c.* of the ſaid lands, but that all the ſaid lands, *&c.* ſhall deſcend, remain, and come in poſſeſſion and uſe to the ſaid ſon and the heirs male of his body, *&c.* no uſe is created or altered by thoſe words. And. 25. pl. 55.

Bridgman, Ch. J. took a difference between covenants obligatory and covenants declaratory; for covenants declaratory ſerve to limit and direct uſes, but covenants obligatory (as for enjoyment free of incumbrances) ſhall never be conſtrued to raiſe a uſe, inaſmuch as they have another effect. Sid. 27. pl. 7. in caſe of Hoare v. Dix.

4. *The Effect of a Covenant to ſtand ſeiſed.*

It is a rule, that no covenant to ſtand ſeiſed can paſs a uſe unleſs the covenantor has ſeiſin of the eſtate at the time of the contract. Thus,

2 Roll. Abr. 790. If a man covenants to ſtand ſeiſed of the manor of *D.*, which he ſhall hereafter purchaſe, to the uſe of *J. S.*, and he afterwards purchaſes the manor, yet this is void.

Noy, 19. Yelverton v. Yelverton, Cro. Eliz. 401. S. C. So, if a man covenants to ſtand ſeiſed of the land that he ſhall hereafter purchaſe to the uſe of his ſon, and after purchaſes land to the uſe of himſelf and his heirs, the fee is in the father.

Gil. Law of Uſes, 116. For if a man binds any lands, you muſt ſuppoſe him to have a power to oblige them; but he that hath no intereſt, hath no power to oblige them; and therefore ſuch a covenant in equity, before the ſtatute, could not oblige him to a ſpecifick performance, for that were in equity to bind the land, which is abſurd; and ſince the covenant is void in equity, there can be no execution by the ſtatute; for the rules of law are equally ſtrict in avoiding this repugnancy; for in law, every diſpoſal ſuppoſes a precedent property; and, by conſequence, every covenant to ſtand ſeiſed preſuppoſes a precedent ſeiſin.

Cro. Eliz. 401. Noy, 19. Another reaſon why the uſe declared upon the covenant is bad, is this; becauſe the uſe muſt be limited by the donor or feoffor; for he muſt limit the uſe, who at the time of the limitation had the diſpoſal: now in this caſe the donor limits the fee to the purchaſer, which controuls the intent of the covenant.

Cro. Eliz. 402 Yelverton v. Yelverton. Noy, 1. S.C. By the ſame rule it is ſaid, that if the mortgagor, in conſideration of ſo much money paid by *J. S.*, covenants, that after redemption he will ſtand ſeiſed to the uſe of *J. S.* and his heirs*, this is a void covenant: but, if a feoffment be made to *A.* to enfeoff *B.*, to the uſe of *C.*, and *A.* enfeoff *B.* without the limitation of any uſe; yet it ſhall be to the uſe of *C.*

* The reaſon is, for that at the time of the contract he had no eſtate or intereſt.

Cro. Eliz. 401. Noy, 19. But it is ſaid in Noy, that if another uſe had been expreſſed in the fine, that ſhould have controuled the firſt declaration of the uſe. So if a man covenant to purchaſe land by *Michaelmas* next, and before *Eaſter* following, to levy a fine to ſuch uſes, and accordingly purchaſe land, and levy a fine, without expreſſing any uſe, or without a conſideration, notwithſtanding the law ſays it ſhall be to the uſe of the conuſor, yet it may be averred to be to the uſes limited in the firſt covenant.

Gil. Law of Uſes, 117. For a man may declare the intent of a future act, which he had no power to do at the time of the declaration; for to declare the intent of a future act, doth not ſuppoſe an immediate power of doing it; but the doing any act itſelf, which the law allows to be good and effectual, preſuppoſes the power of doing.

5 Rep. 8. b. Juſtice Windham's caſe. Gil. Law of Uſes, 114. If a man, ſeiſed of three acres, makes a leaſe of one to *A.* for life, and of another to *B.* for life, and of another to *C.* in tail, and then reciting the ſeveral eſtates, covenants, after all the eſtates finiſhed, to ſtand ſeiſed to the uſe of his brother in fee; if *A.* dies, the brother ſhall have the reverſion of that acre immediately, and not expect till the other eſtates, that is, the other eſtate for life, and the eſtate-tail, are determined; for it muſt be conſtrued *ſecundum ſubjectam materiam;* and the covenantor hath three diſtinct reverſions in him.

It is a rule likewiſe, that a fee cannot be raiſed by way of purchaſe to a man's right heirs, for wherever the heir takes by purchaſe, the anceſtor muſt depart with his whole fee. Thus, *A.* ſeiſed in fee had iſſue two ſons *B.* and *C.*; *A.* covenanted to ſtand ſeiſed to the uſe of *B.* and the heirs male of his body on *M.* his wife to be begotten; and for want of ſuch iſſue, to the heirs male of the covenantor; and for want of ſuch iſſue, to his own right heirs for ever. *B.* had iſſue of *M.* a ſon and a daughter; *A.* dies, and then the ſon dies; the daughter ſhall not take as heir general, but the uncle, *viz. C.* ſhall take *per formam doni*, and not by purchaſe, but by deſcent. 2 Mod 207. 211. Southcot v. Stowel.

It is to be obſerved likewiſe, that uſes may ariſe on covenants to ſtand ſeiſed by implication; as,

If a man covenants to ſtand ſeiſed to the uſe of the heirs male of his body, omitting himſelf, *per* three juſtices, but *Twiſden*, J. *contra*, it is good, and he himſelf takes by implication; and ſo judgment was given for the defendant. Vent. 372. Pibus v. Mitford.

But, where *A.* made a feoffment to the uſe of himſelf for life, and after his death, and the death of *M.* his wife, to *B.* his ſon in tail; it was held in this caſe, that no implied uſe did ariſe to *M.*, and therefore the eſtate to *B.* was contingent. Pollex. 54. Carpenter v. Smith.

It has been held likewiſe, that a covenant to ſtand ſeiſed to the uſes in the indenture, and to no other, cannot exclude uſes by implication, but only expreſs uſes. 2 Lev. 76. Arg. in caſe of Pibus v. Mitford.

2. *Of the Nature and Operation of a Bargain and Sale to Uſes.*

The nature and effect of this kind of aſſurance has been already explained *; and having thus treated of the ſeveral ſorts of conveyances to uſes, we proceed to ſhew, * See title *Bargain and Sale.* vol. 1. p. 463.

(F) What Kind of Property may be conveyed by way of Uſe.

ALL lands and inheritances local, as rents *in eſſe*, advowſons in groſs, common for ſo many beaſts, liberties, franchiſes, viſible or local, may be conveyed by way of uſe. J. in Parl. in Ld. Willoughby's caſe. Sir Wm Jo. 127 by Dodderidge,

But inheritances perſonal, which have no relation to lands or local hereditaments, cannot be conveyed by way of uſe, as *annuities*. *Id. ibid.*

A ſeignory, however, conſiſting of homage and fealty, the ſervice being merely perſonal, and to be performed by the perſon of a man, and reſting in feaſance, may be granted to a uſe in reſpect of the poſſibility that the tenancy may eſcheat, which perhaps never will be. *Per* Crew, Ch. J. Sir W. Jo 117. in Ld. Willoughby's caſe.

So, a ſtewardſhip or bailiwick in fee-ſimple of a manor may be granted to a uſe, being perſonal offices in point of ſervice. *Per* Crew, Ch. J. Jo. 117. in Ld. Willoughby's caſe.

Per Crew, Ch. J. Jo. 118. in Ld. Willoughby's caſe.

So, a liberty of *retorna brevium*, which is perſonal, conſiſting in execution of proceſs.

cites it as ruled, 42 Eliz. B. R. in the Counteſs of Warwick's caſe.

Id. ibid.

So, of a ſhrievalty of a county. And,

And it is there farther ſaid, that there is a diverſity between a mere and a naked truſt, wherein he that hath it, hath neither *jus in re*, nor *jus ad rem*,

Where it is ſaid, that a truſt cannot be raiſed out of a truſt, and therefore a bargain and ſale by deed indented and enrolled cannot be limited to a uſe, becauſe a uſe cannot be limited to a uſe, yet, notwithſtanding, when a man is ſeiſed of an eſtate of an inheritance of an office holden by grand ſerjeanty, wherein there is required truſt in the perſon, yet a uſe, which is a pernancy of the profits belonging to that office, may be raiſed out of the eſtate of inheritance, otherwiſe no land holden by grand ſerjeanty could be transferred to a uſe, nor any uſe raiſed out of the ſame.

nor remedy by the common law, but only a mere perception of the profits by the permiſſion of the terretenant; and an eſtate of inheritance, wherein the owner hath both *jus in re*, and *jus ad rem*, by the rule of the common law, and for the profit whereof the law giveth the owner remedy by writ of aſſize, and a *præcipe quod reddat*, as the caſe requireth; and the confidence required in the perſon for executing the office may be an objection (though a weak one) that it cannot be transferred over; but that a uſe, that is, a pernancy of the profits, cannot be raiſed out of the eſtate, the truſt in the perſon is no objection at all; for the uſe reſpecteth the eſtate of inheritance, and not the perſon.

Gil. Law of Uſes, &c. 281.

Nothing that paſſes by way of extinguiſhment, can be granted to a uſe.

Arg. Le. 148. pl. 205. in caſe of Read v. Naſh.

Neither can a uſe be raiſed out of a power.

Sir Wm. Jo. 227. Gil. Law of Uſes, 281.

Neither can things which are mere rights be conveyed by way of uſe, as *commons*, &c. *ways in groſs*, for a man cannot walk over ground to the uſe of a third perſon.

Cro. J. 189. pl. 13. Bewdley v. Brookby.

In caſe the plaintiff declared that the defendant ſeiſed in fee of the lands over which there was a way, and of other lands by indenture of bargain and ſale enrolled, conveyed his lands to *J. S.* in fee, with a way over his lands, and that *J. S.* leaſed the premiſes to the plaintiff, and that the defendant diſturbed him. The court were all of opinion, that by this bargain and ſale the land only paſſed, and not a way over the ſame, becauſe nothing but the uſe paſſed by the deed, and there cannot be the uſe of a thing which is not *in eſſe*, as a way, common, &c. newly created, and until they are created no uſe can be raiſed by bargain and ſale, and, conſequently, nothing paſſed by the indenture.

And. 294. Inglefield's caſe.

A uſe may be of a leaſe or chattel.

But it is ſaid, that the property of money cannot be changed by a gratuitous delivery to a uſe. Thus,

Dy. 49. a. b pl. 7. &c. Lyte v. Penny.

A ſum of money was delivered to *J. S.*, to the uſe and behoof of a woman, to be delivered to her at the day of her marriage, and before the marriage the bailor revoked it. Two juſtices held the money countermandable, and two *è contra*. But *Dyer* ſays, it ſeems that the property of the money cannot be changed by the words to the uſe and behoof.

But, if the money had been delivered by way of conſideration, ſatisfaction, or recompence, there, the property would alter, and the bailor could not countermand it. Dyer, *loc. citat.*

One

One ſeiſed in fee may bargain and ſell, grant and demiſe land to others and their heirs to the uſe of one for years, becauſe he has a fee-ſimple. But leſſee for years cannot grant and ſell his leaſe to the uſe of one for years. Brownl. 40.

We have thus ſhewn how uſes may be raiſed according to the nature of the reſpective aſſurances, and what kind of property may be conveyed by way of uſe: it remains now therefore more particularly to inquire,

1. What kind of uſes are executed by the ſtatute; 2. what caſes are out of the ſtatute.

(G) Of the ſeveral Kinds of Uſes executed by the Statute *, which in their more general Diviſion are Twofold, *viz.*

* Concerning the execution of *Jointures* by the latter clauſes of the 27 H. 8. c. 10. See title *Jointure*, V. 3. p. 220.

1. Uſes *in eſſe*. 2. Uſes in Poſſibility.

1. Uſes *in eſſe*.

WITH regard to uſes *in eſſe*, they are raiſed either by tranſmutation of poſſeſſion, or without ſuch tranſmutation; and the manner in which they are executed has been already explained in treating of the ſeveral ſorts of conveyances to uſes, and their reſpective operations. It remains therefore to conſider of—

2. Uſes in Poſſibility; wherein,

1. *Executory Fees*. 2. *Contingent Remainders*.

1. *Of Executory Fees*.

Though a remainder of a fee cannot, by the rule of law, be limited after a fee-ſimple, yet that rule hath of late been evaded by diſtinguiſhing between an abſolute fee-ſimple and a fee-ſimple which depends on a contingency; and how ſuch executory fees may be limited, is here to be conſidered, and they are to be governed by the following rules: See *ante*, letter D. p. 357. In what caſe the ſtatute operates againſt the rules of law.

1ſt, That all limitations that tend to the proviſion of the family, and to ſecure againſt contingencies which are within the party's own immediate proſpect, are to be favoured. Gil. Law of Uſes, 118.

2dly, All limitations that perpetuate, or tend to perpetuity, are in themſelves void and repugnant to the policy of the law.

And therefore it is to be ſeen what is a perpetuity. *Id. ibid.*

A perpetuity is the ſettlement of an intereſt deſcendible from heir to heir, ſo that it ſhall not be in the power of him in whom it is veſted to diſpoſe of it, or turn it out of the channel. Caſ. of Perpet. 31. 1 Rep. 138.

The inconveniences of which are, that the eſtate is made incapable of anſwering the ends for which the perpetuity is maintained and eſtabliſhed; for it puts it out of the power of the owner to *Id. ibid.*

provide

provide for the neceſſities of his family, or the extremity and various changes of his own affairs out of the eſtate; beſides, it would be of univerſal damage to the commonwealth; for it would ſhut up all converſe, by making the way of communication between land and money utterly impracticable. To know therefore how far a limitation may be allowed, without the danger of being conſtrued a perpetuity, it is to be conſidered what limitations are conſiſtent with the rules of reaſon and policy.

Gil. Law of Uſes, 119. 1ſt, The law in all caſes allows the limitations of eſtates for life, to perſons in being; for there can be no danger in ſuch a common limitation, nor any deſign to perpetuate; and therefore here the party is reſtrained from alienation farther than for his own life.

Id. ibid. & 120. 2dly, The law allows of no eſtate of inheritance, that goes in lineal ſucceſſion, but what is under the power of that perſon to whoſe repreſentatives the eſtate muſt deſcend; and to eſtabliſh a right of ſucceſſion, and to reſtrain the power of alienation, is to perpetuate; and therefore to limit an eſtate of ſucceſſion, determinable upon a remote contingency, tends to a perpetuity; ſince none can purchaſe with ſecurity while ſuch a cloud hangs over the eſtate.

Before we proceed to the application of theſe principles, it is neceſſary to obſerve, that

As to executory fees, there is a difference, where they riſe by way of uſe, and where by way of deviſe.

Cro. Eliz. 765. Wood v. Reignold. Moor, 731. Strangways v. Newton. 1ſt, If they riſe by way of uſe, there muſt be a ſeiſin in ſome body to be executed in the grantee of the contingent uſe, whenſoever the contingency happens; for if there be not a perſon that can be ſeiſed of a uſe, there can be no uſe; and, conſequently, there can be no execution of it; therefore if a man covenants to ſtand ſeiſed to the uſe of himſelf in fee, till ſuch a marriage take effect, and then to the uſe of himſelf for life, the remainder to his wife, his ſon, *&c.*, and before the marriage he makes a feoffment in fee, gift in tail, or leaſe for life, upon good conſideration, without notice of the uſes, the eſtates limited after the marriage ſhall never ariſe; becauſe there is nobody ſeiſed to ſuch uſes. And the ſame law is of feoffments to ſuch contingent uſes.

Cro. Jac. 168. Bould v. Winſton. But, if in this caſe he had made a leaſe for years, he would not have deſtroyed the future uſe, but only have bound it; becauſe there is a ſeiſin, out of which the uſe ariſes; and at common law, if the feoffees had made a leaſe upon good conſideration, as in this caſe, it would have bound the lands, and conſequently *ceſtui que uſe* muſt have the profits of the land thus leaſed; and in this caſe, ſince the ſtatute, the covenantor has the ſame power of obliging the fee; and therefore thoſe to whom the contingent eſtates are limited muſt take it under the charge.

Moor, 733. Strangway v. Newton. Gil. Law of Uſes, 126. So in caſe of feoffment to the uſe of *A.* in fee, and if *B.* pay ſo much, *&c.* then to *B.* in fee; if *A.* deviſes his land, and dies, it deſtroys the contingent eſtate: otherwiſe it is, if he had deviſed portions out of the land, for that would not alter the freehold.

A re-

A recovery doth not bar an executory fee; for the recoveror with notice, and without conſideration, is ſeiſed to the former uſes. Cro. Jac. 592, 3. Pells v. Brown.

2dly, With regard to executory deviſes.

They have been already treated of under title *Deviſe* *; yet it may not be improper to take notice of ſome circumſtances more particularly applicable to the title under conſideration. * See title *Deviſes*, letters I and K, and *Remainder*, letter D.

If a man deviſes lands to *A.* in fee, and upon contingency to *B.* in fee, and *A.* makes a feoffment in fee, this doth not deſtroy the contingency; for by a deviſe the freehold itſelf is transferred, and there needs no perſon to be ſeiſed to execute an eſtate in the deviſee, as muſt be where a feoffment is made to executory uſes. Gil. Law of Uſes, 127.

But, if a man deviſe to *A*, for life, with a contingent remainder, if *A.* makes a feoffment in fee, this deſtroys the contingent remainder, becauſe there is no particular eſtate to ſupport it. *Id. ibid.* With regard to executory deviſes of fee-ſimple in contingency, after an abſolute fee, they ſtand upon the reaſon of the old law, which admits favourable diſtinctions to ſupply the intent of the teſtator, that being always to be obſerved in wills; and where there is ſuch an executory deviſe, there needs not any particular eſtate to ſupport it, becauſe the teſtator did not part with his whole eſtate in the firſt limitation, for ſomething ſtill remained in him to give, which accordingly he gave to another, but upon a contingency which might happen upon the firſt limitation; therefore, becauſe the perſon who is to take upon him ſuch a contingency, hath not a preſent, but a future intereſt, his eſtate cannot be barred by a common recovery; and that which remained in the teſtator to give, after the firſt fee thus limited upon a contingency, ſhall deſcend after his death to his heir, till the contingency happens. 2 Nelſ. Abr. 797.

It remains now to apply the principles above laid down.

1. With regard to Freeholds.

The firſt remainder which was allowed to be good by a deviſe, after a conditional fee-ſimple limited before in the ſame will, was *anno* 20 *Eliz.* where the deviſe was to the ſon and his heirs, and if he die before twenty-four, and without heirs of his body, remainder over: now this was a plain remainder limited after a fee-ſimple to the ſon, but not upon his dying without heirs of his body generally, for that had been too remote an expectancy, but it was upon his dying without heirs of his body, before he was twenty-four years old; ſo that it being a remainder to ariſe upon a contingency, which might happen in a few years, it was adjudged good, but the ſon living many years after he was twenty-four years old, this contingency never happened; and therefore it was adjudged he had an eſtate in fee, and not in tail. 3 Leon. 64. Hind v. Lyons. Dyer, 124. pl. 38.

But there can be no executory deviſe of a fee-ſimple, after an eſtate-tail; becauſe that would tend to a perpetuity; therefore the firſt limitation muſt always be in fee; as for inſtance, the father having two daughters, deviſed a houſe to the eldeſt and her heirs, and another houſe to the youngeſt and her heirs, and if the youngeſt died before ſhe was ſixteen, living the eldeſt, then the houſe to the eldeſt and her heirs; and if both his daughters died without iſſue, then both the houſes to his grandaughters and their heirs. Adjudged, that this laſt clauſe, *viz.* if both his daughters died without iſſue, did not make croſs remainders to them in tail by implication; but that each of them had a fee-ſimple conditionally, immediately, *viz.* the eldeſt if ſhe ſurvived, her ſiſter dying before ſhe was ſixteen, and the youngeſt if ſhe outlived Dyer, 330. pl. 20. 2 Nelſ. Abr. 797.

outlived that age; that the eſtate-tail was not veſted in the eldeſt but upon a contingency, *viz.* if the youngeſt daughter had died before ſhe was ſixteen, which contingency never happened, becauſe the youngeſt daughter outlived that age; and then this caſe was no more than a deviſe of a houſe to the youngeſt daughter and her heirs, and if ſhe die before ſhe was ſixteen, living the eldeſt, then to her and her heirs; which is a remainder in fee limited, after a conditional fee; and good by way of executory deviſe.

Gedb. 282. Pells v. Brown. Cro. Ja. 590. S. C. But, if an eſtate be limited to *J. S.* in fee, while *J. N.* hath iſſue, remainder to *J. D.*, this is void to *J. D.*, for this comes within the danger of a perpetuity, and doth not determine within the common compaſs of an eſtate for life. Vaugh. 272. Gardner v. Sheldon.

Nevertheleſs we meet with ſome contrary reſolutions as to this point, till at length the law ſeems to have been ſettled by the following caſe, *viz.* the father deviſed his lands to his youngeſt ſon and his heirs, and if he died without iſſue, living the eldeſt, then to him and his heirs; afterwards the youngeſt ſon imagining he had an eſtate-tail, by theſe words, *if he died without* iſſue, ſuffered a common recovery, and ſold the lands, and died without iſſue, his eldeſt brother being ſtill living; and the queſtion was, whether he had a good title or not, againſt the purchaſer? It was adjudged for him, that he had a good title, becauſe the youngeſt ſon had neither an eſtail-tail, nor an abſolute fee-ſimple, but a conditional fee; for the deviſe to him and his heirs, and if he die without iſſue, is not abſolute, and indefinite, but it is tied up to a contingency of his dying whilſt his eldeſt brother was living; now he being living when the youngeſt brother died, the fee-ſimple determined by his death without iſſue, and immediately aroſe in the eldeſt brother, who had the remainder in fee, depending upon the poſſibility that he might be alive when his youngeſt brother died without iſſue, which remainder did not depend upon any particular limitation, but upon a collateral determination of the eſtate of the youngeſt ſon dying without iſſue whilſt he was living; and becauſe it was a remainder not in being when the recovery was ſuffered, nor until the ſaid contingency did happen, therefore it could not be barred by that recovery.

Nelſ. Abr. 798.

So, where there was a deviſe to *T. P.* and his heirs, and if he die without iſſue, living *W. C*, or if he die before he is of the age of twenty-one years, remainder over to another in fee; it was adjudged, that this was a conditional fee in *T. P.* immediately, and that the words if he die without iſſue, make an eſtate-tail, if he had gone no farther; but it is dying without iſſue, living *W. C.*, ſo that though it was an eſtate-tail, it was not to veſt in *T. P.* but upon that contingency; ſo that there is a plain difference, where the limitation is upon a dying without iſſue generally, and a dying without iſſue in the lifetime of another; for in the firſt caſe there can be no executory deviſe after an eſtate-tail, becauſe that would tend to a perpetuity, for that contingeney is too remote, where a man muſt expect a fee upon another's dying without iſſue generally; but dying without iſſue, living another, may happen in a little time, becauſe it depends but upon one life, and therefore a deviſe of a fee-ſimple to one, but to remain to another upon ſuch a contingency, is now held good, by way of executory deviſe, but not upon a dying without iſſue generally; as for in-

ſtance, the father deviſed lands to his eldeſt ſon and his heirs, and other lands to his youngeſt ſon and his heirs, and that if either of them died without iſſue, the ſurvivor ſhould be heir to the other; adjudged, this was an eſtate-tail in them, becauſe it is limited to them upon their dying without iſſue generally. Cro. Ja. 695. Chadock v. Cowley.

2. With reſpect to Chattels.

Not long after a fee-ſimple was adjudged to ariſe to one, after a contingent fee limited to another, it became a queſtion, whether a term for years might be limited in the ſame manner; and it was objected that it could not, becauſe it being no more than a chattel, it was ſo poor and mean an intereſt, that it could not be limited over in remainder; for by the rules of law, the deviſe of a chattel for an hour, is a deviſe of it for ever. Now in anſwer to the poverty and meanneſs of a chattel intereſt, it is certain, there is no material difference between it and an inheritance, in reſpect to the owner of the lands himſelf, but only in reſpect of the duration of his eſtate; for the proprietor of a leaſe for years hath as abſolute a power over it, as the owner of an inheritance hath over that eſtate, and ſince great part of the lands in this nation is held under leaſes, it ſeems very abſurd, for any one to affirm that ſuch leſſees cannot provide for the contingencies of their families, becauſe their eſtates and intereſts in ſuch lands are accounted poor and mean in law, being compared to thoſe who held in fee-ſimple abſolutely. 2 Neſſ. Abr. 801. Ld. Not. Arg. Caſ. of Perp. 32 and 33.

It is true, this reaſon hath prevailed; for formerly, wherever there was a deviſe of a term of years to one, and that if he die, giving another perſon, (particularly named in the will,) that it ſhould remain to the other perſon, during the reſidue of the term, ſuch a remainder was held void. Dyer, 74. pl. 18.

But about the beginning of the reign of Queen *Eliz.* the judges were of another opinion; for there being a deviſe of a term for years to one, for ſo long a time as he ſhould live, remainder over to another; this was adjudged good. At length it was adjudged, that a remainder of a term to one, after it was limited to another for life, was good, *viz.* the teſtator being poſſeſſed of a term for ſixty years deviſed, that his wife ſhould have all his lands in leaſe, for ſo many years as ſhe ſhould live, and that after her death, the reſidue thereof ſhould be to his ſon and his aſſigns, and made her ſole executrix, and died: this remainder was adjudged good upon this diſtinction, *viz.* that there was *jus poſſeſſionis* and *jus proprietatis* of a term for years; that it might be collected out of the words of his will, that the teſtator did not intend the abſolute property of it to his wife, but only the poſſeſſion for ſo many years as ſhe ſhould live, though it is true, there was a poſſibility ſhe might ſurvive the whole term, but that it is plain he intended the right and property of the reſidue of the term to his ſon. And this my Lord *Nottingham* tells us, in the Duke of *Norfolk*'s caſe, was the firſt time that an executory remainder of a term for years was adjudged good. Dyer, 277. pl. 59. Dyer, 358. pl. 50. 4 Leon. 192. Ld. Not. Arg. Caſ. of Perp. 33.

Afterwards

8 Rep. 94. Matthew Manning's caſe. But a grant of the leaſe for years to *J. S.* for life, remainder to *J. N.* is not good to *J. N.*, for leaſes for years being under the power of the freeholder, they are recovered as chattels, and go to the executors; and a chattel cannot be limited for life with a remainder over; becauſe this would create great inſecurity in common traffick. Gil. Law of Uſes, 121.

Afterwards ſome diſtinctions were made, where the deviſe was of the occupation and profits of the land, *&c.* in leaſe, and where the deviſe was of the leaſe or term itſelf; but theſe diſtinctions were ſet aſide in the following caſe. Where a leſſee for years of a farm deviſed the uſe and occupation thereof to his wife for life, and after her deceaſe to his ſon *Matthew Manning*, for the reſidue of the term, and made her ſole executrix, and died; it is true, one judge was of opinion, that the reſidue of the term thus deviſed to the ſon was void, becauſe his mother had the whole by the deviſe to her for life, and there being only a poſſibility that ſhe might die before the term expired, the reſidue could not be deviſed over to another, to veſt in him upon ſuch a poſſibility; but adjudged, that *Matthew Manning* the ſon did not take this term by way of remainder, but by way of an executory deviſe to him, *viz.* upon the contingency of his mother's death within the term; and that there was no difference where the deviſe is of the leaſe itſelf, or of the land, or farm in leaſe, or of the uſe, occupation, or profits of the land, for the law will make ſuch conſtruction of thoſe words, as may conſiſt with the intent of the teſtator.

2 Vol. Caſ. in Eq. Abr. 191.

The law ſeems to be now ſettled, that executory deviſes are good, provided the contingency is to happen within a life, or ſeveral lives *, ſo that they are all in being, for there can be no tendency to a perpetuity, which was one great miſchief apprehended from thoſe kinds of limitations.

* If there are ever ſo many lives, there muſt be a ſurvivor, ſo that in effect it is but the length of one life. 2 Vol. Caſ. in Eq. Abr. 337.

Gil. Law of Uſes, 124. 2 Vern. 235. Maſſenburg v. Aſh.

As the legal eſtate of a term may be deviſed, ſo the truſt of a term may be limited; the truſt of a term in equity being governed by the ſame rules which govern the deviſe of a term at law.

Id. ibid. Chan. Caſ. 8. Goring v. Bickerſtaff.

A limitation of a term for years to twenty diſtinct perſons *in eſſe* is good, as has been ſaid; but the limitation of a term to *A.* for life, the remainder to the right heirs of *B.* a perſon *in eſſe*, is a void remainder; and after the death of *A.* it ſhall revert to the donor; becauſe this might tend to the eſtabliſhing of an eſtate of inheritance in a chattel, and putting it out of the courſe the law had ſettled for it, whereby it ought to go to the perſonal repreſentative.

Id. ibid.

So, if a term be limited to *A.* for life, the remainder is in the donor; and if a term be limited to *A.* for life, the remainder to the right heirs of the donor, this is a void limitation, becauſe the reverſion is in him.

Id. ibid. 4 Rep. 66. Fulwood's caſe.

But, if the truſt of a term be limited to *A.* for life, the remainder to *B.*, *B.* may diſpoſe of the remainder; yet, if a term be deviſed to *A.* for life, the remainder to *B.*, *B.* cannot diſpoſe of this remainder; for by the rules of the common law, a poſſibility cannot be granted over, for a man that only may have a right, has at preſent no right in him; and while the rules of law ſay he has

has no right, it is contradictory and repugnant, to allow him to act as a perſon having right, by transferring an intereſt to another. *B.*, in this caſe, has only a poſſibility to have a right, becauſe the eſtate of *A.* being of uncertain duration may outlaſt the term for years; but in Chancery, where the truſt is examined, they allow a man to provide for his preſent occaſions out of what he may poſſibly have; and a purchaſer of it ſhall not loſe the probable advantage, ſince he hath given for it a valuable conſideration.

2. *Of contingent Remainders.*

The law reſpecting this title has, in part, been already explained*, it may be neceſſary however more particularly to conſider,

* See title *Remainder*, letter D, & *ſequent.*

1. *In what Manner they are to be executed.*

If a feoffment be made to *J. S.* in fee, to the uſe of *A.* for life, remainder to his firſt, ſecond, and third ſon, the remainder to *B.* in fee, from theſe limitations the three following obſervations may be drawn: Gil. Law of Uſes, 127.

1ſt, That there ought to be a perſon ſeiſed to the uſe at the time when the uſe is executed; and this is plain by the words of the ſtatute, *viz. if any perſon ſtand or be ſeiſed.* 1 Rep. 126. a. Chudleigh's caſe.

2dly, That the eſtate for life is immediately executed in *A.* with the remainder in fee to *B.* by the ſtatute; becauſe the uſe is immediately in them, and they have the poſſeſſion in the ſame manner they have the uſe. Pop. 74.

3dly, That no poſſeſſion can be immediately executed in the heirs, becauſe they are not in being; and therefore capable of no property, neither in uſe nor poſſeſſion. 1 Rep. 126. a. Pop. 72. 1 Rep. 136. a.

The inattention to theſe particulars cauſed two falſe opinions in this matter in the debate of *Chudley*'s caſe.

1ſt, Some thought, according to the ſecond rule, that the whole poſſeſſion muſt be executed in *A.* and *B.*, and therefore the contingent uſe, when it falls, was executed out of the firſt livery; and the eſtate formerly in the feoffees; and this by the words of the ſtatute, declaring that the eſtate that was in the feoffee, ſhall be in *ceſtui que uſe*; and hence they inferred, that ſince the eſtate was executed by the power of the ſtatute, it muſt be preſerved in ſuch execution by the ſame power; and therefore they ſaid, the contingent remainders were in *abeyance*, and not extinguiſhable by the alienation of tenant for life. Pop. 73. 1 Rep. 132, 133, 134.

But this is a miſtake; firſt, becauſe this is contrary to the firſt rule; for that ſuppoſes an eſtate in *J. S.* at the time of the execution. 1 Rep. 136. a. 1 And. 332.

2dly, Becauſe it is contrary to the nature of an abeyance by the laws of law; for if there be tenant for life, remainder to the right heirs of *J. S.* living, if tenant for life dies, or aliens, during the life of *J. S.*, the remainder is deſtroyed. 1 Rep. 135.

3dly, Becauſe it would create a perpetuity. Gil. Law of Uſes, 129.

Some

Id. ibid. Some add another conſequence of this doctrine, that a uſe would riſe out of a uſe.

Id. ibid. 1 Rep. 128, 9. Others held a different opinion; and they thought there was an immediate remainder veſted in *J. S.* to ſerve the contingent uſe when it falls, and that this eſtate was determinable upon the riſing and execution of the eſtate in the ſons, *&c.*

Id. ibid. But this could not be; firſt, becauſe this is contrary to the ſecond rule; for thereby an eſtate is immediately veſted in *A.* and *B.*, but by this opinion, the eſtate in *B.* is only executory; for it ariſes to him upon the ſame contingency that the eſtate of *J. S.* riſes, for he could not have a fee before; for then there would be a double fee.

Id. ibid. 2dly, Becauſe *J. S.* would have a remainder without any grantor, and the law leaves it to parties to limit their own eſtates; and where nobody has limited an eſtate, there can be no legal limitation.

Id. ibid. 3dly, If a remainder be veſted in *J. S.* he muſt puniſh waſte, and enter for a forfeiture; but the party deſigned him no ſuch benefit, but made him only an inſtrument to convey it to others.

Gil. Law of Uſes, 130, 1. The true opinion is, that the legal eſtate is executed in *A.* and *B.*, but the contingent remainders are not utterly loſt, becauſe the poſſeſſion by the ſtatute muſt be executed in the ſame manner as the uſe is limited; therefore there remains a poſſibility of poſſeſſion by the feoffees, to this purpoſe only, that when the contingency happens, then the poſſeſſion may be transferred to the remainder-man; and if this is an eſtate not known before, and ſo has no determination at common law, yet it is ſuch an one as muſt be raiſed by the intent of the ſtatute, and all its ends could not be anſwered without it; and therefore to ſuppoſe, as in the other opinions, no eſtate in the feoffees, or to reduce it to the ſtandard and rules of the common law, is equally falſe and impracticable.

2. *How they may be defeated.*

1. Where there is no Power of Revocation.

* See title *Remainder*, letter G. How they may be defeated, where there is no power of revocation, has been already explained *; it may not be improper however to take notice of the following diſtinctions.

2 Roll. Abr. 793. Bould v. Wiſton. Noy, 122. Gil. Law of Uſes, &c. 138. cites S. C. and ſays, that this will not prevent the raiſing of the contingent remainder, nor bind it; for the covenantor has no power to demiſe any thing but the reverſion, and conſequently the freehold remains unaltered to ſupport the contingent remainder. But he adds, that if the

If a man covenants for a good conſideration to ſtand ſeiſed to the uſe of his ſon for life, the remainder to ſuch feme as the ſon afterwards ſhall take to wife, for her life, with remainder over, and after the covenantor makes leaſe for years of the land, reſerving certain rent, and after the ſon takes a wife and dies; this leaſe for years is a revocation and deſtruction of the contingent uſe for ſo much of the time as the leaſe is to continue; for the eſtate of the land is diſturbed before the contingent happened; but this is not any revocation for more than the leaſe, for the feme ſhall have the reverſion, and the rent reſerved upon the leaſe.

the covenantor in this caſe had reſerved to himſelf a power of making leaſes, this leaſe would have been good, and a revocation of the former uſes. [*Vide ſupra*, tom. 5. p. 774. S. C.]

If *A.* ſeiſed in fee, in conſideration of natural love and affection to his wife and children, covenants with *B.* to ſtand ſeiſed thereof to the uſe of himſelf for life, and after to the uſe of his wife for life, and after to the uſe of *C.* his daughter for life, and after to the firſt ſon of the body of *C.* begotten, and ſo after to the other ſons of *C.* in tail, and after to his own right heirs, and after *A.* by indenture between him and *F.* reciting the ſaid conveyance and eſtates, grants his ſaid reverſion in fee without any conſideration to *F.* and his heirs, to the uſe of *F.* and his heirs: this grant of the reverſion in fee to *F.*, is not any deſtruction of the contingent uſe limited to the firſt ſon of *C.*, but that the uſe of the firſt ſon of *C.* born after this grant, and in the life of *A.* or *C.*, ſhall ariſe well enough, becauſe by the grant of *F.* of the reverſion, the firſt uſes and eſtates being recited in the deed of grant, and this being without any conſideration, the grantee ſhall ſtand ſeiſed to the firſt uſes, inaſmuch as he has conuſance of the firſt uſes; and though he limits it to the uſe of the grantee and his heirs, yet this does not alter the truſt any more now than at the common law.

2 Roll. Abr. 796. This was upon a conveyance made by Sir Edward Coke. 2 Sid. 64. 129. 157. Heyns v. Villars. Gil. Law of Uſes, 136. cites S. C. and ſays, that this doth not deſtroy the contingent remainder to the ſon of *C.* for life, who had a right of entry for the forfeiture, and a particular eſtate in right, on which the contingent remainder will depend. [*Vide ſupra*, tom. 5. pag. 764. S. C.]

But, if in this caſe the wife had entered after the huſband's death; this would not only have revived her eſtate, but the eſtate of *C.* and the contingent remainder thereon, which had never been put out of being; otherwiſe it is, as is ſaid, in *Sampſon Shelton*'s caſe, if the contingent remainder had depended upon the eſtate of *B.* Gil. Law of Uſes, 136.

If a feme covert or an infant be enfeoffed to any uſe precedent ſince the ſtatute, the infant or baron comes too late to diſcharge or root up the feoffment: but, if an infant be enfeoffed to the uſe of himſelf and his heirs, and if *J. D.* pay ſuch a ſum of money to the uſe of *J. G.* and his heirs, the infant may diſagree and overthrow the contingent uſe. Ld. Bacon's Readings on the Statute of Uſes, 348.

But it is otherwiſe, if an infant be enfeoffed to the uſe of himſelf for life, the remainder to the uſe of *J. S.* and his heirs, for he may diſagree to the feoffment as to his own eſtate, but not to diveſt the remainder, but it ſhall remain to the benefit of him in remainder. Lord Bacon's Readings on the Statute of Uſes, 348.

2. Where there is an expreſs Power of Revocation.

A feoffment or fine, *&c.* with power of revocation is void at common law, as to all power of revocation; for the words of enfeoffing or granting, *&c.* transfer the whole right, property and power of diſpoſal to the feoffee, *&c.* and therefore for the party to limit to himſelf a power of revocation and diſpoſal, is repugnant to the force of the precedent words, and would introduce a double power ſeated in diſtinct perſons over the ſame thing, 1 Inſt. 237. Gil. Law of Uſes, 141.

which the common law diſallows. But this rule of law was ſet aſide by the ſame conſtruction that hath brought in executory fees; for when, before the ſtatute, uſes were limited with power to revoke, as the occaſion, circumſtances, and mind of the party altered, it was thought reaſonable that the parties ſhould have liberty to revoke according to their own apparent intent, by which uſes are ever governed; and ſince the poſſeſſion is executed by the ſtatute as the party had the uſe, the eſtate continues revocable.

Hard. 415. per Hale: Edwards v. Slater.

A power of *revocation* is two-fold;

1. A Power relating to the Land.
2. A Power ſimply *collateral* to the Land.

1ſt, A power relating to the land is, where a power is limited to one that had, hath, or ſhall have an eſtate or intereſt in the land.

Hard. 415. Gil. Law of Uſes, 141.

This is again two-fold;

1. *Appendant* or *annexed* to the Eſtate in the Land.
2. In *Groſs*.

Id. ibid. 1ſt, Appendant or annexed to the eſtate in the land, is, when a man hath an eſtate in the land, and a power of revocation, and the execution of the power falls within the compaſs of the eſtate in the lands; as if the tenant for life with power to make leaſes, or to revoke, grants a rent-charge, and then makes a leaſe according to his power, the leſſee ſhall hold it charged during the life of the tenant for life; for he hath power to charge his own intereſt, which by his own act cannot be avoided.

And if in this caſe he covenants to ſtand ſeiſed to the uſe of a ſtranger, he cannot, by any after-act, revoke the uſes; for ſince, as is ſaid, the execution of this power falls within the compaſs of the eſtate, ſo that, unleſs it be executed during the continuance of the eſtate, it can never be executed; therefore, whatever act paſſes away the eſtate, hinders the execution of this power of demiſing; for a man cannot demiſe that eſtate which he hath paſſed away to another.

Hard. 416. Gil. Law of Uſes, 141. 2dly, in groſs, is where a man hath an eſtate and power of revocation, and the execution of the power falls out of the compaſs of the eſtate; as, if there be a tenant for life, remainder in tail, with a power lodged in tenant for life to make a leaſe for 31 years to commence after his death, to raiſe portions to his daughters; this is a power in groſs; and if tenant for life bargains and ſells the lands in fee, this doth not deſtroy the power; for ſince the execution of the power doth not fall within the compaſs of his own eſtate, the ſelling of his own eſtate only doth not hinder the making uſe of the power.

Hard. 416. But, if he had levied a fine, or made a feoffment in fee, this power had been deſtroyed, for here he abſolutely paſſes the entire eſtate, and deveſts all the remainders; and thus, by paſſing the whole eſtate to another, and limiting new uſes to his own benefit, he hath deſtroyed all the power of revocation; for this power cannot

cannot be executed but out of the remainders; and he hath prevented the execution of it by having already diſpoſed of the whole eſtate to another.

He may likewiſe releaſe ſuch a power of revocation to the remainder-man; for he that is to have an intereſt by any poſſibility may releaſe the ſame to the preſent poſſeſſor, as well as if he had a future right, for it is according to the policy of the law, for the quiet and peace of the poſſeſſors. Hard. 416. And ſee 10 Rep. 48. Lampet's caſe. Gil. Law of Uſes, 143.

2dly, Where the power of revocation is ſimply collateral. Hard. 415.

And that is, where a man hath no preſent intereſt in the land, and by the revocation of the eſtate is to have nothing. Gil. Law of Uſes, 144.

In this caſe, a fine or feoffment of the land is no extinguiſhing of the party's power; for though every man is eſtopped to claim an intereſt contrary to his own act, whereby he paſſes an eſtate to another; yet, if a man makes a feoffment, or levies a fine, and then revokes, whereby a ſtranger claims an intereſt; the ſtranger, who is the only perſon that can claim, is not eſtopped to claim it, for no man is eſtopped from demanding his own right by the act of another; and if there be no eſtoppel in this caſe, the ſtranger hath a right by the contract. *Id. ibid.* 1 Rep. 174. Digge's caſe.

It remains laſtly to conſider of the manner of *revocation*.

1ſt, If a covenantor is tenant for life, having a power of revocation, upon revoking he is ſeiſed of his former eſtate, without entry or claim; for he is in poſſeſſion already; and therefore there can be no entry, and the claim where the party is already in poſſeſſion is a void ſolemnity; for it doth not make any change of property notorious. 1 Inſt. 237. 1 Rep. 173, 174. Digge's caſe.

2dly, If there be a tenant for life, with a power to revoke the remainders, and limit new ones, he may do both by the ſame conveyance. *Id. ibid.*

For ſince upon revocation the former uſes are void *ipſo facto*, without any ſolemnity; there is nothing to hinder why the ſame conveyance ſhould not create new ones, and the law, to ſupport the contract, will ſuppoſe the deſtruction of the ancient uſes to precede the creation of the new uſes.

[But, where a revoker limits new uſes, not being expreſsly warranted by his power ſo to do, or, if warranted, then not exactly purſuant to the terms of the power, ſuch uſes cannot enure upon the original conveyance, but muſt take effect out of his intereſt; they muſt, conſequently, be limited on a *new grant*, or by *covenant* upon a conſideration expreſſed; the conſideration of the original uſes not extending to the new uſes limited upon the revocation. Powell on Powers, 281.

R. B. having iſſue only one daughter married to *E.*, levied a fine, and by indenture declared the uſes to *R. B.* and his heirs males, remainder to ſeveral of his brothers, and the heirs males of their bodies, remainder to the ſaid daughter, *&c.* In the indenture there was a *power* of revocation of thoſe uſes, and alſo a power to declare new uſes. An indenture was made accordingly, Ward v. Lenhal, 1 Sid. 343.

revoking the firſt uſes, in which alſo there was a power of revocation, but no power to limit new uſes. Then another indenture of revocation, and alſo declaring new uſes, was made; which indenture contained a clauſe, that all other fines afterwards to be levied ſhould enure to thoſe uſes. Upon this caſe it was argued, and alſo agreed by the court, that if an indenture declared the uſes of a fine, and further that it ſhould be lawful to revoke, &c., and alſo to limit new uſes, &c., the party might, by ſuch deed, revoke and limit new uſes as often as he pleaſed, and all the eſtates ſhould ariſe out of the fine. But, if upon any ſuch indenture, wherein he declared new uſes and reſerved power of revocation, he omitted *expreſsly* to reſerve a power to limit new uſes; he could then only revoke, and could not limit new uſes by virtue of the eſtate raiſed by the firſt fine. And thereupon the counſel, in ſupport of the laſt indenture, ſhewed another fine levied the term after the date thereof, by which it was agreed, that the eſtates limited by the laſt indenture were well raiſed.

Anon. 3 Str. 584.

A. ſuffered a recovery to the uſe of himſelf for life, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in tail, remainder to *A.* in fee, with power to revoke the three remainders in tail by any writing under his hand and ſeal. He revoked them within the terms of the power, and, by the ſame deed, declared new uſes in favour of the plaintiff without any words of conveyance, covenant to ſtand ſeiſed, or conſideration expreſſed. The queſtion was, Whether this new declaration of uſes was good or not? It was inſiſted in ſupport of it, that *A.*, having revoked the intermediate remainders, had the whole fee in himſelf, and might diſpoſe of it as he pleaſed: and whether it was by the ſame deed or a different deed was not material. But it was anſwered, and reſolved by the court, that true it was, he might, by will or any new conveyance, have made ſuch new diſpoſition, and even this deed would have been ſufficient for ſuch purpoſe, if there had been a *new grant*, or a *new covenant* on conſideration expreſſed: but, here, he had declared new uſes as under the recovery; whereas the uſes of the recovery were full before, and the power was only to revoke and not to declare new uſes.]

1 Inſt. 215. a. 237. a. Gil. Law of Uſes, 145.

3dly, He may revoke part at one time, and part at another; for this is not entire, like a condition, for a condition is entire, becauſe the eſtate muſt be defeated in the ſame manner that it is made; for otherwiſe the ſolemnity of the entry will not be equivalent to the ſolemnity of livery; but a revocation is in the nature of a limitation, and there is no ſolemnity neceſſary to the defeating of the eſtate; and therefore it may be done by parts; conſequently, if a fine be levied of part, that is a revocation only of that part.

Thorne v. Thorne, 1 Vern. 141. 182. Perkins v. Walker, *Id.* 97.

[He may revoke too conditionally. Thus, where *A.* ſeiſed in fee made a ſettlement of the eſtates in queſtion, with power of revocation; and ſeven years afterwards mortgaged the ſame in fee to one of the remainder-men in the ſettlement, and the condition of the redemption was, that, if the mortgagor or his heirs paid the money at the day, he ſhould have the lands in his former eſtate;

eſtate; the queſtion was, Whether this mortgage was a total revocation, or only *pro tanto?* The Lord Keeper declared, that it was a revocatlon *pro tanto* only, the mortgagor being to have the lands on payment, as in his former eſtate; and it was decreed accordingly.

But, Sir *Joſeph Jekyll*, in giving his opinion in the caſe of *Fitzgerald* and Lord *Fauconberge*, ſaid, that he knew of no caſe but that of a mortgage, wherein equity controuled a power of revocation; and the reaſon of that caſe was, becauſe the mortgagor in *equity* continued to be ſtill owner of the eſtate, it being conſidered there but as a pledge for the money. And the deciſion in that caſe ſeems to go a great way in ſupport of the opinion. Powell on Pow. 265.

There, *F.*, being unmarried and having no child, and being ſeiſed of eſtates of large annual value, did by leaſe and releaſe, dated the 2d and 3d of *July* 1712, as well for ſettling the ſaid premiſes in his name and blood, to the ſeveral uſes, truſts, and purpoſes, and in ſuch manner as thereinafter limited, " with liberty never- " theleſs, to and for him the ſaid *F.*, freely and clearly at his will " and pleaſure, to diſpoſe of, charge, or alienate the ſaid premiſes, " or any part thereof, for any eſtate or eſtates whatſoever, as he " ſhould think fit; and to revoke, recall, and make void all and " every the uſe and uſes, truſts, limitations, and appointments there- " by raiſed, limited, and appointed, mentioned, and declared con- " cerning the ſame, as alſo in conſideration of 5 *s.*, convey to truſ- " tees and their heirs all the eſtates, to the uſe of himſelf for life, " with remainders over." There was alſo a term created, among other things, by ſale, mortgage, or demiſe thereof, for the term, or any part thereof, to raiſe all ſuch ſums as *F.* ſhould owe at his deceaſe, and alſo all ſuch ſums as he, by his laſt will, or any other deed or writing executed under his hand and ſeal, in the preſence of two or more witneſſes, ſhould give and appoint to be paid, or charge the premiſes with, to any perſon or perſons whatſoever: but, if the perſon next in remainder expectant on the term ſhould pay all the ſaid debts, annuities, and monies ſo to be deviſed or appointed, then the term was to ceaſe. Then followed theſe proviſoes: firſt, " A proviſo or power for the ſaid *F.*, " from time to time, by any deed or writing under his hand and " ſeal, to be ſigned and duly ſealed and delivered in the preſence " of two or more witneſſes, to demiſe, leaſe, limit, or appoint " the ſaid premiſes or any of them, to any perſon or perſons " whatſoever for any term or terms whatſoever, for ſo much " yearly rent as the ſaid *F.* ſhould think fit, and with ſuch other " conditions and agreements as the ſaid *F.* ſhould pleaſe." Secondly, " A proviſo, that if any female, who, according to the " limitations, ought to inherit the premiſes, ſhould marry any " perſon without the conſent of the truſtees, or ſhould marry any " perſon that ſhould be a proteſtant, and not of the communion " of the church of *Rome;* that then, and immediately after ſuch " marriage, all the eſtates before created and appointed for the " benefit of ſuch perſon ſo marrying ſhould ceaſe and be void." Fitzgerald *et. al.* v. Lord Fauconberge *et al.* 3 Brown's Parl. Ca. 543. S. C. Fitzgib. 207.

Thirdly, a proviſo, " That it ſhould and might be lawful to and " for the ſaid *F.*, at any time or times during his natural life, at " his will and pleaſure, to grant, ſell, or demiſe, the thereby " granted premiſes, or any part thereof; or by any deed or writ- " ing under his hand and ſeal, or by his laſt will and teſtament in " writing, ſigned, ſealed, delivered, and publiſhed, in the preſence " of three or more credible witneſſes, to revoke, repeal, and make " void, all, every, or any of the uſe and uſes, eſtate and eſtates, " truſts, and limitations before raiſed, created, limited, or ap- " pointed; and to declare and limit the ſame, or ſuch other new " uſes as ſhould ſeem moſt meet and convenient to the ſaid *F.*; " and then and from thenceforth the eſtates and uſes before " limited and appointed, and ſo revoked and repealed, to ceaſe " and determine and be utterly void, as if the ſame had never " been made, limited, and appointed; and that the ſaid *F.* ſhould " and might diſpoſe of the ſaid premiſes, and every part and " parcel thereof, to ſuch other perſon and perſons, uſe and uſes, " as he ſhould think fit, any thing before mentioned to the con- " trary in anywiſe notwithſtanding."

By other indentures of leaſe and releaſe, dated the 25th and 26th of *September* 1715, made between *F.* of the one part, and *T.* and *W.* of the other, reciting, that *F.* ſtood indebted to ſeveral perſons named in a ſchedule thereunto annexed in the ſeveral ſums therein mentioned; he, as well for ſecuring the ſaid debts, and more ſpeedy payment thereof, and in conſideration of 5*s.*, as alſo for other good cauſes, conveyed to *T. and* W. *and their heirs, the premiſes*, upon truſt that they or the ſurvivor of them, &c., ſhould, *out of the rents and profits of the premiſes or by mortgage*, &c., *raiſe ſo much money as ſhould be ſufficient to pay all the debts mentioned in the* ſaid ſchedule, with intereſt, *over and above the ſeveral annuities, rents, and rent-charges in the ſaid ſchedule mentioned*, wherewith the ſame premiſes ſtood charged, and pay the ſame in full diſcharge of the ſaid debts and intereſt; and, after payment thereof and their own charges being ſatisfied, that " they ſhould pay the overplus thereof (if any), *and reconvey ſuch* " *part of the premiſes as ſhould remain unſold*, to the ſaid *F.*, or " to ſuch perſon and perſons, and to ſuch uſe and uſes, eſtate " and eſtates, as the ſaid *F.* ſhould, by any deed or writing under " his hand and ſeal, atteſted by two or more credible witneſſes, " limit, direct, and appoint the ſame." This indenture was atteſted only by two witneſſes, and remained in the cuſtody of *W.*, the truſtee, till his death.

Then, by indenture dated the 26th of *September* 1715, executed by all the ſaid three parties, reciting the leaſe and releaſe of the 25th and 26th of *September* 1715, it was declared, that it ſhould and might be lawful for the ſaid *F.*, at any time or times thereafter during his life, at his will and pleaſure, by any deed or writing under his hand and ſeal, atteſted by two or more witneſſes, or by his laſt will in writing, atteſted by three or more witneſſes, to revoke, repeal, and make void, all or any of the truſts and eſtates in the ſaid indenture of releaſe of the 26th of *September*

1715, raiſed, created, limited, and appointed of the ſaid premiſes, and every part thereof; and to declare, limit, and appoint the ſame to ſuch other uſe and uſes as ſhould ſeem moſt meet and convenient to him; and that, from thenceforth, the truſts and eſtates ſo revoked and repealed, ſhould ceaſe and be void, as if the ſame had never been created, limited, or appointed; and that it ſhould and might be lawful for the ſaid *F.* to diſpoſe of the ſame premiſes, or any part thereof, to ſuch other perſon and perſons, uſe and uſes, as he ſhould think fit.

F. died on the 24th of *January* 1716, having made no appointment or diſpoſition of the eſtate after the execution of the *deeds* of 1715.

And, upon theſe ſeveral inſtruments, a queſtion aroſe between the heir at law of *F.* and the claimants under the ſettlement of 1712, whether the deed of *September* 1715, for ſecuring the creditors of *F.* was not a revocation of the ſettlement of 1712, purſuant to *ſome* or *one* of the proviſoes therein contained. It was contended on the part of the claimants under the ſettlement of 1712, that if theſe deeds of 1715 were deemed to be a revocation of that ſettlement, (which upon other grounds it was argued they could not be,) yet they could not be a total revocation; becauſe it was admitted, that thoſe deeds operated *only* as an implied revocation, by reaſon of their inconſiſtency with the ſettlement of 1712; and, therefore, were no further a revocation than ſuch inconſiſtency extended: then, the releaſe having conveyed the premiſes in truſt to raiſe money for paying the debts mentioned in a ſchedule thereunto annexed, and afterwards to reconvey to *F.*, or ſuch perſons or uſes as he ſhould appoint, without ſaying to *F.* or his heirs, or limiting the eſtate in default of appointment, which was the caſe that had happened, it was apprehended that the releaſe of 1715 was no further inconſiſtent with the ſettlement of 1712, than as to the particular uſes ſpecified in that deed, and, conſequently, as to the reſt of the eſtate, did not revoke the ſettlement of 1712; and that, under thoſe circumſtances, a court of equity ought to reſtrain it from operating any further than to ſatisfy the particular purpoſe. It was argued on the other ſide as to this point, that *F.*, having, by the deeds of 1715, conveyed the fee and inheritance of the whole eſtate to *T.* and *W.* upon truſts and for uſes utterly inconſiſtent with thoſe of the ſettlement of 1712, this latter conveyance muſt, conſequently, be a *complete* revocation of the former; the legal eſtate being veſted in new truſtees, who could be ſeiſed thereof upon no other truſts than the new ones, and *F.* having made no ſubſequent appointment of ſuch part as ſhould remain unſold, after the particular purpoſes were anſwered, a truſt muſt therefore neceſſarily reſult for the benefit of him and his heirs, according to the eſtabliſhed rules both of law and equity; conſequently, there could be no foundation for a court of equity to controul or abridge the operation of the deeds of 1715, by confirming them to be only a revocation *pro tanto*, merely to diſinherit one of the coheirs at law; and of this opinion was Lord Chancellour *King*, aſſiſted by

Sir *Joſeph Jekyll*, and Lord Chief Baron *Reynolds*: and it was decreed accordingly. And on appeal to the Houſe of Lords, the judges having delivered their opinions *ſeriatim* upon the queſtion, Whether the deed of 1715 were a revocation of the deed of 1712; and if ſo, whether the ſaid deed of 1715 were a total revocation, or a revocation *pro tanto*. It was ordered, that the appeal ſhould be diſmiſſed, and the decree affirmed.]

Gil. Law of Uſes, 145. cites Ley, 55. 57. Allen's caſe.

4thly, The power of revocation follows the eſtate.

Thus, in a covenant to ſtand ſeiſed to the uſe of *A.* for life, remainder to *B.* and his heirs, with power of revocation upon payment of money by *A.* or his aſſigns, to *B.* or his aſſigns; if *B.* dies, *A.* may tender to the heir, who is in law the aſſignee to this purpoſe.

1 Vent. 128 to 132. Smith v. Wheeler. Gil. Law of Uſes, 146.

5thly, A power of revocation is in ſome caſes a forfeiture.

If there be tenant for life, with power of revocation over the eſtates in remainder, and the revocation depend upon circumſtances inſeparably annexed to the perſon of tenant for life, this cannot be forfeited; but, if it depend upon circumſtances, which may be performed by another, the king ſhall take advantage of it, and revoke the uſes: as, if the revocation is to be by writing under the parties' own hands and ſeals, this cannot be forfeited to the king; but, if the revocation is to be upon tender of a ring by himſelf, or any other for him during his life, this power is forfeitable.

1 Vent. 198. Jones v. the Counteſs of Manchеſter. 2 Roll. Abr. 262.

6thly, If a man makes a feoffment with power of revocation, when he hath executed that power, he cannot limit new uſes upon the ſame feoffment; but otherwiſe it is, if he had a power to revoke and limit new ones on the ſame feoffment, for then he might revoke and limit new uſes, with a ſecond power of revocation, *&c.* and ſo *in infinitum*.

2 Salk. 677. Jones v. Morley.

Where a conveyance to uſes enures by way of tranſmutation of poſſeſſion, the uſes may be revoked without deed.

Adams v. Adams, Cowp. 651. (*a*) Colſton v. Gardner, 2 Ch. Caſ. 46. Lady Haſtings's caſe, 3 Keb. 7.

[Where a power of appointment is given, a power of revocation is likewiſe given, although no expreſs power of revocation be reſerved in the deed creating the power of appointment. And where there is a power of revocation, the law alſo gives a power to limit new uſes (*a*), though no power of new limitation be expreſſed in the deed; for he who has power to revoke has alſo power to limit.]

3. How they may be ſuſpended, revived, or extinguiſhed.

It has been ſhewn that where a feoffment, *&c.* is made to feoffees to contingent uſes, and the feoffees make a feoffment over before the contingent uſes happen to be *in eſſe*, that thereby the uſes are deſtroyed for ever.

But if, in caſe of a feoffment to contingent uſes, the feoffees are *diſſeiſed* before the contingent uſes veſt, hereby theſe contingent uſes are only *ſuſpended*; and by the re-entry of the feoffees the ancient uſes will be *revived*.

And therefore, if the feoffees releaſe to the diſſeiſor, and thereby bar themſelves of their entry, the uſes are *extinguiſhed*, and ſhall

ſhall not be revived; and the party grieved has no remedy but in Chancery againſt the feoffees for breach of truſt.

(H) Of the Caſes out of the Statute.

IT has been obſerved, that there are three ways of creating a uſe or truſt, which the ſtatute cannot execute; as, where uſes are limited upon uſes; or, where a term is raiſed and limited in truſt; or, laſtly, where lands are limited to truſtees to pay over the rents and profits. See *ante*, Letter D.

1. Where Uſes are limited upon Uſes.

Thus, if a man bargains and ſells his lands to *A.* to the uſe of *B.*, the ſtatute cannot execute the uſe in *B.*, for by the bargain and ſale, which implies a conſideration, there is a uſe in *A.*; and before the ſtatute it was impoſſible that two diſtinct perſons ſhould have the uſe of the ſame land. Gil. Law of Uſes, 162.

And by the ſtatute, the firſt uſe cannot be executed in *A.*, ſince there could not be two plenary poſſeſſors, and the ſecond uſe being contrary to the diſpoſition to *A.* muſt be null and void. But the Chancery that looks upon the intereſt of the parties in conveyances, conſtrues *A.* only as an inſtrument to take the legal eſtate, and that in conſcience he is bound to anſwer the truſt to *B.* which he hath taken. *Quære tamen*, if the conſideration moves from *A.*? Chan. Caſ. 114, 115. Aſh v. Gallen. Gil. Law of Uſes, 162.

If a man enfeoff another to the uſe of *J. S.* and his heirs, and upon this conſideration, that if *J. N.* ſhall pay ſo much money, then the ſaid *J. S.* and his heirs ſhall be ſeiſed to the uſe of *J. N.* and his heirs, *J. N.* pays the money, the uſe is not executed to him by the ſtatute; but the court of Chancery will undoubtedly ſupport ſuch truſt. Gil. Law of Uſes, 162. Pop. 81. Dillon v. Fraine.

A deviſe ſuppoſes a conſideration, and therefore it cannot be averred to any other uſe than to the uſe of the deviſee, for that were an averment contrary to the deſign of the will appearing in the words. 4 Rep. 4. Vernon's caſe.

But, if a uſe be expreſſed, it ſhall be to the uſe of *ceſtui que uſe*, and will execute; for the will has only an implied uſe, where no other is limited, and *expreſſum facit ceſſare tacitum*. 2 Vent. 312. Burchett v. Durdant.

But, if lands be deviſed to *A.* during the life of *B.*, in truſt for *B.*, the remainder to the heirs of *B.* now living; this is a Chancery truſt in *B.*, and not executed by the ſtatute; for this was the deſign of limiting an eſtate to *A.*, that a tail might not be executed in *B.*, whereby he might have a power to dock it. *Id. ibid.* Gil. Law of Uſes, 162.

2. Where Terms are raiſed and limited in Truſt; and theſe Limitations are Two-fold.

1. *Of ſuch as wait on the Inheritance.*
2. *Of Terms in Groſs.*

1. *Of*

1. *Of Terms which wait on the Inheritance.*

Gil. Law of Uſes, 163.

The original of theſe was in the time of Queen *Elizabeth*, when mortgaging by way of raiſing terms was invented; and then if a marriage ſettlement was made, or a purchaſe upon a valuable conſideration, and the mortgage was diſcharged by the purchaſe-money, or the marriage-portion, it was thought fit (*a*) to take an aſſignment of the term in truſt to the ſame perſons to whom the inheritance was limited, to protect it againſt latter mortgages.

[(*a*) The reaſon of this was, that the terms do not determine, unleſs there be a ſpecial proviſo, by the performance of the truſts for which they were created. In theſe caſes the legal intereſt, during the continuance of the term, is in the truſtee, but the owner of the eſtate is entitled to the equitable and beneficial intereſt. As courts of common law had determined, that the poſſeſſion of the leſſee for years was the poſſeſſion of the owner of the freehold, courts of equity determined, that where the tenant for years was but a truſtee for the owner of the inheritance, he ſhould not ouſt his *ceſtui que truſt*, or obſtruct him in any act of ownerſhip, or in making any aſſurances of his eſtate. In theſe reſpects, therefore, the term is conſolidated with the inheritance; it follows the deſcent of the heir and all the alienations made of the inheritance, or of any particular eſtate or intereſt carved out of it, by deed, will, or act in law. Whitchurch v. Whitchurch, 2 P. Wms. 236. Gilb. Rep. 168. 9 Mod. 124. Charlton v. Low, 3 P. Wms. 330. Villiers v. Villiers, 2 Atk. 72. Willoughby v. Willoughby, Ambl. 282. but more fully reported 1 Term Rep. 763. Goodright v. Sales, 2 Wilſ. 329. Scott v. Fenhoulet, 1 Bro. Ch. Rep. 69. But, though the truſt or benefit of the term is annexed to the inheritance, the legal intereſt of the term remains diſtinct and ſeparate from it at law; and the whole benefit and advantage of the term ariſes from this ſeparation, by affording the means of protecting *bonâ fide* purchaſers of real eſtates, and alſo of enabling courts of equity to keep real eſtates in the right channel; courts of equity conſidering ſuch terms as creatures of equity. See Mr. Butler's note, Co. Litt. 293.; and Willoughby v. Willoughby, *ubi ſupra*; and Nourſe v. Yarworth, Finch's Rep. 160. And though it ſeems to be now ſettled at law, that a plaintiff in ejectment ought not to be nonſuited by a term ſtanding out in his own truſtee, or a ſatisfied term ſet up by a mortgagor againſt a mortgagee, yet to effect this, the jury muſt preſume in either of theſe caſes the term to be ſurrendered; for without a ſurrender, the eſtate of the truſtee muſt prevail at law. Goodtitle v. Knott, Cowp. 46. Doe v. Pott, Dougl. 721. Lade v. Holford, Bull. N. P. 110. Doe v. Pegge, 1 Term Rep. 758. Doe v. Staple, 2 Term Rep. 698. Doe v. Sybourn, 7 Term Rep. 3. Goodtitle v. Jones, *Id.* 47. At law, every term ſtanding out is a term in groſs. The difference in equity is produced by affecting the perſon holding the term with a truſt to attend the inheritance, which may be either by expreſs declaration, or by implication of law. If it be by expreſs declaration, it is immaterial whether the term, if in the ſame hand with the inheritance, would or would not merge, or whether it be ſubject to ſome ulterior limitation, to which the inheritance is not ſubject; for the expreſs declaration is ſufficient to make it attendant upon the inheritance. If it is to be made attendant upon the inheritance by implication of law, then it is neceſſary that it ſhould not be ſubject to any other limitation, and that the owner of the inheritance ſhould be entitled to the whole intereſt in the truſt of the term; ſo that according to the rule laid down in Beſt v. Stamford, Pr. Ch. 253. 2 Freem. 288. if the term and inheritance had been in the ſame hand, the term would have merged. The intent to purchaſe the whole intereſt will not, it ſeems, be ſufficient to make the term attendant on the inheritance by implication of law. Scott v. Fenhoulet, 1 Bro. Ch. Rep. 69. But any limitation, though void in law, which ſhews an intention to ſever the term from the inheritance, will be ſufficient for that purpoſe. Hayter v. Rod, 1 P. Wms. 359. And therefore a term, though limited in truſt for *A.* and his heirs, will devolve on the perſonal repreſentative of *A.* Hunt v. Baker, 2 Freem. 62. Attorney General v. Sandys, *Id.* 131. And though a term raiſed for a particular purpoſe, will, when ſuch purpoſe is anſwered, veſt in the heir; yet he muſt take it as a term, and it will go in a courſe of adminiſtration, and not in a courſe of deſcent. Levit v. Needham, 2 Vern. 138.]

Caſ. of Perp. 3, 4, 5. 17.

And hence it is, that if the inheritance was limited in tail, with remainder over, the truſt of the term might be limited in the ſame manner; and therefore if the tail was docked by fine and recovery, the truſt of the tail and remainders ceaſed, and attended the inheritance in fee; for the truſts could not protect or attend theſe eſtates that were not in being, and the truſtee, who is but an inſtrument to protect others, cannot have it to his own uſe.

Ibid. 3. 11.

The entailing of a term is not within the ſtatute *de donis condit.*, for that ſtatute extends only to eſtates of inheritance, and not to chattels, which the rules of the common law have carried into another channel.

And

And therefore in this caſe the truſtee and tenant in tail may diſpoſe of it without a fine or recovery; and this, upon valuable conſideration, will bind the iſſue; becauſe, ſince the Chancery are not bound by the ſtatute, they are at liberty to direct the rules of equity, and it is not equity to ſet up the truſt to the iſſue when the anceſtor has received for it a valuable conſideration. *Ibid.* 3. Gil. Law of Uſes, 164.

It will likewiſe be aſſets to pay inteſtates' debts, for all chattels of inteſtates are aſſets at common law; and it is not equity to direct it otherwiſe. *Ibid.*

[A term to attend the inheritance is real aſſets in the hands of the heir; for the ſtatute of frauds having made a truſt in fee aſſets in the hands of the heir, the term which follows the inheritance, and which is ſubject to all charges which affect the inheritance, muſt be ſo alſo. Attorney-General v. Sir G. Sandys, Hardr. 489. Willoughby v. Willoughby, 1 Term Rep. 766.]

But, if the inheritance of a uſe be entailed, the alienation of tenant in tail will not deveſt it out of the iſſue; for it is within the intent of the ſtatute *de donis*, which ſays, that if an eſtate be thus limited, the donee ſhall not alien to prejudice his iſſue; and the Chancery interpreting men's contracts, is bound by the intent of an act of parliament. Gil. Law of Uſes, 105.

If a term be given to *A.* in truſt for *B.* in tail, with remainder over, attendant on an inheritance, and *A.* ſurrender to *B.*, this ſhall not deſtroy the remainder; for though the ſurrender deſtroys the eſtate at law, yet the truſt remains in equity, if the party had notice. Gil. Law of Uſes, 165.

But in caſe *A.* or *B.* had aliened upon valuable conſideration, without notice, this would have deſtroyed the equity of the iſſue and the remainder-man. *Id. ibid.*

2. *Of Terms in Groſs.*

Concerning terms in groſs much hath been ſaid already; it only remains to add, that

If a leaſe be limited in truſt, and the truſtee renew the leaſe, it ſhall be to the benefit of *ceſtui que truſt:* for if the truſtee take on him the truſt, he takes upon him to act for the benefit of the party to whom the advantage of the term was originally deſigned. 1 Ch. Caſ. 190. Holt v. Holt.

3. Where Lands are limited to Truſtees to pay over the Rents and Profits.

If lands are deviſed to truſtees and their heirs, in truſt for a feme covert, and that the truſtees ſhall from time to time pay and diſpoſe of the rents and profits to the ſaid feme covert, or to ſuch perſons as ſhe, whether ſole or covert, ſhall appoint, and that her huſband ſhall have no benefit thereof; and as to the inheritance, in truſt to ſuch perſons as ſhe by will, or other writings under her hand, ſhall appoint; and for want of ſuch appointment, to her and her heirs; this ſhall be a truſt, and not a uſe executed by the ſtatute. 1 Vern. 415. Nevil v. Saunders.

But, where a man deviſed the rents and profits of certain lands to *T. B.* the wife of *W. B.* during her natural life, to be paid by his executors, into her own hands, without the intermeddling of her 1 Salk. 228. South v. Alleine. Comb. 375.

S. C. and 5 Mod. 63. by the name of Buſh v. Allen. Adjudged by two juſtices against the opinion of Holt, Ch. J. but the reporters differ as to the opinion of the Ch. J.

her huſband, and after her deceaſe he deviſed them to others; it was held by *Rokeby* and *Eyre*, Juſtices, that the lands themſelves belonged to the wife, againſt *Holt*, Ch. J., who held ſtrongly, that the executors were only truſtees for the wife.

1 Caſ. Eq. Abr. 383. Jones v. the Lord Say and Seal. [3 Br. P. C. 458. S. C.]

Likewiſe where lands were deviſed to truſtees and their heirs, in truſt to pay ſeveral legacies and annuities, and to pay the ſurplus of the rents and profits to a married woman, during her life, for her ſeparate uſe, or as ſhe ſhould direct; and after her death the truſtees to ſtand ſeiſed to the uſe of the heirs of her body, with remainders over; the queſtion was, Whether this deviſe to pay the ſurplus of the rents and profits to the wife, was ſuch a uſe or truſt as was executed by the 27 *H.* 8.; for if it was, then it was urged, that ſhe being tenant for life, the limitation after to the heirs of her body being coupled with it, gave her an eſtate-tail, according to *Shelly*'s caſe, 1 *Rep.*; but, if it did not, then the eldeſt ſon was to take as a purchaſer. It was held by the court, that ſhe had only a truſt for life, and, conſequently, the heirs of her body muſt take by purchaſe; and the rather in this caſe, becauſe it was limited to the heirs of her body ſeverally and ſucceſſively, as they ſhould be in ſeniority of age and priority of birth, and the heirs of their reſpective bodies iſſuing. And a difference was taken between this caſe and that of *Broughton* and *Langley*, 2 *Salk.*, for there it was to permit *A.* to receive the rents and profits for life; but here it is a truſt in the truſtees to pay over the rents and profits to ſuch and ſuch perſons; and therefore the eſtate muſt remain in them to anſwer theſe truſts; otherwiſe ſhe muſt be the truſtee, contrary to the expreſs words of the will.

2 Salk. 679. Broughton v. Langley. And *per* Holt, Ch. J. the ſame point *cont.* in the caſe of Burchett v. Durdant, 2 Vent. 312. is not law.

But, if lands are deviſed to truſtees and their heirs, on truſt to permit *A.* to take the profits for his life, and after the truſtees to ſtand ſeiſed to the uſe of the heirs of the body of *A.*, *A.* has an eſtate-tail executed in him; for this being a plain truſt at common law, what is ſo, muſt be executed by the ſtatute, which mentions the word *truſt* as well as *uſe*.

Shapland v. Smith, 1 Br. Ch. Rep. 75.

[A teſtator deviſed lands to truſtees upon truſt, that they, their heirs and aſſigns, ſhould yearly, by equal quarterly payments, by and out of the rents and profits of the premiſes, after deducting rates, taxes, repairs, and expences, pay ſuch clear ſum as ſhould then remain to his brother *C. S.* and his aſſigns, during his natural life, and after his deceaſe to the uſe and behoof of the heirs male of the body of the ſaid *C. S.* lawfully to be begotten, as they ſhould be in priority of birth; and in default of ſuch iſſue, remainder over. *Eyre*, B., and Maſter *Holford*, thought that the eſtate for life was executed in *C. S.*; but Maſter *Hett* differed. And upon a rehearing Lord Chancellour *Thurlowe* expreſſed his opinion, that the truſtees being to pay the taxes and repairs, they muſt have an intereſt in the premiſes; and therefore that the *legal* eſtate for the life of *C. S.* was in them; and that *C. S.* had only an

an *equitable* eſtate for life, and the ſubſequent eſtate being executed could not unite; and of courſe that a recovery ſuffered by *C. S.* was void.

Again, lands were deviſed to truſtees and their heirs, upon truſt to ſtand ſeiſed thereof during the natural life of teſtator's ſon *J. S.*, to ſuch uſe and behoof as after mentioned, *viz.* that the truſtees ſhould yearly and every year, during the natural life of the ſaid *J. S.*, take and receive the rents, iſſues, and yearly profits of the premiſes; and the teſtator ordered, that ſuch rents, iſſues, and yearly profits ſhould be applied for the ſubſiſtence and maintenance of the ſaid *J. S.* during his natural life; and immediately from and after his deceaſe he deviſed the ſame premiſes unto the heirs of the ſaid *J. S.* lawfully to be begotten, and for default of ſuch iſſue, then to his own right heirs. The court held, that the uſe was not executed in the teſtator's ſon, but in the truſtees *during his life*, from the nature of the truſt to *receive and pay over the profits*, and the *application* directed for the ſubſiſtence and maintenance of the ſon, by which the teſtator ſeemed to inveſt the truſtees with ſome degree of *diſcretionary* power in that reſpect. And there being nothing in the nature of the truſt to prevent the limitation to the heir of his body from being a *uſe executed*, they held the two limitations did not unite ſo as to give *J. S.* an eſtate-tail.] Silveſter v. Wilſon, 2 TermRep. 444.

(I) Of reſulting Uſes, or Uſes by Implication.

HERE it is to be premiſed that the mere alteration of poſſeſſion does not, in *equity*, give a right, but it ſhall be to the uſe of the donor, *&c.*, unleſs the uſe is *expreſſed*, or there is a *valuable conſideration*. Thus,

If a man makes a feoffment without conſideration, and expreſſes no uſe, the feoffment is intended by the law to be to the uſe of the feoffor and his heirs. Bro. F. al Uſes, pl. 32. In this caſe the law makes not any conſideration, becauſe the feoffee ſhall not hold of the feoffor, &c., but of him of whom the feoffor held; and this by the ſtatute of *quia emptores*, &c. Dy. 146. b. pl. 71. S. P. Arg. in caſe of Villers v. Beaumont.——But, before the ſtatute of *quia emptores terrarum*, if a man made a deed of feoffment without any conſideration or cauſe, the feoffee ſhould have had this to his own uſe, becauſe there was tenure between feoffor and feoffee, Dy. 146. b. pl. 71. Villers v. Beaumont. And ſee Barnard. Chan. Rep. 387. Lloyd v. Spillit.

But, if one, without any conſideration, enfeoffs another by deed, to hold to the feoffee and his heirs to his own uſe, and the feoffee ſuffers the feoffor to occupy the land ſeveral years, yet the right is in the feoffee; becauſe *expreſs* uſe is contained in the deed, which is ſufficient without other conſideration. The ſame law is, when a feoffment is made to the uſe of a ſtranger and his heirs. And. 37. pl. 95. Anon. There is a difference between raiſing uſes by fine, feoffment, or other conveyance, which operates by tranſmutation of poſſeſſion, and uſes raiſed by covenant; for upon the firſt, if no uſes were expreſſed, it is equity that aſſigns the feoffor to have the uſe; for by the law the feoffor has parted with all his intereſt: but, where he expreſſes uſes, there can be no equity in giving him the uſe againſt his own will; and there can be no preſumption that the conveyance was to the uſe of the feoffor againſt his own declaration. But in caſe of a covenant, it is equity that muſt give a uſe; for the perſon can have no right by law; therefore in ſuch caſe, there can be no uſe without a conſideration; for there is no equity that there ſhould. Gil. Law of Uſes, &c. 222, 223.

That

2 Le. 19. pl. 25. in Brent's caſe.

That which cannot veſt in him to whom it is limited, ſhall return to the feoffor; as, if I make a feoffment in fee to the uſe of myſelf for life, and after to the uſe of my ſecond wife, all the fee is now in me; and when I take a ſecond wife, then the feoffees ſhall be ſeiſed to the uſe of ſuch wife in remainder for her life; *per Manwood*, J.

2 Rep. 58. a. Beckwith's caſe.

Likewiſe, if one ſeiſed of land of the part of his mother makes feoffment in fee without conſideration, he ſhall be ſeiſed as he was before, *viz.* of the part of the mother.

Godb. 180. Bury v. Taylor.

In like manner, if a man ſuffers a common recovery, or levies a fine (*a*) of land, and limits no uſe, this ſhall be to the uſe of him who ſuffers the recovery or levies the fine.

Where one ſeiſed in tail ſuffers a recovery, and declares no uſe, the uſe reſults to the tenant in tail, and he becomes ſeiſed in fee by virtue of the recovery, becauſe the recoveror is tenant in fee-ſimple, and then no uſes are declared of that recovery; and where no conſideration appears from the recoveror, the recovery can be to no other purpoſe than to dock the entail. Gil. Law of Uſes, 61. [(*a*) But there is a difference between a fine or recovery as to the operation on the deſcent. If tenant in tail by *deſcent ex parte maternâ* ſuffer a recovery, in that caſe, it is true, the eſtate will continue notwithſtanding the recovery in the ſame line, and deſcend to the heirs *ex parte maternâ*: but, if tenant in tail by *purchaſe*, with a reverſion in fee by deſcent, both *ex parte maternâ*, ſuffer a recovery, he muſt take the reſulting fee as a *purchaſer*. For the eſtate that paſſes by the recovery is the eſtate-tail, the old eſtate-tail, now conſidered as a fee; the party comes in in continuance of that eſtate-tail, which, being by purchaſe, muſt of courſe deſcend to the heir at law. But it is otherwiſe, where tenant in tail, with remainder to himſelf in fee, levies a fine; for the fine extinguiſhes the eſtate-tail, and paſſes a baſe or qualified fee; and that fee becomes merged in the other fee; and the reverſion being ſo let in, the eſtate continues in the ſame line. Martin v. Tregonwell, 2 Str. 1179. 1 Wilſ. 2. 66. S. C. 4 Br. P. C. 486. S. C. 5 Term Rep. 107. S. C. Roe v. Baldwere, 5 Term Rep. 104. Symonds v. Cudmore, 1 Salk. 338. Carth. 258. S. C. Skin. 339. S. C. 1 Show. 370. 4 Mod. 1. S. C.]

2 Roll. Abr. 789.

Likewiſe, if two join in a common recovery where one has nothing in the land, and no uſe is limited upon it, this ſhall be to the uſe of him only who had the intereſt in the land, and no uſe ſhall ariſe to the ſtranger.

2 Rep. 58. a. Beckwith's caſe.

Alſo, if *A.* tenant for life, and *B.* in reverſion or remainder levy a fine, generally, the uſe ſhall be to *A.* for life, the reverſion or remainder to *B.* in fee; for each grants that which he lawfully may, and each ſhall have the uſe which the law veſts in them according to the eſtate which they convey over.

Id. ibid.

So, if there are two joint-tenants, the one for life, and the other in fee, and they levy a fine without declaring any uſe, the uſe ſhall be to them of the ſame eſtate as they had before in the land.

Co. Litt. 23. a.

[Where a perſon ſeiſed in fee makes a feoffment in fee without valuable conſideration to divers particular uſes, ſo much of the uſes as he diſpoſes not of is in him as his ancient uſe in point of reverter. Therefore where *A.*, ſeiſed in fee, covenanted to ſtand ſeiſed to the uſe of *his heirs male begotten or to be begotten on the* body of his ſecond wife, it was upon this principle holden by *Hale*, C. J., and two other judges, that *A.* took an eſtate for his own life by implication.

Pibus v. Mitford, 1 Vent. 372.

So, where the immediate uſe is limited away for *years only*, and no uſe limited of the freehold till the grantor's death, the uſe of the freehold ſhall in that caſe reſult to the grantor, and he ſhall take an eſtate for life by implication. As, where an eſtate was conveyed by *A.* to the uſe of truſtees for 70 years, if *A.* ſhould ſo long live, remainder to truſtees for 3000 years, and from and after

after the death of *A.* to *B.* his ſon for life; it was objected, that the limitation to *B.* together with the remainders over were void, being an eſtate of freehold to commence *in futuro;* for the firſt freehold eſtate was limited to *B.*, which was not to ariſe until the death of *A.*, and no eſtate for life was limited to *A.* unleſs an eſtate for life ſhould be ſuppoſed to reſult to him. After ſolemn argument upon the point, and a caſe ſtated to the judges, it was decreed, that an eſtate for life reſulted to *A.*, which ſupported the limitation over.

In a ſubſequent caſe, where the uſe was limited to the grantor himſelf for 99 years, remainder to the uſe of the truſtees for 25 years, remainder *to* (the uſe of) *the heirs male of his own body*, remainder to his own right heirs; the court held the limitation to the *heirs male* of the body to be void, becauſe there was no preceding freehold limited to ſupport it, and that it ſhould not be implied *contrary to the intent* of the conveyance; that there the eſtate took effect by tranſmutation of poſſeſſion out of the ſeiſin of the truſtees, and not like *Fenwick* (ſhould be *Pibus*) and *Mitford*'s caſe, where the owner *covenanted to ſtand ſeiſed* to the uſe of the heirs of his body; and *Powel*, Juſtice, held that even in that caſe, if there had been an *expreſs eſtate limited to the covenantor*, it had been different. Adams v. Savage, 2 Salk. 679. And vide Dyer, 111. in margin.

And ſo where *A.* by marriage ſettlement conveyed certain lands to the uſe of himſelf for 99 years, if he ſo long lived, and after to the uſe of truſtees for 200 years, remainder to the uſe of the *heirs male of his own body*, remainder to his own right heirs; upon a caſe referred to the judges of *C. B.* from the court of Chancery, they held the limitation to the *heirs male of the body of A.* void, no freehold being limited to any perſon precedent to that eſtate; and that no eſtate of freehold could *reſult to A.* for his life *by implication*, becauſe another eſtate, *viz.* for 99 years if, *&c.* was expreſsly limited to him, which would be inconſiſtent with a freehold *by implication*. Rawley v. Holland, Vin. v. 22. p. 189. c. 11. 2 Eq. Abr. 753.

And where the uſe was expreſsly limited away *during the life* of the grantor inſtead of for years only, it has been held, that the freehold could not reſult to him, ſo as to unite with the ſubſequent limitation to the heirs of his body.

Thus, *E. C.*, on his intended marriage, ſettled lands by deed and fine, to the uſe of himſelf and his heirs till the marriage, and afterwards to the uſe of his wife for life, remainder to the uſe of the cognizees in the fine, and their heirs, *during the life of E. C.*, upon truſt to permit him to receive the rents and profits, remainder to the ſons of the marriage ſucceſſively in tail male, and for want of ſuch iſſue to the *heirs of the body* of the ſaid *E. C.*, and for want of ſuch iſſue to the ſaid *E. C.* and his heirs. It was agreed that the caſe differed from that of *Fenwick* v. *Mitford*, for there, no uſe at all was limited *for the life* of the feoffor, which left a vacancy the law would ſupply by implication; but in the principal caſe there being an expreſs eſtate limited to the cognizees *during the life of E. C.*, there was no room left for any implication. Tippin v. Coſin, Carth. 272. 4 Mod. 380. Moor, 284.

plication. Beſides that in *Mitford*'s caſe, it was held to be no other than the *old reverſion* ſubſiſting in the feoffor; but the limitation in the principal caſe being of a new eſtate, *viz. an eſtate-tail*, could not be any part of the old eſtate, which was a fee-ſimple. And though it was contended, that the law would imply an eſtate for life in *E. C.* intermediate between the eſtate of the cognizees and that to the firſt ſon of the marriage, becauſe it was poſſible that the cognizees might forfeit or ſurrender; yet the whole court was clearly of opinion, that the limitation to the heirs of the body of *E. C.* was a *contingent remainder*, and ſuch as the heir would take by *purchaſe*, and not by deſcent; and that the caſe differed from that of *Fenwick* v. *Mitford* for the reaſons before given. And judgment was given accordingly.

1 P.W. 387. Elſe v. Oſborne.

So, where *A.* made a ſettlement to the uſe of himſelf for 99 years, if he ſhould ſo long live, remainder to the truſtees and their heirs *during his life*, &c. remainder to the uſe of the *heirs of his body*; remainder to himſelf in fee; Lord Chancellour *Cowper* held this limitation to the heirs of the body to be plainly a contingent remainder.

Southcot v. Stowell. 1 Mod. 226. 237. 2 Mod. 207. 211.

And in a caſe where *A.*, having two ſons *C.* and *D.*, covenanted to ſtand ſeiſed to the uſe of *C.* and the heirs-male of his body on *M.* his wife to be begotten, and for want of ſuch iſſue to *the heirs male of his* (*A.*'s) *own body*, and for want of ſuch iſſue to his own right heirs for ever; *C.* the eldeſt ſon died, leaving iſſue one ſon and ſeveral daughters, *A.* died, and then the ſon of *C.* died without iſſue; the court held the limitation to the heirs of the body of *A.* to be words of *purchaſe*, and to veſt in the ſon of *C.* upon the death of *A.* as *heir male* of his body by *purchaſe*; and that on the death of *C.*'s ſon it deſcended to his uncle *D.* as heir male of the body of *A. per formam doni*; and not by *purchaſe* as heir male of the body of *A.*, he not being heir, as his nieces were living. They allowed no eſtate for life in *A.* by implication, and ſeemed to doubt the doctrine in the caſe of *Pibus* and *Mitford*. But this difference is obſervable between the two caſes; in that of *Pibus* and *Mitford*, the covenantor had not limited any uſe at all *during his own life*; whereas, in *Southcot* v. *Stowell*, the covenantor had limited a *preſent uſe* to his ſon *C.* in tail.

Vide Mandevile's caſe, Co. Lit. 26. b.

Fearne's C. R.

Wills et al'. v. Palmer, 5 Bur. 2615. 2 Black. 687.

Archdale Palmer and his ſon *John Palmer*, upon the marriage of the ſon with *A.*, ſettled certain lands to the uſe of *Archdale* and his heirs until the marriage; and afterwards, as to part of the lands to the uſe of *John Palmer* for life, and after intermediate remainders, (to the uſe of his wife for life and of his ſons by her or any other woman ſucceſſively in tail male,) *to the uſe of the heirs male of the body of the ſaid* Archdale Palmer, remainder to the uſe of the heirs of the body of *John Palmer*, remainder to the uſe of *John Palmer* his heirs and aſſigns; and as to the reſidue of the lands to the uſe of *Archdale* for life, and after ſeveral intermediate limitations, (to the uſe of *John* for life and to his wife, in part, for life, and of the ſons of the marriage ſucceſſively in tail male,) to the uſe of *John* and the heirs male of his body, remainder to the

uſe of *Archdale*, his heirs and aſſigns. *John* died without iſſue male in the lifetime of his father, leaving *A.* his widow and one daughter by her, named *Ann*. *Archdale* afterwards by his will, noticing that by the death of his eldeſt ſon *John* without iſſue male, that part of his eſtate then in poſſeſſion was, by the ſaid marriage ſettlement, veſted in him in fee-ſimple, deviſed the ſaid eſtate to his ſon *William Palmer* for life, with remainder to his ſons ſucceſſively in tail-male, and for want of ſuch iſſue, to the *heirs male* of his (teſtator's) body begotten, and for want of ſuch iſſue to his own right heirs for ever.

Archdale died, leaving his ſaid grand-daughter *Ann* his heir at law, and his ſon *William Palmer* who (as well as *John* his deceaſed brother) was the teſtator's iſſue by a firſt wife, and alſo leaving *Henry*, an eldeſt ſon, and ſeveral other children by his ſecond wife. Afterwards *William Palmer*, who at his father's death was *heir male of his body*, died, leaving a ſon, who died leaving a ſon *Henry John*, who died an infant without iſſue; and no recovery was ſuffered by *William* or his ſon. Upon the death of *Henry John*, *Henry*, the then eldeſt ſon and heir male of the body of *Archdale* by his ſecond wife, entered upon that part of the eſtate which was by *Archdale*'s will deviſed to the *heirs male* of his body. And afterwards, upon the death of *Ann* the widow of *John*, *Henry* took poſſeſſi . as *heir male of the body of* Archdale, of the lands which ſhe h ..d for her life under the ſettlement. Upon a bill filed by *Ann* the daughter of *John*, and heir general of *Archdale* and her huſband, claiming in her right, as *heir at law and heir of the body of* John Palmer, to be entitled, on failure of iſſue male of the whole blood, to that part of the eſtate which was limited by the ſettlement to *John Palmer* in fee; and alſo claiming in her right, *as heir at law of* Archdale, to be entitled to the eſtates of which the reverſion in fee was limited to him by the ſettlement, as not deviſed by his will; a caſe was made for the opinion of the judges of the King's Bench, upon the queſtion, Whether any and what eſtate paſſed by the ſettlement to the defendant *Henry Palmer*, as *heir male* of the body of *Archdale Palmer* the *grantor*? And whether any, and what eſtate paſſed to the ſaid defendant *Henry Palmer* as *heir male* of the body of the ſaid *Archdale Palmer*, by his will? Upon which the judges certified they were of opinion, that the defendant *Henry Palmer*, by the ſettlement, took *by deſcent* as *heir male of the body* of *Archdale Palmer* the *grantor*. That in caſe a *third perſon* had been the *grantor*, they ſhould have thought that *Henry Palmer* would have taken an eſtate in tail male *by purchaſe*, under the deſcription of *heir male* of *Archdale Palmer*. And that they were of opinion, that an eſtate in tail male paſſed to the defendant *Henry Palmer*, as *heir male of the body of* Archdale Palmer *by his will*.

No eſtate for life can ariſe by implication, or by way of reſulting uſe, to a perſon who was not the owner of the eſtate granted. As, where huſband and wife levied a fine of the wife's land to the uſe of the *heirs of the body of the huſband on the wife begotten, and for default of ſuch iſſue to the uſe of the right heirs of the huſband*; 2 Salk. 675. Davies v. Speed, Show. Caſ. Parl. 104.

they had iſſue; the wife died, then the iſſue died, and then the huſband died; and the queſtion was, Whether the heir of the huſband or the heir of the wife ſhould have the lands? And the court held, that no eſtate for life could ariſe to the huſband by implication, becauſe the eſtate was the wife's, to which he was a ſtranger; therefore the limitation to the heirs of the huſband, *&c.* was void, for want of a preceding freehold to ſupport it. An implied eſtate in the wife for her life would not do as ſhe died before her huſband, and, conſequently, before the remainder to his heir could commence.

Vide 1 P.W. 359. Sir T. Tippin's caſe there cited, and vide Jenk. Cent. 248. c. 18.

So, where a marriage ſettlement was made by a *third perſon* to the uſe of *A.* the huſband for 99 years, remainder to truſtees *during his life* to ſupport contingent remainders, remainder to the wife for life, remainder to the firſt, *&c.* ſon of the marriage, remainder to the *heirs of the body* of *A.*, remainder to his *right heirs*; here the freehold *during* A.'s *life* being limited to truſtees, and he taking only a term of years, and the eſtate not moving from him, (for if it had, the limitation to his *right heirs* would have been the old reverſion,) the remainder to his *heirs* was a *contingent remainder.*

Harris v. Barnes, 4 Burr. 2157.

And where lands were deviſed to *C.* for the term of 90 years if he ſhould ſo long live, and afterwards to the heirs of *C.*'s body, it was held, that it veſted in the heir by purchaſe.

Indeed in a caſe where the teſtator deviſed in remainder (after limitations to his brother *W.* and his heirs males) to the *heirs males* of his brother *N.*'s ſons, (who then had two ſons living,) without any antecedent deviſe to thoſe *ſons themſelves*, and by a ſchedule annexed to the will and referred to in it, (which the ſpecial verdict found to be part of the will,) purporting to be an account how the teſtator had diſpoſed of his eſtates by his will, he ſaid, and for want of his brother *W.*'s having ſons, then *to his brother* N.'s *ſons*, and for want of ſons, then over: Upon the queſtion, Whether one of the ſons of *N.* took an eſtate for life or in tail? the court of King's Bench in *Ireland* held he took only for life. But on an appeal to the King's Bench in *England*, Lord *Manſfield*, in delivering the opinion of the court, obſerved, that the only doubt was, whether by the words of the will the *ſons of* N. took any eſtate by implication; that ſuch doubt was removed by the ſchedule, which expreſsly *gave an eſtate to the ſons of* N.; and therefore the ſon of *N.* took an eſtate for life by implication *thus explained*, which being conjoined with the eſtate expreſsly given to his *heirs males*, by the will, would by the known rule of law give him an eſtate in tail male.—But this caſe turned on the operation of the ſchedule.

Hayes v. Foorde, 2 Black. Rep. 698.

Sand. on Uſes, 480.

It has been doubted, Whether there can be a reſulting uſe on the conveyance by leaſe and releaſe; that is to ſay, if a bargain and ſale in conſideration of money is made to *J. S.* for a year, and then a releaſe is made to him in fee, without any further conſideration or declaration of the uſe, whether in this caſe the uſe will reſult to the releaſor.—Thus, where *A.* brought covenant a

as aſſignee of a reverſion, and ſhewed, that the leſſor, in conſideration of five ſhillings, bargained and ſold to *B.* for a year, and afterwards releaſed to him and his heirs, *virtute quorundam indentur' barganiæ venditionis et relaxationis, necnon vigore ſtatuti de uſibus*, &c. he was ſeiſed in fee; it was objected, that the uſe muſt be intended to the releaſor and his heirs, becauſe no conſideration of the releaſe, nor expreſs uſe, appeared by the pleadings. It was argued in this caſe, that there could be no reſulting uſe on a leaſe and releaſe: that nothing paſſes to the leſſee in poſſeſſion, but by way of enlargement of the eſtate of ſuch leſſee; for it does not operate to give a new eſtate of the reverſion, but to increaſe the eſtate in poſſeſſion, according to the words of it: ſo it does not work by *merger* of the firſt intereſt, but by *enlarging* it: that if the releaſe enure only to enlarge the eſtate, the intereſt enlarged muſt be to the uſe of the leſſee, elſe it cannot be ſaid to be an increaſe of it: that if the practice had not prevailed to the contrary, it were odd to limit the uſe of a releaſe to any but the leſſee; for which reaſon it is, that we find it expreſſed in the clauſe in the leaſe, on which the leſſor intends to build his releaſe, that the intent of the leaſe was to paſs an eſtate by releaſe upon it, for the uſe of a third perſon: that it would be abſurd to ſay, that my conveyance ſhould have no other operation but to extinguiſh or merge the eſtate, which the grantee has already, in order to have it brought back to me; and what need could there be of ſuch a way? if the party had any ſuch intent, it might ſoon be done by a ſurrender: that if it had been expreſſed in the deed of releaſe, that he had already made him a leaſe for *years*, and that for the enlargement of that eſtate he made the releaſe, there could be no doubt but that it would be to the uſe of the releaſee; and there is no difference between the caſes, ſince this releaſe, in its own nature, enures by way of enlargement: beſides, here is alſo a valuable conſideration; for the leaſe and releaſe being but *one* conveyance, the five ſhillings, expreſſed to be the conſideration of the leaſe, ſhall extend to the releaſe; and alſo the acceptance of the releaſe is in its own nature a conſideration, for it implies an alteration of the eſtate of the leſſee, the conſent to which is a conſideration moving from the leſſee; and the only motive of the leſſee's parting with the old eſtate was to get a new one. On the other ſide it was urged, that before the ſtatute of 27 *H.* 8. *c.* 10. if *A.* made a feoffment, levied a fine, or ſuffered a recovery without a uſe declared, and without any conſideration, the feoffee, conuſee, and recoveror ſtood ſeiſed of thoſe lands to the uſe of *A.*: that ſince the ſtatute the law as to this matter is not altered; for the ſtatute only intended to execute the uſe to the poſſeſſion, and by that means to deſtroy the uſe, but it did not intend to make any other thing paſs by the conveyance than that which paſſed before: that there was the ſame reaſon the uſe ſhould not paſs in a releaſe without conſideration or expreſs declaration, as in a feoffment, fine, and recovery; becauſe the *uſe* and *eſtate* are diſtinct, and though the eſtate paſſes, yet the uſe does not, without a conſideration or expreſs limitation of it; and they are as

Shortridge v. Lamplugh, 2 Salk. 678. 7 Mod. 71. 2 Ld. Raym. 798. 1 Lutw. 351.

much diſtinct things in a *releaſe* as in any other conveyance: and the precedents are, that when a releaſe is pleaded, there, always mention is made of a conſideration or expreſs uſe. 2 *Saund.* 11. 277. 2 *Ventr.* 120. *Co. Entr.* 264. 220. 474. To the objection that this releaſe enured by way of enlargement of the leaſe for a year, and therefore would participate of the conſideration of it, and that the leaſe and releaſe made but *one* conveyance, it was anſwered, that though the leaſe and releaſe made but one conveyance as to the paſſing of the fee, yet they were in truth *diſtinct* conveyances, and had different operations, the one by the ſtatute of uſes, and the other by the common law: that as to what was ſaid, that the releaſe enures by way of enlargement of the eſtate of the leſſee, it is true, that it gives him a greater eſtate than he had before, but that notwithſtanding it deſtroyed the eſtate for years by merger, and it cannot participate of the conſideration which is contained in the leaſe, which is perfectly diſtinct. However, *Holt*, C. J. without conſidering the operation of the conveyance, and admitting there might be a reſulting uſe on it, held, that the manner of pleading the releaſe, as above, to the releaſee, was good; and that if a feoffment be pleaded in the ſame manner, without ſhewing the uſe or a conſideration, with an averment *virtute cujus* the feoffee was ſeiſed, the uſe ſhall be intended to be to the feoffee: that that was the form of pleading before the ſtatute; and the ſtatute has not altered, but rather confirmed, this manner of pleading.]

See Sand. 95, 96. 485.

Gil. of Law Uſes. 7.

It is to be obſerved likewiſe, that when one takes a feoffment, having notice of the ſeveral uſes and truſts, there, the party is ſuppoſed to take it under thoſe uſes and truſts; for the law will ſuppoſe a man's actions rather juſt than otherwiſe.

Gil. Law of Uſes, 7. The reaſon is, for that it argues a corrupt conſcience to bargain for an eſtate which the purchaſer knows to be another's in equity; therefore as conſideration or no conſideration is an iſſue at law; ſo notice or no notice is an iſſue in Chancery. Ld. Bacon's Read. on Stat. of Uſes. But Q. If the uſe is expreſſed to the ſecond feoffee, for there it ſeems notice or no notice is immaterial. 1 And. 314.

Therefore, if a feoffee to a uſe make a feoffment in fee upon a valuable conſideration with notice, the ſecond feoffees ſhall be ſeiſed to the former uſes; for the conſideration imports a ſeiſin to his own uſe, the notice a ſeiſin to the former uſes: and where the act is capable of a double interpretation, that muſt be taken which conſiſts moſt with equity.

2 Roll. Abr. 781.

Likewiſe, if *A.* agrees with *B.* to leaſe *Blackacre* to him for certain years, and afterwards, before he has made the leaſe, according to the promiſe, he enfeoffs *C.* of the land for a valuable conſideration, *C.* having notice of the promiſe before the feoffment made; *C.* ſhall be compelled in Chancery to make the leaſe to *B.* according to the promiſe, becauſe of his notice.

But, where a man takes upon a valuable conſideration without notice, there, he is ſuppoſed to take it to his own uſe, for otherwiſe he would not have given an equivalent.

1 Rep. 122. Chudleigh's caſe.

Therefore, if a feoffment be made with conſideration, and without notice, the feoffee ſhall be ſeiſed to his own uſe, for here, the act is capable of no other conſtruction.

Alie

Alſo, if feoffee in uſe makes a gift in tail, the donee ſhall be ſeiſed to his own uſe; for there is a conſideration, *viz.* a tenure between them, unleſs he expreſs a uſe upon the gift, or in the gift; *per Brooke*, J. Bro. F. al. Uſes, pl. 10.

If the feoffee in uſe makes a leaſe for life, he ſhall have fealty; for this is to the uſe of the leſſee, if a uſe be not expreſsly reſerved, *&c.; per Brooke*, J. *Id. ibid.*

In like manner, if he deviſes by teſtament, the deviſee ſhall be ſeiſed to his own uſe, unleſs it be otherwiſe expreſſed; for there is a conſideration implied. *Id. ibid.*

So, if a feoffment be made to *A.* to enfeoff *B.* to the uſe of *C.*, and *A.* enfeoff *B.* without limiting any uſe, yet it ſhall be to the uſe of *C.* Noy, 19. *Per* Popham, Ch. J. in caſe of Yelverton v. Yelverton.

(K) Of ſecond or ſhifting Uſes.

IF a man made a *feoffment in fee* before the ſtatute of uſes, 27 *H.* 8. *c.* 10. or after the ſtatute, *to the uſe of* W. *and his heirs till* A. *paid* 40 *l.* to the ſaid *W.*, and *then to the uſe of the ſaid* A. *and his heirs*, and after comes the ſtatute of uſes and executes the eſtates in *W.*, and after *A. pays W.* the 40 *l.*, there, *A. is ſeiſed in fee if he enters*; by ſeveral. But by ſome, *A.* ſhall not be ſeiſed in fee by the ſaid payment, unleſs the feoffees enter; *quære inde.* And therefore it ſeems to be the ſureſt way to enter in the name of the feoffees, and in his own name, and then the one way or the other the entry ſhall be good, and it ſhall make *A.* to be ſeiſed in fee: and therefore a man at this day may make a feoffment to uſes, and the uſe *ſhall change from one to another by act* ex poſt facto *by circumſtance*, as well as it ſhould before the ſtatute 27 *H.* 8. of uſes. Bro. F. al. Uſes, pl. 30. cites 6 E. 6.

So, if I limit a uſe *jointly to two perſons not* in eſſe, and the *one comes to be* in eſſe, he ſhall take the entire uſe; and yet if the *other afterwards comes* in eſſe, he ſhall take jointly with the former. Ld. Bacon on the Statute of Uſes, 351. As, if I make feoffment to the uſe of my wife that ſhall be and my firſt begotten ſon, for their lives, and I marry; my wife takes the whole uſe; and if I afterwards have a ſon, he takes jointly with my wife. Ld. Bacon on the Statute of Uſes, 351.

Where a conveyance was made by fine to *A. B. to the uſe of* C. D. *and* M. *his wife for life*, and the longer liver of them, remainder after their deceaſe to the *uſe of* C.*'s executors for ſix months*, and after the ſix months ended, to the uſe *of* E. *and* F. *his wife, and the heirs male of their bodies*, remainder to *C.* and his heirs, *provided if* C. *at any time after have iſſue* of his body, or any wife of C. at his deceaſe be enſient with any iſſue begotten by *C. then after ſuch iſſue had, and after* 500 *l. paid to* G. or tendered and refuſed, *within ſix months after the birth* of ſuch iſſue, then the uſe of the ſaid lands, immediately after the deceaſe of the ſaid *C. D.* and *M.* the ſix months expired, ſhall be *to* C. *and the heirs of his body, and in default of ſuch iſſue, to the right heirs of the ſaid* C. D.; *M.* dies, and *C.* marries *N. Per Plowden* and *Dyer*—Before the performance of the contingent, *C.* has no larger eſtate than he had before. Dy. 314. pl. 96. Anon.

So, where *A.* made a feoffment to the uſe of *himſelf for life*, remainder to his *wife for life*, remainder to his right heirs, with a *proviſo* if his ſon interrupted his wife it ſhould be *to the uſe of the* Cro. Eliz. 766. Caſe of Wood v. Reynold,

cites it as the caſe of Leigh v. Burton.

wife and her heirs: A. made a leaſe for years, to begin after * his deceaſe, and died: The ſon diſturbed the wife: Reſolved, that the uſe will not ariſe to give the wife the fee.

And Godfrey, Arg. ſaid, he conceived the reaſon thereof to be, becauſe the uſe limited to the right heirs was the ancient reverſion, and no new eſtate, and a condition cannot be annexed thereto. *Ibid.* ——Mo. 742. pl. 1022. Barton's caſe ſays, it was to begin after the * wife's deceaſe. Reſolved, by Popham and Anderſon, Ch. J. clearly, that the future uſe was checked by the leaſe, and never ſhall ariſe, for ſince it could not ariſe at the death of the wife, by reaſon of the leaſe for years, it is deſtroyed for ever. Yet *nota*, (ſays the reporter,) that the leaſe was only an *intereſſe termini* all the time of the wife's life, and the diſturbance which ought to raiſe the uſe in fee to the wife, was made in her life before the commencement of the leaſe.——Gil. Law of Uſes, &c. 138, 139. cites S. C.; and ſays, the wife ſhall not have the reverſion, becauſe the leaſe has altered it; for there is the ſame eſtate to be executed in the wife as was in being at the diſpoſition of the particular eſtate.

Moor, 761. pl. 1054. in Chancery, Holloway v. Pollard.

Likewiſe, where *A. bargained and ſold land to* B. *and his heirs* for 500 *l.*, *upon condition* that *if* A. *paid* B. 500 *l.* he might *re-enter, and be ſeiſed to the uſe of himſelf and his heirs, until* he attempt to alien without the aſſent of *B.*, *and then to the uſe of* B. *and his heirs*, and a *fine* was levied to thoſe uſes: *A.* paid the 500 *l.* and entered; afterwards *A.* aliened to *J. S.* without the aſſent of *B. Per* Lord C. *Egerton*——No uſe will ariſe to *B.*, becauſe *B.* entering for the condition broken, ought to be in of the old uſe and eſtate, and cannot be ſeiſed to any other uſe.

(L) Of the Manner of pleading Uſes.

Br. Pleadings, pl. 170. cites 13 H. 7. c. 18. *Id. ibid.*

IF a man pleads that *A.*, *B.*, and others were ſeiſed to his uſe in fee, this is good pleading, without ſhewing the commencement of the uſe.

But it is otherwiſe, where he ſays that they were ſeiſed to the uſe of him and the heirs of his body, becauſe this is a particular eſtate.

Owen, 86. Green v. Wiſeman. Gil. Law of Uſes 81.

If a man makes a feoffment in fee to *A.* to the uſe of *B.*, *B.* may plead this feoffment, and ſhew that *J. S.* diſſeiſed him, without laying any *actual entry*, for the ſtatute executes the poſſeſſion in him: he may alſo plead it without ſhewing any agreement thereto, becauſe the freehold is in him, unleſs he diſagree, and then it muſt be ſhewn on the other ſide, for thereby the freehold is immediately out of him.

Owen, 87. Green v. Wiſeman.

But in treſpaſs he muſt ſhew an actual entry; for this action is grounded on the diſturbance of his poſſeſſion, or the violation of his right, by taking the actual profits, which no man could hinder him from, or diſturb him in, till he ſhews he was in poſſeſſion.

Bro. F. al. Uſes, 338. b. pl. 15.

If a man pleads that he bought land for 20 *l.*, without ſhewing the money paid, or a day alleged for the payment of it, this is good; for the buying implies payment of the money; and if there was none paid, the plaintiff may reply, that he did not buy, *&c.*

Br. Count, pl. 49. cites 21 H. 7. c. 25.

In debt the plaintiff counted upon a leaſe for years made by his father, rendering rent. The defendant ſaid, that the father and others were ſeiſed in fee to the uſe of the father, *abſque hoc* that the reverſion deſcended to the plaintiff. And it was held a good plea to the count, for the plaintiff ought to have counted ſpecially

ſpecially that they were ſeiſed to the uſe, &c. and that the father leaſed, and becauſe he did not, the writ and count ſhall abate; *per Rede*, Ch. J. and *Kingſmill*, J.; for, *per Rede*, the defendant may ſay that the father had nothing at the time of the demiſe, and then the plaintiff cannot maintain the declaration by the uſe, but it is a *departure;* for he ought to have ſhewn it at firſt.

The tenant of the land cannot plead a releaſe made by *ceſtui que uſe* to the feoffee, without ſhewing the releaſe. Br. Monſtrans *de faites*, &c. pl. 61. cites 14 H. 8. 4.

In waſte the writ ſet forth a feoffment to ſeveral perſons to ſeveral uſes. After verdict exception was taken to the writ, becauſe it did not ſay the feoffment was to them and their heirs, without which there could be no inheritance in *ceſtui que uſe*, and ſo no diſheriſon, as the action of waſte imports. But the plaintiff had judgment, becauſe all the forms of the writs had been ſo ſince the making of the ſtatute; and the declaration laid the ſeiſin in fee, as it muſt; and yet the plaintiff might have had a general writ, and declared ſpecially. Hob. 84. pl. 112. Sheat v. Oxenbridge.

We proceed now to treat more particularly of the latter branch of this title, and to conſider the law reſpecting

Truſts.

A TRUST is a right to receive the profits of the land, and to diſpoſe of the land in equity; *per Pemberton*, *Arg. Mod.* 17. in the caſe of *Smith* v. *Wheeler*. And holding the poſſeſſion and diſpoſing thereof at his will and pleaſure, and making leaſes thereof when the legal eſtate is in others, are ſigns of a truſt. 1 Mod. 27. Smith v. Wheeler. *Ibid.* 38. Arg. in S. C. Chan. Rep. 52. Earl of Newcaſtle v. Earl of Suffolk.

Truſts are of the ſame nature now that uſes were at common law. *Arg. Allen*, 15. *in caſe of the King* v. *Holland*. Allen, 15. the King v. Holland.

Abr. Eqa. Caſe, 220 S. P. Symſon v. Turner. — S. P. Arg. Vent. 130. in caſe of Smith v. Wheeler. — A truſt is but a new name given to a uſe, and invented to defraud the ſtatute of uſes *, Arg. Sti. 40 in caſe of the King v. Holland.

* It has already been obſerved, that now the uſe by the way of truſt (which were one and the ſame before the ſtatute) remains ſeparately in ſome perſons, and the poſſeſſion ſeparately in others, as it did before the ſtatute, and are not brought together but by decree in Chancery, or the voluntary conveyance of the poſſeſſor of the land to *ceſtui que truſt*.

[The legiſlature, by the ſtat. of 27 *H.* 8. *c.* 10. are thought by Lord *Coke* (1 *Rep.* 125.) to have intended to aboliſh uſes and truſts, though this opinion is controverted by Lord *Bacon* in his Readings on the ſtatute. If ſuch was the intention, courts of law, by too ſtrict a conſtruction of its proviſions, defeated it, and rendered it neceſſary for courts of equity to retain that juriſdiction, of which a more liberal interpretation of the ſtatute by courts of law would probably have deprived them; ſo that, as Lord *Hardwicke* obſerved, "A ſtatute made upon great conſideration, and introduced in the moſt ſolemn manner, by a ſtrict conſtruction, has had no other effect, than to add at moſt three words to a conveyance." 2 Fonbl. E. Tr. 15. 1 Atk. 593.

2 Bl. Comm. 337. "veyance." Courts of equity have, however, in the exerciſe of this juriſdiction, wiſely avoided, in a great degree, thoſe miſchiefs which made uſes intolerable. They now conſider a truſt-eſtate (either when expreſsly declared or reſulting by neceſſary implication) as equivalent to the legal ownerſhip, governed by the ſame rules of property, and liable to the ſame charges in equity, except dower, to which the other is ſubject at law: and by a long ſeries of uniform determinations for a century paſt, with ſome aſſiſtance from the legiſlature, they have raiſed a new ſyſtem of rational juriſprudence, by which truſts are made to anſwer in general all the beneficial ends of uſes, without their inconvenience or frauds.]

But for the better underſtanding of this head, we ſhall divide it into the following branches; and conſider,

(A) By what general Rules Truſts are governed.

(B) What amounts to a Declaration of Truſt, and when a Truſt ſhall be raiſed.

(C) What ſhall be deemed a reſulting Truſt, or Truſt by Implication.

(D) What ſhall be deemed an Advancement, and what a Truſt.

(E) What Acts of a Truſtee ſhall be a Breach of Truſt, &c. or ſhall be deemed to alter or vary the Nature of it.

(F) What Acts of the Truſtee jointly with *Ceſtui que Truſt*, or by *Ceſtui que Truſt* only, ſhall defeat the Truſt, or deſtroy contingent Remainders.

(G) In what Caſes Equity will decree Truſtees to join in a Recovery, &c. with *Ceſtui que Truſt*.

(H) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.

(I) Truſtee in what Caſes favoured, and in what Caſes decreed to account.

(K) How far Truſtees are anſwerable for each other.

(L) In what Caſes Truſtees ſhall give Security, and when be diſcharged or removed.

(M) The Power of *Ceſtui que Truſt*.

(N) Of Forfeitures by *Ceſtui que Truſt*.

(A) By

(A) By what general Rules Truſts are governed.

TRUSTS and legal eſtates are to be governed by the ſame rules; and this is a maxim which has univerſally prevailed. It is ſo in the rules of *deſcent*, as in *gavelkind*, and *borough Engliſh* lands; there is a *poſſeſſio fratris* of a truſt, as well as of a legal eſtate. The like rules in *limitations*, and alſo in *barring entails* of truſts, as of legal eſtates; *per* the Maſter of the Rolls, who ſaid he thought there was no exception out of this general rule, nor is there any reaſon that there ſhould; and that it would be impoſſible to fix boundaries, and ſhew how far, and no farther, it ought to go; and that perhaps in early times the neceſſity of keeping thereto was not ſeen, or thoroughly conſidered. 2 P. Wm's Rep. 645. Sutton v. Sutton.

[But there is a difference between truſts *executed*, and truſts *executory*; for though the former are conſtrued in the ſame manner as legal eſtates; yet it is otherwiſe with the latter; for they are ſo moulded by the courts of equity, as beſt to anſwer the intent of the parties creating them. However, it muſt be acknowledged, that even with theſe, where it does not violate ſuch intent, the ſame rule of conſtruction is applied as to legal eſtates.] Lord Glenorchy v. Boſville, Ca. temp. Talb. 19. Garth v. Baldwin, 2 Vez. 655. Roberts v. Dixwell, 1 Atk. 608.

A. being ſeiſed in fee of certain lands deviſed them to truſtees in fee, in truſt to pay his debts, and to convey the ſurplus to his daughters equally: the younger married and died, leaving an infant ſon, and her huſband ſurviving: the eldeſt daughter brought a bill for a partition; and the only queſtion was, Whether the huſband of the younger daughter ſhould have an eſtate for life conveyed to him as tenant by the curteſy? Upon which it was decreed by Lord Chancellour, that truſt eſtates were to be governed by the ſame rules, and were within the ſame reaſon, as legal eſtates; and as the huſband ſhould have been tenant by the curteſy, had it been a legal eſtate, ſo ſhould he be of this truſt eſtate; and if there were not the ſame rules of property in all courts, all things would be, as it were, *at ſea*, and under the greateſt uncertainty. 1 P. Wms. 108 Watts v. Ball. [So, Chaplin v. Chaplin, 3 P. Wms. 234. Caſhborne v. Scarſe, 1 Atk. 603. Burgeſs v. Wheate, 1 Bl. Rep. 138. 161.]

[But, where a father deviſed lands to truſtees, in truſt to apply the rents and profits to the ſole and ſeparate uſe of the daughter during her life, not ſubject to the debts and controul of her huſband, and alſo to permit his daughter by deed or writing to deviſe the lands to ſuch perſons as ſhe ſhould think proper; Lord *Hardwicke* held, that the huſband ſhould not be tenant by the curteſy of the truſt; becauſe, though the daughter had the benefit of a truſt of inheritance, yet ſhe had neither a legal nor equitable ſeiſin during the coverture. Hearle v. Greenbank, 3 Atk. 715.

It is eſtabliſhed, that there ſhall not be tenant in dower of a truſt. 3 P. Wms. 234. 2 Atk. 525. Ca. temp. Talb. 138.

It hath alſo been holden, that a truſt is not liable to eſcheat to the lord in conſequence of attainder or want of heirs; becauſe the truſt could never be intended for his benefit. Burgeſs v. Wheat, 1 Bl. Rep. 123.

Truſts

Sand. on Uſes, 250. (a) Berrington v. Maſon, Finch. Rep. 262. (b) Norton v. Turville, 2 P. Wms. 144. (c) Blakeway v. Earl of Strafford, 2 P. Wms. 373. Jones v. Earl of Strafford, 3 P. Wms. 89. Lacon v. Briggs, 3 Atk. 107.

Truſts in general are not barred by the ſtatute of limitations. Thus, a truſtee has been decreed to account and reconvey after a poſſeſſion of twenty years (*a*). So, where a truſt is created for payment of debts, it will not only take a debt out of the ſtatute of limitations, incurred *ſince* its creation (*b*), but will alſo *revive* a debt barred by the ſtatute before it was raiſed (*c*). But this rule, that a truſt eſtate is not within the ſtatute of limitations, holds only as between *ceſtui que truſts* and *truſtees*, not between *ceſtui que truſt* and *truſtees* on one ſide, and *ſtrangers on the other* (*d*). And it is ſaid, that a fine and five years non-claim will, in favour of a purchaſer, bar a truſt term, though *ceſtui que truſt* be an infant (*e*). So, if a truſtee neglects to ſue within the time preſcribed by the ſtatute of limitations, *ceſtui que truſt*, though an infant, is bound by it (*f*).]

(*d*) Llewellin v. Mackworth, 2 Eq. Ca. Abr. 579. Townſhend v. Townſhend, 1 Br. Ch. Rep. 551. (*e*) 3 P. Wms. 310. note G. (*f*) Wych v. Eaſt India Company, 3 P. Wms. 309.

(B) What amounts to a Declaration of Truſt, and when a Truſt ſhall be raiſed.

[It has been holden, that this proviſion does not extend to declarations of truſts of perſonalty. Nab v. Nab, 10 Mod. 404. *Sed vide* Fordyce v. Willis, 3 Bro. Ch. Rep. 577.]

THE *ſtatute of* 29 Car. 2. c. 3. § 7. *enacts, That all declarations or creations of truſt ſhall be manifeſted by ſome writing ſigned by the party, or by his laſt will in writing, or elſe ſhall be void. And by—*

§ 9. *Aſſignments of truſts ſhall be in writing ſigned by the party aſſigning the ſame, or by his laſt will, or elſe ſhall be of no effect.*

Fin. Rep. 159. Nourſe & al. v. Yarmouth.

But words which are not *altogether artificial*, will ſerve to direct a truſt, which will not ſerve to limit an eſtate; *per* Lord Keeper.

1 Vern. 411. Clowdeſley v. Pelham.

Where *A.* deviſed all his lands to *B.* and the heirs of his body; and in another part of his will, reciting that he owed *B.* money upon account, he therefore deviſed to him all his perſonal eſtate, and made him executor, willing him to pay his debts; upon the reading of the will, though the clauſe as to the payment of debts ſeemed to relate to the perſonal eſtate only; and though the lands were deviſed to *B.* in tail, with a remainder over to another; and it was objected, that a tenant in tail could not be a truſtee; yet the court decreed both real and perſonal eſtate to be ſold for payment of the teſtator's debts; and the decree, it is ſaid, was affirmed in the Houſe of Lords.

2 Vern. 228. Alcock v. Sparhawk.

So, if *J. S.* deviſes his lands to his brother, who is his heir at law, in fee, and likewiſes deviſes ſeveral legacies, and makes his brother executor, deſiring him to ſee his will performed according to the truſt and confidence he had repoſed in him; this makes the real eſtate liable; for the teſtator needed not to have deviſed the eſtate to his brother, being heir at law, unleſs he intended that he ſhould take it chargeable with the debts and legacies. Decreed, and affirmed by the Houſe of Lords.

A truſt

A truſt was decreed of a term for years aſſigned, though the truſt was *not expreſſed in the deed*; it having been ſo declared by the aſſignee, who had given *bond to perform the truſt*. Fin. R. 356. Goodwin v. Cutler. [So where a bond was given to *ceſtuy que truſt* to aſſign as he ſhould direct. Moorecroft v. Dowding, 2 P. Wms. 314. So, where a bond was given by a mother to her ſon to ſurrender a copyhold eſtate to him; the mother's brother, whoſe heir at law ſhe was, having been diſappointed of deviſing the eſtate to the impracticability of ſurrendering it to the uſe of his will, and having taken this method of ſecuring it to him. Parks v. Wilſon, 10 Mod. 515. 9 Mod. 62. S. C.]

[A covenant to make conveyances, or to purchaſe lands to certain uſes, hath been holden to be a good declaration of truſt, and binding upon the eſtate.] Earl of Plymouth v. Hickman, 2 Vern. 167. Blake v. Blake, 2 Bro. P. C. 350. Deg v. Deg, 2 P. Wms. 415.

If a man deviſes 1500 *l.* to *A.* and *B.* for ſuch uſes as the teſtator had declared to them, and by them not to be diſcloſed, and he diſcloſes the truſt to *A.* who by letter diſcloſes it to *B.*; this ſhall be a truſt, and the letter is a good declaration thereof. 2 Vern. 106. Crooke v. Brooking. [2 Br. P. C. 39. O'Hara v. O'Neil, S. P.]

But, if a man deviſes 40 *l.* to be paid to his couſin *J. S.*, and by him to be diſpoſed of in ſuch manner as the teſtator ſhould by a private note acquaint him with, and he dies without having made any ſuch appointment; this ſhall be a good bequeſt to *J. S.*, and ſhall not go to the executors, from whom it was intended to have been given away. 1 Chan. Caſ. 198. Martin v. Douch.

A. lent *B.* 100 *l.*, and in the note which was given for it, mention was made that it ſhould be diſpoſed of as *A.* ſhould direct; on a bill exhibited for it, the court declared it was a *depoſitum* or truſt, and decreed payment of it, though it was barred by the ſtatute of limitations. 2 Vent. 345. Lord Hollis's caſe.

A. in conſideration of 80 *l.* conveys an eſtate abſolutely to *B.* and afterwards *A.* brings a bill to redeem, and *B.* by anſwer inſiſts that the conveyance was abſolute, but confeſſes it was in truſt, that after the 80 *l.* paid, with intereſt, he was to ſtand ſeiſed for the benefit of the wife and children of *A.*, though no truſt was declared in writing, and *A.* replies to the anſwer: It was inſiſted that *A.* having replied, and defendant having made no proof of the truſt, no regard ought to be had to the matter ſet forth in avoidance of the plaintiff's demand; yet the court decreed the truſt for the benefit of the wife and children. 2 Vern. 288. Hampton v. Spencer. [2 Atk. 155. Cottington v. Fletcher S. P.]

So, if *J. S.* makes his will, and his wife executrix, and the ſon afterwards prevails on his mother (by telling her that the executorſhip would be troubleſome to her, *&c.*) to get *J. S.* to make a new will, and name him executor therein, he promiſing to be a truſtee for the mother, which is done accordingly, and in that will there is but a ſmall legacy given the wife; this will be decreed a truſt for the wife on the point of fraud, notwithſtanding the ſtatute of *frauds* and *perjuries*, which requires a declaration of truſt in writing. 1 Vern. 296. Thynn v. Thynn. [1 Ro. Abr. 378. pl. 1. 4 Vin. Abr. 305. pl. 3. Roſwell v. Every. 5 Vin. Abr. 521. pl. 31. Sellack v. Harris. Pr. Ch. 3. Daveniſh v. Baines. 2 Vern. 506. Oldham v. Litchford. Ambl. 67. Reech v. Rennigate. 3 Veſ. jun. 152. Barrow v. Greenough. Anſtr. 343. Newcomb v. Burdon. Similar deciſions on the ground of fraud.]

But,

Chan. Caſ. 310. Civil v. Rich.

But, where one poſſeſſed of leaſes for years deviſed them to his wife, and hoped ſhe would leave them to his ſon, and died; and her ſecond huſband granted the leaſes away, and the ſon ſued to be relieved; his bill was diſmiſſed; for it was no truſt for the ſon (*a*). Cited by Lord Chancellour as a caſe he remembered in Lord *Egerton*'s time.

[(*a*) So, other caſes have ſaid, that words merely *of recommendation* will not be ſufficient to create a truſt. Bland v. Bland, 24th February 1745. Le Maiſtre v. Banniſter, 26th November 1770, ſtated in Finch's note to Eales v. England, Pr. Ch. 200. Cunliffe v. Cunliffe, Ambl. 626. However, notwithſtanding theſe deciſions, it now ſeems to be ſettled, that words of deſire, requeſt, or recommendation (for requeſt and recommendation are conſidered as convertible terms) are ſufficient to create a truſt, provided that the property be certain, and the objects diſtinctly marked. Where any perſon gives property, and points out the objects, the property, and the way in which it ſhall go, that does create a truſt, unleſs he ſhews clearly that his deſire expreſſed is to be controuled by the party, and that he ſhall have an option to defeat it. Eales v. England, Pr. Ch. 200. 2 Vern. 486. Glynn v. Harding, 1 Atk. 469. Vernon v. Vernon, Ambl. 4. Palmer v. Scrib, 8 Vin. Abr. 289. pl. 25. Harland v. Trigg, 1 Bro. Ch. Rep. 142. Nowlan v. Nelligan, *Id.* 489. Pierſon v. Garnett, 2 Bro. Ch. Rep. 38. 226. Richardſon v. Chapman, Burn's E. L. tit. Biſhop, pag. 220. Maſſey v. Sherman, Ambl. 520. Wynne v. Hawkins, 1 Br. Ch. Rep. 179. Malim v. Keighley, 2 Veſ. jun. 333. Barrow v. Greenough, 3 Veſ. jun. 152. In Puſhman v. Filliter, 3 Vez. jun. 7. where a teſtator gave the reſidue of his perſonal eſtate to his wife, deſiring her to provide for his daughter *A.* out of the ſame, as long as ſhe, his wife, ſhould live, and at her deceaſe to diſpoſe of what ſhould be left among his children, in ſuch manner as ſhe ſhould judge moſt proper; upon a bill filed by the children againſt the wife's repreſentative to have the benefit of this reſiduary bequeſt, the Maſter of the Rolls ſaid, that it is now clearly ſettled, that any words of recommendation by any perſon having a right to command, do create a truſt, if the perſon and property are defined; but the queſtion in this caſe, he added, is merely a queſtion of conſtruction upon the words, "what ſhould be left;" and thoſe words, he conſtrued to convey an abſolute gift to the teſtator's wife of any part of his property to any uſe ſhe might think proper, clothed only with a truſt for his daughter *A.*]

Sonley v. Clock-makers Company, Br. Ch. Rep. 81.

[An eſtate was deviſed to a body corporate in truſt to ſell, and that the money ariſing from the ſale, and the receipt and profits till the ſale, ſhould be divided between the teſtator's nephews and nieces. The queſtion was, Whether the deviſe to the corporation being void, the heir at law took beneficially, or ſubject to the truſt? And by *Eyre*, B.—Although the deviſe to the corporation be void at law, yet the truſt is ſufficiently created to faſten itſelf upon any eſtate the law may raiſe. This is the ground on which courts of equity have decreed, in caſes where no truſtee has been named.—Decreed that the heir at law is a truſtee to the uſes of the will.]

MSS. Rep. Fry v. Fry, in Chan. Trin. 27 G. 2.

With reſpect to the raiſing of truſts, it has been held, that where a truſt is created by marriage ſettlement or will, or a truſt of a term to raiſe money at 21 or marriage, and the perſon dies before the time, a court of equity will not ſuffer the truſtee to raiſe the money at law.

Fry v. Fry, in Chanc. Trin. 27 Geo. 2. MSS. Rep.

A. by his will deviſed his real eſtate to his wife for life, with remainders over, and gave a legacy to his daughter, to be paid within one month after the death of his wife, and charged it upon the real eſtate: The daughter died in the life of the wife, unmarried; and after the wife's death the repreſentative of the daughter brought his bill to have this legacy paid out of the real eſtate. For the plaintiff it was inſiſted, that this was different from the common caſe of a legacy payable out of the lands, for here the time of payment was poſtponed out of regard to the circumſtances of the fund, and not of the perſon. But by Lord Chancellour.—The general rule is, that where a legacy or portion

is given to be raiſed out of lands, payable at a certain time, if the legatee or child dies before that time comes, and before the time, when in the view of the teſtator he could be ſuppoſed to want the legacy or portion, it ſhall ſink in the land for the benefit of the heir or deviſee; and this rule has only been broke into in favour of the huſband or children of ſuch legatee, &c. where ſhe has married. But that is not the preſent caſe, and as to the argument made uſe of from the circumſtances of the fund, that is only brought as an auxiliary reaſon; and no caſe has been determined upon ſuch circumſtances alone. If it had been given on a more remote contingency, as on the failure of iſſue of *A.* &c. there might have been ſome reaſon to have given it to the repreſentative, as the teſtator might probably think the legatee could not be living at ſuch a diſtant period. But here it depends on the death of his wife, which might happen in a reaſonable time. In caſes where it has been given to *A.*, his executors and adminiſtrators, it ſhews the intention of the teſtator to make it tranſmiſſible; and where it has been charged by a condition, or a conditional limitation, and the legatee has had a remedy at law to defeat the deviſe of the eſtate to the deviſee, this court will not interpoſe to take that remedy from him, but will leave the deviſee to take the eſtate *cum onere*. But in the caſe of a truſt created by marriage ſettlement or will, or a truſt of a term to raiſe money at 21 or marriage, where the perſon dies before, this court will not ſuffer the truſtee to raiſe the money at law, where there might be a remedy at law contrary to the rule of this court. The teſtator here, in the latter part of his will, gives legacies to his two daughters, and if either of them die, her ſhare to go to the ſurvivor; this looks as if he did not intend that the repreſentative ſhould have it even in the firſt bequeſt, and is a farther circumſtance to confirm the opinion given againſt raiſing the legacy out of the real eſtate.—Bill diſmiſſed, but without coſts. If this had been the caſe of a child who had married, and left children, it might have been otherwiſe.

(C) What ſhall be deemed a reſulting Truſt, or Truſt by Implication.

IT has been ſhewn under the laſt head, that by the ſtatute againſt frauds and perjuries, the 29 *Car.* 2. *c.* 3., all declarations of truſts were to be made in writing; but there is a ſaving in the act with regard to truſts reſulting by implication of law, which are left on the footing whereon they ſtood before the act; now a bare *declaration by parol* before the act, would prevent any reſulting truſt. *Arg.* and the court ſeemed to be of that opinion.

2 Vern. 294. pl. 285. Lady Bellaſis v. Compton v. Frankland. [That parol evidence is admiſſible to rebut a reſulting uſe is fully eſtabliſhed by the caſe of Lord Altham v. Earl of Angleſea, 2 Salk. 676. Dougl. 26.]

It was likewiſe ruled by Lord Chan. *Cowper*, that the ſtatute of frauds, § 8. which ſays, "that all conveyances where truſts and "confidences ſhall ariſe or reſult by implication of law, ſhall be

1 P. Wms. 111. Lamplugh v. Lamplugh.

"as

"as if that act had never been," muſt relate to truſts and equitable intereſts, and cannot relate to a uſe which is a legal eſtate.

2 Vent. 361. Anon. 1 Vern. 366. S. P. Gaſcoigne v. Thwyng.

If a man purchaſes lands in another's name, and pays the money, it will be a truſt for him that paid the money, though there be no deed made, declaring the truſt thereof; for the ſtatute of frauds and perjuries extends not to truſts raiſed by operation of law. Admitted; but there ſaid, "that the proof muſt be clear, that he paid the purchaſe-money."

Fitz. Gibb. 223. Fitzgerald v. Ld. Faucon-bridge.

No rule is more certain than that if a man makes a conveyance in truſt for ſuch perſons and ſuch eſtates as he ſhall appoint, and makes no appointment, the reſulting truſt muſt be to him and his heirs. The truſt in equity muſt follow the rules of law in the caſe of a uſe, and that it would be ſo in the caſe of a uſe is undoubtedly true; and that was Sir *Edward Cleer*'s caſe in 6 *Rep. per* Ld. Chancellour.

Bernard. Rep. in Canc. 388. Lloyd v. Spillit. The reaſon why the court has allowed a truſt by operation of law to ariſe in the latter caſe, has been, that the party by declaring part of the truſt to be for another, and by ſaying nothing with regard to the other part of it, ſhews his intention to be that the other was to have only one part of the truſt, and conſequently he himſelf ought to have the benefit of the other part of it. Theſe have been the only two inſtances of truſt allowed of, to ariſe by operation of law, ſince the ſtatute of frauds, unleſs there has been a plain or expreſs fraud. Where there has been a fraud, in gaining a conveyance from another, that may be a reaſon for making the grantee in that conveyance to be conſidered merely as a truſtee. *Per* Lord Chancellour. *Ibid.*

But truſts ariſing by operation of law have been but of *two* kinds, (firſt,) either where the conveyance has been taken in the name of one man, and the purchaſe-money paid by another; or, (ſecondly,) where the owner of an eſtate has made a voluntary conveyance of it, and made a declaration of the truſt with regard to one part of the eſtate, and has been ſilent with regard to the other part of it (*a*). *Per* Lord Chancellour.

[(*a*) We cannot help ſuſpecting the fidelity of the reporter in this paſſage, as the Chancellour is not made to deliver himſelf with his uſual preciſion and accuracy. For there certainly have been other caſes, beſides thoſe which are here put by my Lord Hardwicke, wherein conſtructive truſts have been admitted. For inſtance, where there were three leſſees under a church, and one of them ſurrendered the old leaſe, and took a new one in his own name, it was holden to be a reſulting truſt for them all. Palmer v. Young, 1 Vern. 276. So, if a guardian, or truſtee for an infant, renew a leaſe, the renewed leaſe will be to the uſe of the infant. Whalley v. Whalley, 1 Vern. 484. Lee v. Vernon, 7 Br. P. C. 432. So, if a truſtee purchaſe lands with his truſt money, and take the conveyance in his own name without declaring the truſt, but reciting or otherwiſe admitting that the purchaſe was made with the profits of the truſt eſtate, a truſt will reſult for the perſon entitled to the profits. Deg v. Deg, 2 P. Wms. 414. So, if a mortgagee, whoſe mortgage was taken in the name of a truſtee, buys in the equity of redemption, in the name of the ſame truſtee, without any declaration of the truſt, yet there is a good reſulting truſt to the mortgagee. Acherley v. Acherley, 4 Br. P. C. 67. So, if a term is created to pay debts, or deviſed for a ſpecific purpoſe, after the debts paid, or purpoſe anſwered, there is a truſt for the heir. Counteſs of Briſtol v. Hungerford, 2 Vern. 645. Levet v. Needham, *Id.* 138. So, a grant of the next avoidance of a church to a perſon, without his privity, is a reſulting truſt for the grantor. Duke of Norfolk v. Browne, Pr. Ch. 80. 1 Eq. Ca. Abr. 381. pl. 4. S. C. Nor is there a reſulting truſt only in thoſe caſes, where part of the eſtate only is diſpoſed of or conveyed; for though the whole eſtate be conveyed, yet if it be for particular purpoſes, or on particular truſts, which by accident or otherwiſe cannot take effect, a truſt will reſult; as, where a teſtator deviſes real eſtates to truſtees to ſell and convert into perſonalty for particular purpoſes ſpecified in the will, and thoſe purpoſes cannot be effectuated, the real eſtates, or the produce thereof, will in ſuch caſe reſult to the heir. Cruſe v. Barley, 3 P. Wms. 20. Randall v. Bookey, Pr. Ch. 162. Emblyn v. Freeman, *Id.* 541. Stonehouſe v. Evelyn, 3 P. Wms. 252. Arnold v. Chapman, 1 Veſ. 108. Digby v. Legard, Tr. 1774, reported in the note in 3 Cox's P. Wms. 22. Akeroyd v. Smithſon, *Ibid.* and 1 Br. Ch. Rep. 503. Robinſon v. Taylor, 2 Br. Ch. Rep. 589. Spink v. Lewis, 3 Br. Ch. Rep. 355. *Sed vide* Ogle v. Ogle, 1 Br. Ch. Rep. 501. Neither is it univerſally true, as is obſerved by Mr. Fonblanque (2 Eq. Tr. 122. note), that what is not conveyed will reſult; as, where the grantor limits an eſtate for years to himſelf, and an eſtate to another, by way of uſe, upon a contingency which may not happen within the term of years, an eſtate of freehold will not reſult to the grantor. Adams v. Savage, 2 Salk. 679. & *ſupra.*]

Where it plainly appeared upon the evidence of both ſides, that the conſideration-money paid on a purchaſe was the proper money of *A.*, (though mentioned in the conveyance to be paid by *B.*,) in ſuch caſe, had it not been for the ſtatute of frauds, this would have made a reſulting truſt; and *B.* after *A.*'s death executing a declaration of truſt, this plainly took it out of the ſtatute. *Per* Lord Chancellour *Cowper*. 1 P. Wms. 323. Ambroſe v. Ambroſe.

Wherever there is a conſideration, there can be no reſulting truſt. But, if a leaſe be made for years without a conſideration, there will be a reſulting truſt to the leſſor (*a*). [(*a*) But it ſhould ſeem, that there can be no implied truſt between a leſſor and leſſee; becauſe every leſſee is a purchaſer by his contract and his covenants, which excludes all poſſibility of implying a truſt for the leſſor; and therefore in that caſe, if there be any truſt at all, it muſt be declared in writing. Filkington v. Bayley, 7 Br. P. C. 526. But between an aſſignor and aſſignee there may be an implied truſt. Hutchins v. Lee, 1 Atk. 447.]

Where a daughter's portion was charged upon the father's land, ſhe at the requeſt of her father had releaſed her intereſt in the land to the intent that he might be enabled to make a clear ſettlement thereof upon his ſon. It was declared by the Lord Keeper, that if this was done by the daughter without any conſideration, there would be a reſulting truſt in the father, whereby he ſhould be chargeable to the daughter for ſo much money. Freem. 305. Lady Tyrrell's caſe.

But, where a truſtee purchaſes lands out of the profits of the truſt eſtate, and takes the conveyance in his own name; though probably, if he cannot make other ſatisfaction for the miſapplication, theſe lands may be ſequeſtered, yet they cannot be decreed to be a truſt for *ceſtui que truſt*, any more than if *A.* borrows money of *B.*, and purchaſes land with it (*b*), thoſe lands are no truſt for *B.*, for it is *not* a truſt in writing; and a reſulting truſt it cannot be, becauſe that would be to contradict the deed, by *parol proof*, directly againſt the ſtatute of frauds. But, if this purchaſe had been recited to have been made with the profits of the truſt eſtate, this appearing in writing might ground a reſulting truſt. On appeal to the Houſe of Lords, this decree was affirmed. Ch. Prec. 84. pl. 77. Kirk v. Webb. [Show. P. C. 83. (*b*) The reſult of the different caſes upon this point is well ſtated by Mr. Sanders in his edition of Atkyns's Reports, 2 vol. 150.

note (2). If the conſideration-money is *expreſſed* in the deed to be paid by the perſon in whoſe favour the conveyance is taken, and nothing appears in ſuch conveyance to create a preſumption that the purchaſe-money belonged to another, parol proof cannot be admitted *after the death of the nominal purchaſer* to prove a reſulting truſt; for that would be contrary to the ſtatute of frauds and perjuries. See the principal caſe. Walter de Chirton's caſe, Pr. Ch. 88. Heron v. Heron, *Id.* 163. Newton v. Preſton, *Id.* 103. Gaſcoigne v. Thwyng, 1 Vern. 366. Hooper v. Eyles, 2 Vern. 480. Crop v. Norton, 2 Atk. 75. But, if the nominal purchaſer *in his lifetime* gives a declaration of, or confeſſes the truſt, that takes it out of the ſtatute. Ambroſe v. Ambroſe, 1 P. Wms. 322. Ryal v. Ryal, 1 Atk. 59. In Lane v. Dighton, Ambl. 409. there was evidence, in Mr. Dighton's own hand-writing, that *the truſt ſtocks had been ſold, and the money laid out from time to time in the purchaſe of land.* So, if it appears on the face of the conveyance (whether by recital or otherwiſe) that the purchaſe was made with the money of a third perſon, that will create a truſt in his favour. As in the principal caſe, Deg v. Deg, 2 P. Wms. 414. Ryal v. Ryal, *ubi ſupra*. Young v. Peachy, 2 Atk. 257.]

I doubt ye diſtinction here taken.

So, where a teſtator *empowered the executor to lay out the perſonal eſtate in land, and ſettle it on* A. *and his heirs*, and the executor being about to purchaſe, told *A.*'s mother of it, and aſked her conſent, but took the conveyance in his own name, and *no truſt in writing was declared*, but it was proved that he at ſeveral times *declared it muſt be ſold to make* A. *ſatisfaction*; yet the court (though Ch. Prec. 168. pl. 139. Halcot v. Markant.

(though inclined to decree a conveyance to *A.*, the executor being dead inſolvent) declared it could not, becauſe there was *no expreſs proof of the application of the truſt-money.*

(*a*) Hobart v. Counteſs of Suffolk, 2 Vern. 645. (*b*) Starkey v. Brooke, 1 P. Wms. 390.

[It is a general rule, that where lands are deviſed for a particular purpoſe, what remains after ſuch purpoſe is ſatisfied ſhall reſult to the heir at law of the teſtator. Thus, if lands are deviſed to executors for payment of debts and legacies; after payment of debts and legacies, the executors will be truſtees, as to the ſurplus, for the heir at law (*a*); though the executors have no legacy, and the heir at law has an expreſs one (*b*).

City of London v. Garway, 2 Vern. 571.

So, where *A.* deviſed lands to truſtees to ſell, and to diſpoſe of the money as he ſhould appoint, and for want of appointment to his four nephews; *A.* appointed ſeveral ſums to be paid to different perſons, which ſums did not amount to the value of the land; it was holden, that the ſurplus reſulted to the heir.

Wych v. Packington, 11 Br. P.C. 372.

So, where *A.* deviſed to his wife a rent-charge for thirteen years for payment of debts; and deviſed lands to his wife in augmentation of her jointure; it was holden, that the ſurplus of the rent-charge, after the debts were paid, reſulted to the heir.

Stonehouſe v. Evelyn, 3 P. Wms. 253.

So, where a rent-charge was deviſed to be ſold for payment of legacies to the amount of 800 *l.*; but, if the rent-charge ſold for 1000 *l.*, then an additional legacy of 100 *l.* was given to *B.*, and another of 100 *l.* was given to *C.*: it was holden, that if the rent-charge ſold for above 800 *l.*, and leſs than 1000 *l.*, the reſidue, above 800 *l.*, would reſult to the heir at law, and not be divided between *B.* and *C.*

Digby v. Legard, 3 Cox's P. Wms. 22. Akeroid v. Smithſon, *Ibid.* S. P.

So, where *A.* deviſed her real and perſonal eſtates to truſtees in truſt, to ſell and pay debts, and to pay the reſidue to five perſons, to be equally divided between them ſhare and ſhare alike (which words in a will create a tenancy in common, 1 *P. Wms.* 700. 2 *P. Wms.* 282.); and one of the reſiduary legatees died in the lifetime of the teſtatrix; the court held, that this was a reſulting truſt (as to the ſhare in the real eſtate of the reſiduary legatee, who died in the teſtatrix's lifetime), for the benefit of the heir at law. And upon a ſimilar bequeſt of perſonal eſtate, it ſeems, the ſhare of the legatee ſo dying would go according to the ſtatute of diſtributions.

Sand. on Uſes, 245. 1 P. Wms. 700. 2 P. Wms. 532.

Gravenor v. Hallum, Ambl. 643.

So, where lands were deviſed to be ſold, and part of the money ariſing by the ſale was given to *charitable uſes*, and the reſidue of *the money* was given over; it was holden, that the part given in mortmain ſhould reſult to the heir at law, and not go to the reſiduary legatees.

Arnold v. Chapman, 1 Vez. 108.

So, where a teſtator gave a legacy to his executors by name, and then deviſed his copyhold to *A.*, he paying his executors 1000 *l.*, and after payment of debts and legacies, gave the reſidue to a charity, it was holden, that the 1000 *l.*, being a charge on the real eſtate, and not well diſpoſed of by reaſon of the mortmain act, the heir at law was entitled to it by way of reſulting truſt.

Robinſon v. Taylor, 2 Br. Ch. Rep. 589.

So, where the teſtator directed the reſt and reſidue of his real and perſonal eſtates to be ſold by truſtees, and thereout to pay annuities

annuities and legacies, and then to pay the ſurplus to *A. B.* for her life; upon the death of *A. B.* it was holden, that ſo much of the ſurplus as aroſe from the real eſtate was a reſulting truſt for the heir at law, and the reſt for the next of kin.

So, where a teſtatrix, having an eſtate which came to her *ex parte maternâ*, on her marriage conveyed the ſame to truſtees to ſuch uſes as ſhe ſhould direct, with remainder to her own right heirs; and afterwards by will directed the eſtate to be ſold, the money to be laid out in the funds, and the truſtees to permit the huſband to receive the intereſt for hislife; and then, after deducting 3500*l.* to certain uſes which veſted in *C. D.*, and after paying 1000*l.* to *A. B.*, to pay the reſidue to three perſons; and by a codicil gave her huſband a power of appointing the 3500*l.* in caſe *C. D.* ſhould marry without his conſent; *A. B.* died in the teſtatrix's lifetime before the codicil made, but the teſtatrix took no notice thereof in the codicil; it was holden, that the 1000*l.* were to be conſidered as real and not perſonal eſtate, and reſulted to the heir at law of the teſtatrix *ex parte maternâ*. Hutcheſon v. Hammond, 3 Br. Ch. Rep. 128.

So, where a teſtator directed real eſtate to be ſold, and the money ariſing from the ſale to be inveſted in the funds, and then ordered the reſidue of his perſonal eſtate to be laid out in the funds, to remain there for 10 years, and at the end thereof gave the ſame to his next of kin; the Chancellour held, that the next of kin in that caſe muſt mean next of kin at the time of the death; and the teſtator having but one brother, who fell within that deſcription, and he having died within the ten years, the legacy was lapſed, and ſo much as was produced by the real eſtate muſt revert to the heir at law of the teſtator, and ſo much as was perſonalty to the repreſentatives of the brother. Spink v. Lewis, 3 Br. Ch. Rep. 355.

So, where a teſtator deviſed his real and perſonal eſtate to his executor in truſt to pay debts and legacies, and afterwards gave the reſt and reſidue to the executor, but declared, that the only purpoſe for which he deviſed his real eſtate was, that he might ſubject it to his debts; it was holden, that ſo much of the real eſtate, as was not applied to the debts, ſhould go to the heir. Halliday v. Hudſon, 3 Vez. jun. 210.

But this rule, that where lands are deviſed for a particular purpoſe, after the purpoſe ſatisfied, there is a reſulting truſt for the heir at law, admits of ſeveral exceptions. Thus, Lord *Hardwicke* ſaid, if *J. S.* deviſed lands to *A.* to ſell them to *B.*, for the particular advantage of *B.*, that advantage is the only purpoſe to be ſerved according to the intent of the teſtator, and to be ſatisfied by the mere act of ſelling, let the money go where it would; and that there was no precedent of a reſulting truſt in ſuch a caſe. So, if *A.* deviſed lands to *J. S.* to ſell to the beſt price to *B.*, or to leaſe for three years at ſuch a fine, there could be no reſulting truſt to the heir of the teſtator. 1 Atk. 619.

Again, a teſtator deviſed to truſtees to ſell, and to diſpoſe of the money ariſing by the ſale, as they, or the major part of them ſhould think proper; he having previouſly intimated an intention of giving the money to charitable uſes. Here the heir at law can have no reſulting truſt; for a man empowering others to ſell, may diſinherit his heir, as well as by his own actual diſpoſition. Nor Cook v. Duckenfield, 2 Atk. 561.

can his truſtees have any beneficial intereſt; for his giving his eſtates to perſons whom he *names truſtees* to ſuch purpoſes, as they, or the *major part* of them, ſhall judge fit, plainly ſhews he intended them no benefit, but only an authority.

Coningham v. Meliſh, Pr. Ch. 31. 1 Eq. Co. Abr 273. S. C.

So, a teſtator deviſed to his couſin *T. M.* by name all his meſſuage, &c., *in truſt* to ſell for the payment of all his debts and legacies within a year after his death, and made him executor, but gave him no legacy, though he was as nearly related to him as his heir at law. It was holden by two Lords Commiſſioners againſt one, that there ſhould be no reſulting truſt; for then the executor, who was taken notice of as his couſin, would have nothing but his labour for his pains.

Rogers v. Rogers, 3 P. Wms. 193.

So, a teſtator by his will made his *dearly beloved* wife *ſole heireſs* and executrix of all his real and perſonal eſtate, to ſell and diſpoſe thereof at her pleaſure, and to pay his debts and legacies, and gave his brother (who was his next of kin and heir) five pounds. It was decreed, that the teſtator's wife was entitled to the premiſes deviſed for her own benefit, and that there was no reſulting truſt to the heir at law of the teſtator: that the deviſe that the wife ſhould be ſole heireſs of the real eſtate did in every reſpect place her in the ſtead of the heir, and not as a truſtee for him: that it was the plainer by reaſon of the language of tenderneſs and affection, his *dearly beloved wife*, which muſt intend to her ſomething beneficial, and not what would be a trouble only: and what made it ſtill ſtronger was, that the heir was not forgotten, but had a legacy of 5 *l.* left him.

Mallabar v. Mallabar, Ca. temp. Talb. 78.

So, a teſtator deviſed his real eſtate to his ſiſter *in truſt* to ſell, and with the produce of the ſale to pay his debts and certain pecuniary legacies; and after payment of his debts and legacies gave her the reſidue of his perſonal eſtate. Lord *Talbot* held, that there was no reſulting truſt for the heir; and that the ſiſter ſhould have the whole reſidue, after the ſale of the eſtate, both of the money ariſing by the ſale, and of the perſonal eſtate.

Hill v. Biſhop of London, 1 Atk. 618.

A teſtator deviſed the advowſon of a church to his mother in-law, willing and deſiring her to ſell and diſpoſe of the ſame to *Eton College*, and on their refuſal, to *Trinity College* in *Oxford*; and on the refuſal of both thoſe ſocieties, to any of the Colleges in *Oxford* or *Cambridge*. It was decreed, that there was in this caſe no reſulting truſt to the heirs at law of the teſtator, but a deviſe of the beneficial intereſt to the teſtator's mother-in-law, with an injunction to ſell to particular ſocieties.

Durour v. Motteux, 1 Ves. 320.

A. by his will gave all his real eſtate to truſtees to ſell and diſpoſe of the whole, with his perſonal eſtate, for payment of his debts, legacies, and performance of his will; and gave ſeveral legacies, and, among the reſt, 1200 *l.* to be applied to charitable uſes within the mortmain act; and then directed the truſtees to place out all the reſidue of his eſtate and intereſt therein upon ſecurities, and divide among ſeveral perſons. The whole of the 1200 *l.* being a void deviſe, the queſtion was, Whether it ſhould go to the heir at law, or to the reſiduary legatees? Lord *Hardwicke* was of opinion, that the money which ſhould ariſe by ſale of the real eſtate, was turned into perſonal by the teſtator, and

and ſo intended; and therefore the heir at law had no claim to it.

A deviſe was in truſt, among other things, to pay 4*l.* a year, ariſing out of real eſtate, to a charity. This charge being void by the ſtatute of mortmain, it was holden, that it did not go to the heir at law, but ſunk for the benefit of the ſpecifick deviſee, as ariſing out of his eſtate. Wright v. Row, 1 Br. Ch. Rep. 61.

A. deviſed freehold eſtates to truſtees in truſt by rents and profits, or by ſale or mortgage, to pay debts and legacies, which his perſonal eſtate ſhould not be ſufficient to diſcharge, and ſubject thereto, in caſe *T. B.* ſhould attain 21, in truſt for him and his heirs. It was contended, that the ſurplus profits of the eſtates, after payment of the annuities left by the will and the intereſt of the debts, were undiſpoſed of until *T. B.* ſhould attain 21, and, conſequently, the heir at law was entitled to them. But the court held this a complete deviſe to the truſtees until *T. B.* ſhould attain 21; and that the ſurplus profits, after the legacies, annuities, and intereſt of debts paid, ſhould be applied to ſink the principal of the debts.] Popham v. Lady Ayleſbury, Ambl. 68.

(D) What ſhall be deemed an Advancement, and what a Truſt.

IT is a ſettled rule, that whenever a father purchaſes in the name of a child unprovided for, it is intended as a proviſion and not a truſt, unleſs it be otherwiſe proved, and the proof lies on the plaintiff. This was held ſo before the ſtatute of frauds, *&c.* and is ſtronger ſince, becauſe declarations of truſts ought to be in writing, though in other caſes a truſt will reſult where it appears that another paid the money. And — 2 Freem. 252. Shales v. Shales.

A diſtinction has been taken where a parent makes a purchaſe in the name of an unadvanced child, and where in the name of a child already advanced. In the former caſe, it was only an advancement for the child; in the latter, a truſt for the parent. 2 Chan. Ca. 231. Elliot v. Elliot.

The reaſon why where the father purchaſes *in the name of a ſon unadvanced*, without any expreſs declaration of the truſt, this is an advancement of the ſon, and not a truſt for the father, is, becauſe between father and ſon *the blood is a ſufficient conſideration to raiſe a uſe* to the ſon; and that in all caſes whatſoever, where a truſt ſhall be between the father and ſon, contrary to the conſideration and operation of law, the ſame ought to appear upon very plain, and coherent, and binding evidence; and not by any argument or inference from the father's continuing in poſſeſſion, and receiving the profits, which ſometimes the ſon may not in good manners contradict, eſpecially, where he is advanced but in part: And if ſuch inference ſhall not be made by the father's *perception of profits*, it ſhall never be made from any words between them in *common diſcourſe*; for in thoſe there may be great variety, and ſometimes apparent contradictions. Now where there is no clear proof of any truſt between the father and ſon, the law will never imply a truſt, becauſe the natural conſideration of blood, and the obligation which lies on the father in conſcience to pro- Finch. 338. Grey v. Grey.

vide for his ſon, are predominant; and muſt over-rule all manner of implications. And herein the law of truſts does (as it ought to do) agree with the *law of uſes before the ſtatute* of *H.* 8., and therefore, if, before that ſtatute, the father had made a feoffment to a ſtranger without any conſideration, the law raiſed a uſe without any implication to himſelf; but, if he made a feoffment to *his ſon*, no uſe aroſe to the father by implication, becauſe the blood, which is a ſufficient conſideration, fixed and ſettled the eſtate in the ſon. It is true, where the *ſon is married in the lifetime of his father, and by him fully advanced*, and in a manner emancipated, there, a purchaſe by the father, and in the name of his ſon, may be a truſt for the father, as much as if it had been in the name of a ſtranger, becauſe in that caſe all preſumptions or obligations of advancements ceaſe. *But, where* the ſon is not *advanced*, or but advanced or emancipated *in part*, in ſuch caſe there is no room for any conſtruction of a truſt by implication; and without clear proofs to the contrary, it ought to be taken as an advancement of the ſon.

2 Ch. Caſ. 231, Elliot v. Elliot.

So, where the father purchaſes in the name of the ſon, it has frequently been decreed an advancement, and not a truſt, though the father takes the profits and keeps poſſeſſion; and though the father, after ſuch purchaſe, declares the truſt, yet it is not good, unleſs the truſt be declared before or at the time of the purchaſe; and ſo the Lord Chancellour agreed.

1 P. Wms.'s Rep. 111, 112. Lamplugh v. Lamplugh. It was farther ſaid in this caſe, that the father's taking the profits, muſt be intended to have been done by him as guardian to the ſon.

Likewiſe, where a father purchaſed *in a younger ſon's name, and a nephew's*, lands of inheritance; and alſo purchaſed a term for years (of which he himſelf had the inheritance) in the ſame ſon's and the father's mother's name; though the whole purchaſe-money was mentioned to be paid by the father, and though he *took the profits* during his life, and died leaving the ſon about eight years old; and *though a reverſion, expectant on his mother's death, was ſettled upon him*, yet, the truſtees diſclaiming any intereſt in the eſtate, Lord Chancellour held the ſon to be *unprovided for, notwithſtanding ſuch reverſion* after his mother's death, for that he might ſtarve in the mean time; and that the *truſtees* having *diſclaimed*, made it all one as if the purchaſe had been in the ſon's name only.

Mumma v. Mumma, 2 Vern. 19.

[A father purchaſed a copyhold in the name of the defendant, his eldeſt ſon, an infant of 11 years old, and enjoyed it during his life, and afterwards having ſurrendered it to the uſe of his will, deviſed it to his wife for life, remainder to his younger children, and made other proviſions for the defendant, who, having recovered in ejectment, the bill was to be relieved againſt it. Lord Chancellour *Jeffries* conceived, that as he was but an infant at the time of the purchaſe, the purchaſe was an advancement for him, and not a truſt, notwithſtanding the father enjoyed it during his life.

Taylor v. Taylor, 1 Atk. 386.

So, where a father purchaſed a copyhold in his ſon's name, who was then 18 years of age, and the father continued in poſſeſſion till his death; Lord *Hardwicke* ſaid—I am of opinion it ſhould be conſidered as an advancement for the ſon, and found my opi-

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nion greatly on the caſe of *Mumma* v. *Mumma (ſupra)*; and though two receipts are produced under the ſon's hand for the uſe of the father, I think that will not alter the caſe; for the ſon, being then under age, could give no other receipt in diſcharge of the tenants who held by leaſe from the father.]

But it ſeems it had been otherwiſe, if the father had taken *the profits after the child's coming of age*, and when of diſcretion to claim his right—

As, where *A.* a *grandmother, purchaſed an annuity in the* 14 l. per cent. *annuities for lives*, for 100 *l. in the name of* E. *her grand-child*, the father of *E.* gave *A.* the grandmother a bond to repay her the 100 *l.* in caſe *E.* ſhould die in the grandmother's life; *A.* kept the tally, and received the annuity during her life, and diſpoſed of it by her will to *F.* another grand-child; it was decreed by the Chancellour, that the receiving of the income, and keeping the tally, and *no claim having ever been made by* E. ſhewed that *E.* was but a truſtee for *A.* and that the bond given by the father, in which no mention was made of a truſt, did not make it to be ſo. P. Wms.'s Rep. 607, 608. Loyd v. Read.

Likewiſe, where a father purchaſes the reverſion and inheritance in his own name, of lands of which a leaſe for three lives was then in being, and afterwards purchaſes the leaſe for three lives in his ſon's name, it is decreed a truſt, and not an advancement. Finch, 373. Hodgkinſon v. Moor.

[In the manor of *H.* it is the cuſtom to grant copyholds for three lives *ſucceſſivè*. *S. D.* purchaſed copyhold premiſes holden of this manor, and took the grant to himſelf and *M.* his wife, and *W.* his eldeſt ſon, to take in ſucceſſion for their lives.—By his will he deviſed all his intereſt in theſe copyholds (amongſt others) to his youngeſt ſon. There were no other circumſtances in this caſe; and the queſtion was, Whether this was an advancement to *W.*, or, whether he was a truſtee for his father? The court, after full conſideration, determined, that this was to be taken as an advancement for the eldeſt ſon.—The Chief Baron in delivering the judgment of the court, obſerved, that in the caſes cited the circumſtance of the nominee being a *child* of the purchaſer, had been conſidered as a *circumſtance of evidence to rebut the reſulting truſt*, and not as *raiſing a conſideration* in itſelf, which ſeemed a more ſimple way of treating it. That the circumſtance of the cuſtom of the manor requiring two nominees beſides the purchaſer had been inſiſted upon in the preſent caſe, as taking off the inference of an intended advancement, and had been relied upon in that view by the Lords Commiſſioners in *Dickinſon* v. *Shaw* in Chancery, 22d *May* 1770, in which caſe alſo the grant was for three lives *ſucceſſivè*. But that, notwithſtanding that authority, the court was of opinion, this circumſtance was not ſufficient to turn the preſumption againſt the child.] Dyer v. Dyer, in the Exchequer, Nov. 1788. Cox's P. Wms. 112. note.

But, where a purchaſe is made by a father in his own and his ſon's name, it ſhall *primâ facie* be intended an advancement for the ſon, and not preſumed a truſt, unleſs declared ſo. Chan. Caſ. 28. Scroope v. Scroope. It was ſaid in this caſe, that it was antiently the way to join the ſon in a purchaſe, to avoid wardſhip.

[But this is a weaker caſe than where the purchaſe is made in the ſon's name only; and therefore the ſon ſhall not have the benefit of ſurvivorſhip as againſt a judgment creditor of the father.

Pole v. Po'e. 1 Vez. 76. A father upon his ſon's marriage gave him a conſiderable advancement; and having ſeveral younger children who were unprovided for he ſold an eſtate; but 500 *l.* only of the purchaſe-money being paid, he took ſecurity for the remainder in the name of himſelf and his ſon. The father received the intereſt and great part of the principal without any oppoſition from the ſon, as did his executrix after his death, the ſon writing receipts for the intereſt. A queſtion being made, Whether the ſon ſhould be conſidered as truſtee for his father, or intereſted in his own right? Lord *Hardwicke* ſaid—No doubt, where a father takes an eſtate in the name of his ſon, it is to be conſidered as an advancement; but that is liable to be rebutted by ſubſequent acts. So, if the eſtate be taken jointly, ſo as the ſon may be entitled by ſurvivorſhip: that is weaker than the former caſe, and ſtill depends on the circumſtances. The ſon knew here that his name was uſed in the mortgage deed, and muſt have known whether it was for his own intereſt, or only as truſtee for his father; and inſtead of making any claim, his acts are very ſtrong evidence of the latter. Nor is there any colour why the father ſhould make him any farther advancement, when he had ſo many children unprovided for; and in uſing his ſon's name, the father might have a view that his ſon ſhould be a truſtee rather than another.

Stileman v. Aſhdown, 2 Atk. 477. A bill was brought by an executor to have ſatisfaction out of the eſtate of the defendant's late father upon a judgment given by him to the plaintiff's teſtator. It appeared, that in 1700 the father made a ſmall purchaſe jointly with the defendant to them and their heirs: that in 1708 he made another joint purchaſe with his youngeſt ſon, and ſettled it by way of proviſion for younger children, and paid the purchaſe-money for both eſtates, and continued in poſſeſſion till his death, which happened in 1735. The ſons afterwards entered upon theſe eſtates. It was inſiſted on the part of the defendants, that theſe two purchaſes were to be conſidered with reſpect to a moiety and on account of the ſurvivorſhip, as an advancement of the ſons, and, conſequently, they were entitled to retain the eſtate, and not liable to the plaintiff's judgment. But Lord *Hardwicke*, after obſerving, that he thought the caſes had gone full far enough in favour of advancements, and that he ought not to carry it further, ſaid, Here, the purchaſe is in the names of the father and ſon as joint-tenants: now this does not anſwer the purpoſe of an advancement, for it entitles the father to the poſſeſſion of the whole till a diviſion, and to a moiety abſolutely even after a diviſion, beſides the father's taking a chance to himſelf of being a ſurvivor of the other moiety: nay, if the ſon had died during his minority, the faher would have been entitled to the whole by virtue of the ſurvivorſhip, and the ſon could not have prevented it by ſeverance, he being an infant. Suppoſe a ſtronger caſe, that the father had taken an eſtate in the purchaſe to himſelf for life, with remainder to

to his ſon in fee, ſhould this prevail againſt the creditor? No, certainly, for the father having the profits for life, and the ſon only a remainder, the eſtate would have been liable. A material conſideration for the plaintiff, is, that the father might have other reaſons for purchaſing in joint-tenancy, namely, to prevent dower upon the eſtate, and other charges, *&c.* Then conſider how it ſtands in reſpect of the creditor. A father was in poſſeſſion of the whole eſtate, and muſt neceſſarily appear to be the viſible owner of it, and the creditor too would have had a right by virtue of an *elegit* to have laid hold of a moiety, and ſo it differs extremely from all the other caſes. Now it is very proper that this court ſhould let itſelf looſe as far as poſſible, in order to relieve a creditor, and ought to be governed by particular circumſtances of caſes. I ſhall therefore decree the creditor in this caſe to be let in upon theſe eſtates.]

(E) What Acts of a Truſtee ſhall be a Breach of Truſt, *&c.* or ſhall be deemed to alter or vary the Nature of it.

TRUSTS are ſo far regarded and ſupported in equity, that regularly no act of the truſtee ſhall prejudice the *ceſtui que truſt*; for though a purchaſer for a valuable conſideration, without notice, ſhall in no caſe have his title impeached in equity; yet the truſtee muſt, eſpecially in equity, make good the truſt; and my Lord *Hobart* is of opinion, that an action lies againſt him at common law (*a*) But, if one purchaſes with notice, then he becomes the truſtee himſelf, and ſhall be accountable for every act of his, as the truſtee was, and if either become inſolvent, the *ceſtui que truſt* has his remedy againſt the other. The truſtee of a legacy dying before the legacy is paid, ſhall not prejudice the legatee. So, if a truſtee of land die without heir, though the lord by eſcheat will have the land at law, yet it will be ſubject to the truſt in equity.

1 Abr. Eq. Caſ. 384. Pr. Ch. 200. Eacles v. England.

[(*a*) But this opinion of Lord Hobart is directly contradicted by my Lord Hardwicke, who ſays, that "a truſt "is where "there is "ſuch a "confidence "between the parties, that no action *at law* will lie; but it is merely a caſe for the conſideration of this "court," meaning a court of equity. 2 Atk. 612.]

When all the remainders are *veſted remainders* in tail, the *truſtees may join in making a tenant to the præcipe*, in order to the ſuffering a common recovery. *But, if any* remainder *is in contingency*, the truſtees appointed to preſerve contingent remainders ought not to join in ſuffering a recovery to bar any ſuch remainder; *as*, where the remainder was *to the uſe of the body of* A. *(ſtill living)* and *A. had iſſue* C. *a ſon, and* D. *a daughter*, and the truſtees join with *C.* in a bargain and ſale enrolled, for making a tenant to the *præcipe* to ſuffer a common recovery, which is ſuffered accordingly, and *C.* dies, leaving an infant ſon; now if the ſon ſhould die without iſſue, in the life of *A.*, in ſuch caſe *D.* would be heir of *A.*'s body. This would be a breach of truſt, and in caſe of a purchaſer having notice, his title would not be good.

2 P. Wms. 201. It was ſo ſaid by Talbot, Solicitor General, in the caſe of Marlow v. Smith.

1 P. Wms. 358, 359. Sir Thomas Tippen's caſe [1 Eq. Ca. Abr. 385. S. C. Gil. Eq. Rep. 34. S. C.]

Where *a ſettlement on the marriage of* A. *with* M. *was made by* J. S. *to* the uſe *of* A. *for* 99 *years*, remainder *to* E. *and* F. *truſtees*, for 99 *years*, remainder *to truſtees during the life of* A. *to ſupport contingent remainders*, remainder *to* M. *for life*, remainder *to the firſt*, &c. *ſon of the marriage*, remainder *to the heirs of the body of* A., remainder *to the right heirs of* A.; there being *no iſſue* of the marriage, and the remainder in fee being contingent, in regard the limitation to *A.* was for years only, and the eſtate not moving from *A.*, (for if ſo, the remainder limited to *A.* had been the old reverſion) the truſtees joined to deſtroy this contingent remainder. On a bill brought by a remote relation, the court refuſed to puniſh the truſtees, as *diſtinguiſhing* between a *voluntary ſettlement* and one made on a *valuable conſideration*: And the Maſter of the Rolls ſaid, that *if a ſon had been afterwards born, it would have been a breach of truſt*; but this remainder to the right heirs of *A.* being a *remote limitation, and not within the conſideration of the ſettlement*, equity would not puniſh it as a breach of truſt.

1 P. Wms. 537. Winnington v. Foley. [Note, this deciſion was upon an application to the court to direct the truſtee to join.]

So, where a *remainder in tail being veſted in the firſt ſon, the truſtees joined* with him *in ſuffering a common recovery*; it was held no breach of truſt, though *againſt the conſent of the father*; for when ſuch remainder was veſted in one of full age, a ſubſequent remainder was not to be regarded; neither was it aſſets in law or equity. Cited *per* Mr. *Vernon*, and ſo held ſince the caſe of Sir *Thomas Tippen ſupra*.

2 P. Wms. 610. 617. Manſell v. Manſell. Caſes in Eq. temp. Talbot, 252. S. C. In this caſe it was ſaid, that where an eſtate is limited *to* A. *for life*, remainder *to his firſt*, &c. *ſons in tail*, though it be a plain wrong and tort in him to do any act which will deſtroy thoſe contingent remainders before the birth of a ſon, notwithſtanding his *legal* power of doing ſo; yet as in this

But, where *J. S.* ſeiſed in fee of lands, deviſed the ſame to *A.* and *B.* and their heirs, to the uſe of *D.*, his ſiſter, for life, remainder to *A.* and *B.* and their heirs, during the life of *D.*, in truſt to preſerve contingent remainders, remainder to the uſe of the firſt, *&c.* ſons of *D.* in tail male ſucceſſively, remainder to the uſe of *E. M.* in fee; teſtator dying without iſſue, *D.* entered, and married *C.*, afterwards *C.* and *D.* his wife, and *E. M.* the remainder-man in fee, join in a feoffment to (new) truſtees to the uſe of *C.* and his heirs, and covenant to levy a fine to the (new) truſtees to the ſame uſes; and a fine (as it ſeems, though not ſtated in the caſe) was accordingly levied; afterwards *A.* and *B.* (the truſtees for preſerving *&c.* in the will) by leaſe and releaſe convey the lands to *C.* in fee, *D.* being then *enſient* of a ſon, who was ſoon afterwards born, and named *G.*, and *D.* had afterwards ſeveral other children; ſubſequent to which *C.* the father deviſed all his lands in general words to the ſaid *G.* for life, remainder to his firſt, *&c.* ſons in tail male ſucceſſively, remainder to his (*C.*) the teſtator's ſecond ſon by *D.*, for life, remainder to his firſt, *&c.* ſon in tail male ſucceſſively, and died, leaving ſeveral ſons, and *D.* alſo died; on a bill by *G.* it was reſolved by *King*, C, aſſiſted by Lord Chief Juſtice *Raymond* and Chief Baron *Reynolds*, that the joining of the truſtees to deſtroy the contingent remainders was a plain breach of truſt, and that though this had not been before judicially determined, yet it ſeemed to the court in common ſenſe, reaſon, and juſtice, to be capable of no other conſtruction;

conſtruction: and all parties were decreed to join in making ſuch an eſtate to *G.* as he would have been entitled to under the will of *J. S.* if theſe contingent remainders had not been deſtroyed, *i. e.* an eſtate in tail male, *&c.*

Caſe there is no truſtee, there can be no truſt, nor conſequently any breach of truſt, and therefore *this* court can have no conuſance of ſuch a caſe, nor handle for relief, the matter being left purely to the *common* law. But to prevent this inconvenience has the remedy of appointing truſtees been invented, on purpoſe to *diſable the tenant for life* from doing ſuch injury to his iſſue, which is not a very old invention. *Per* Lord Ch. King, aſſiſted *ut ſupra.* 2 P. Wms. 612, 613.

If *A.* ſeiſed in fee, in truſt for *B.* for full conſideration conveys to *C.*, who has notice of the truſt, and afterwards *C.*, to ſtrengthen his own eſtate, levies a fine; *B.*, the *ceſtui que truſt*, is not bound to enter within five years; for *C.* having purchaſed with notice, notwithſtanding any conſideration paid by him, is but a truſtee for *B.*, and ſo the eſtate not being diſplaced, the fine cannot bar.

1 Vern. 149. Bovey v. Smith. [2 Atk. 630. Story v. Ld. Windſor, 3 Atk. 563. Shields v. Atkins. S. P.]

So, if an executor, in truſt for an infant reſiduary legatee, renews a leaſe, part of the teſtator's perſonal eſtate, in his own name, and firſt mortgages it, and then aſſigns the equity of redemption to a truſtee, to ſell for payment of his own debts, and his truſtee ſells to one who has notice of the infant's title, the purchaſe will be ſet aſide.

1 Vern, 484. Walley v. Walley.

[If a truſtee conveys to one who has *no* notice of the truſt, and the grantee levies a fine, and five years paſs, and afterwards the truſtee purchaſes the ſame lands again for a *bonâ fide* conſideration; ſtill he ſhall be a truſtee, as he was before.

Bovey v. Smith, 1 Vern. 70.

But, if a truſtee, when in poſſeſſion, alienates for a valuable conſideration, and without notice, the ſale will be good, and the purchaſer will not be a truſtee in his ſtead. The *ceſtui que truſt* may indeed compel the truſtee to make ſatisfaction in ſuch caſe; but the breach of truſt is conſidered but as a ſimple contract debt, and can only fall upon the perſonal eſtate of the truſtee, unleſs the truſtee has acknowledged the debt to the truſt-eſtate under hand and ſeal.]

Millard's caſe, 2 Freem. 43. Hardr. 469, 1 Ch. Rep. 245. Vernon v. Vaudrey, Barnardiſt. Ch Rep. 280. 2 Atk. 119. S. C. Gifford v. Manley, Ca. Temp. Talb. 109.

A bare truſtee cannot alter the nature of the truſt by turning land into money, or money into land, ſo as to make it veſt in different perſons, by his act, than it would otherwiſe have done.

Furlam v. Sanders in Chanc. Mich. 28 G. 2. MS. Rep. And ſee 3 P. Wms. 100. Witter v. Witter.

[So, where an executor in truſt for an infant of a leaſe for 99 years, determinable on three lives, upon the lord's refuſing to renew but for lives abſolutely, complied with the lord, and changed the years into lives; this, upon the infant's dying under twenty-one and inteſtate, was adjudged to be a truſt for his adminiſtrator, and not for his heir.

Witter v. Witter. 3 P. Wms. 99.

But, where a feme purchaſed a church leaſe to her and her heirs for three lives, and died, leaving an infant daughter, two of the lives died, and the guardian renewed the leaſe, it was holden, that this renewed leaſe was a new acquiſition, and ſhould go to the heirs on the part of the father.

Maſon v. Day, Pr. Ch. 319. Pierſon v. Shore, 1 Atk. 480. S. P.

However,

Rook. v. Warth, 1 Vez. 461. Tullit v. Tullit, Ambl. 370. Inwood v. Twyne, *Id.* 417.

However, in general, it is true, that a guardian or truſtee ſhall not alter the nature of an infant's property, ſo as to change the right of ſucceſſion to it in caſe of the infant's death, unleſs by ſome act manifeſtly for the advantage of the infant at the time.]

Vernon v. Vernon, cited in *ex parte* Bromfield 3 Br. Ch. Rep. 513.

(F) What Acts of the Truſtee, jointly with *Ceſtui que Truſt*, or by *Ceſtui que Truſt* only, ſhall defeat the Truſt, or deſtroy contingent Remainders.

Gil. Eq. R. 34. Tipping v. Piggot.

THOUGH at law, by the truſtees concurring in any act to prevent the riſing of the contingent remainder, it was formerly held that it was for ever deſtroyed and gone; yet *Cowper*, C. held this to be an exploded opinion now in Chancery, as to perſons who are to come in and be conſidered as purchaſers under the marriage ſettlement and portion. But as for voluntary remainders, (as a remainder to the right heirs of the body of the huſband, and after to his right heirs, neither of which can be ſaid to be within the purchaſe of the marriage portion, but only the firſt and other ſons, *&c.* of the marriage) this court will not aſſiſt them to ſupport the remainder ſo deſtroyed.

2 Salk. 680. Pye v. George, 1 P. Wms. 128. S. C. [1 Br. P. C. 359. S. C.]

If truſtees in a ſettlement, to ſupport contingent remainders, join with the tenant for life in any conveyance, to deſtroy the contingent remainders before they come *in eſſe*; this is a plain breach of truſt; and whoever claims under ſuch a conveyance, having notice of the truſt, or by a voluntary ſettlement, ſhall be liable to make good the eſtate.

But, if a truſtee join with a *ceſtui que truſt* in tail in any conveyance to bar the entail, this is no breach of truſt; for it is no more than what he may be compelled to, though the *ceſtui que truſt* himſelf might have barred ſuch entail without his joining; and that not only by fine or recovery, but likewiſe by feoffment, bargain or ſale, deviſe or ſurrender, (if the entail be of a copyhold, and there be no particular cuſtom which requires a common recovery); for ſuch entail is not within the ſtatute *de donis*, but remains as at common law; and being a truſt is governable only by the rules of equity, and not by the niceties of the law, and this ſeems to be ſupported not only by the latter, but by the far greater number of authorities and in caſes wherein the very point itſelf was debated, though there are *obiter* ſayings and opinions, which have made ſome diſtinctions, and others which have flatly contradicted it. *Vide* 1 Chan. Ca. 49. 213. 2 Chan. Ca. 78. 64. 1 Vern. 13. 440. 2 Vern. 133. 583. 702.

2 Vern. 754. Elie v. Oſborne, and ſee 1 P. Wms. 387. S. C. by the name of Elſe v. Oſborne.

But, if a ſettlement on a marriage-treaty be made on the huſband for ninety-nine years, if he live ſo long, remainder to truſtees to preſerve contingent remainders, remainder to the heirs of the body of the huſband by the wife, remainder to the heirs of the huſband; and there be iſſue two ſons and a daughter; and the wife being dead, the huſband and truſtees join with the eldeſt ſon in a fine or feoffment to *J. S.*; this is a good bar of the truſt-eſtate, and the truſtees joining is no breach of truſt, for they were truſtees purely for the tenant in tail, and to preſerve his eſtate, and not to ſtand in oppoſition to him for the ſake of thoſe who were to come after him.

Truſtees

Truſtees to preſerve contingent remainders, if tenant for life or years commit waſte, may reſtrain them by injunction. If there is only an eſtate for years, remainder to firſt and other ſons, remainder in tail, and no truſtees to preſerve, *&c.* the remainder-man in tail before iſſue born, would have an immediate freehold; and if it had been tenant for life and no truſtees, he might before iſſue born have ſurrendered to the remainder-man, or barred the whole eſtate. The riſe of theſe truſtees was from *Chudley* and *Archer*'s caſe in *Co. Rep.* and remainders in truſtees and their heirs during the life of another perſon have been held good, as that perſon may commit a forfeiture. Where there is tenant for years, with remainder to truſtees during his life to preſerve contingent remainders, the freehold is in the truſtees, and the poſſeſſion of tenant for years is in law the poſſeſſion of the owner of the freehold. It is agreeable to juſtice in ſupport of right to conſtrue truſts in the moſt liberal manner. Truſtees are the creatures of this court, and under the correction of it intended to preſerve the inheritance entire. Theſe truſts are generally declared with power to make entry and bring *actions*, *&c.* as the law requires, which includes equity too: and truſtees may bring a bill in equity to ſtay waſte, before the contingent remainder comes *in eſſe*. Truſtees are liable in equity to make ſatisfaction for breach of truſt, and a voluntary alience, with notice, will be decreed to reſtore the eſtate.

Garth v. Cotton, MS. Rep.

(G) In what Caſes Equity will decree Truſtees to join in a Recovery, *&c.* with *Ceſtui que Truſt.*

IN ſome caſes, truſtees have been decreed to join for the benefit of creditors—Thus, where *J. S.*, after marriage, made a voluntary ſettlement of his lands *to himſelf for life*, remainder *to truſtees to ſupport*, &c. remainder *to his firſt*, &c. *ſon in tail ſucceſſively*, remainder to *himſelf in fee*; and contracting debt, he afterwards makes a conveyance of his eſtate to other truſtees for payment of theſe debts; the creditors bring a bill, and (*inter alia*) inſiſt that the truſtees in the firſt ſettlement ſhould join in the ſale to deſtroy the contingent remainders; his *Honour*, upon ſhewing a precedent of a like decree, decreed that the truſtees ſhould join to deſtroy the contingent remainders, and be indemnified, it being at the ſuit of creditors, and for the raiſing of money for the payment of debts.

1 P. Wms. 358. Baſſet v. Clapham. Note. By the 7 Ann. c. 19. Infants being truſtees or mortgagees may be compelled to make conveyances by order of the Court of Chancery.

It is a general rule in equity, that where a real or perſonal eſtate is charged with payment of debts generally, and veſted in truſtees to ſell, the purchaſer from ſuch truſtees is not anſwerable for any miſapplication of the money; and needs not ſee that the debts are paid. But, if it is made chargeable with particular debts, it is otherwiſe; or if there is any colluſion between the executor or truſtee and purchaſer, the purchaſe would be infected with the fraud or colluſion. *Per* Lord Chancellour Hardwicke, Mich. 27 G. 2. Anon. MSS. Rep. And ſee 1 Vern. 260. Dunch v. Kent. And *id.* 303. Spalding v. Shalmer, S. P.

So likewiſe a court of equity will decree truſtees to join for the apparent benefit of the family.

In

1 P. Wms. 536. Winnington v. Foley.

In a marriage ſettlement the huſband was made tenant for ninety-nine years, if he ſhould ſo long live, remainder to truſtees during his life, remainder to the firſt, &c. ſon of that marriage in tail male ſucceſſively, remainder to the firſt, &c. ſon of any other marriage, remainder over. A ſon is born and of age, and the wife is dead. The truſt for preſerving contingent remainders deſcends to an infant. If for the benefit of the family, equity will decree the infant truſtee to join in a recovery, in order to make a new marriage ſettlement.

2 Vern. 303. Platt v. Sprigg.

Likewiſe, where *A.* having mortgaged his lands, and alſo confeſſed a judgment, and afterwards, on a marriage-treaty, ſettled the lands thus incumbered to the uſe of himſelf for life, remainder to the truſtees to ſupport contingent remainders, remainder to his wife for life, remainder to his firſt and other ſons in tail, remainder to his own right heirs, and having no iſſue, articled to ſell the lands to *J. S.*, who brought a bill for a ſpecifick performance of the agreement, and ſuggeſted that the truſtees refuſed to join, and that the mortgagee threatened to enter; it was decreed, that the truſtees ſhould join and be indemnified, the eſtate being of an equity of redemption only, and there being no iſſue, (though the huſband and wife were married ſix years) and the wife, on her examination in court, conſenting freely thereunto. But *note*; thoſe ſettlements can rarely be broken through but by an act of parliament.

2 P. Wms. 379. Townſend v. Lawton.

Where on marriage, lands were limited to the uſe of *A.* for ninety-nine years, if he ſhould live ſo long, remainder to *B.*, and other truſtees, (of which *B.* was the ſurvivor,) and their heirs during *A.*'s life, to preſerve, &c., remainder to *A.*'s wife for life; remainder to the firſt, &c. ſons of the marriage in tail male ſucceſſively, remainder over; the wife died, leaving iſſue of the marriage only two ſons, *C.* and *D.* *A.* having mortgaged the premiſes, he and his ſon *C.* (*C.* being then of age,) covenanted to ſuffer a recovery, and to procure *B.* the ſurviving truſtee to join therein, but *B.* refuſing to join in making a tenant to the *præcipe*, the mortgagee prayed a ſpecifick performance of the covenant, and that *B.* might join in ſuffering the recovery; *B.* by anſwer ſubmitted to the court, but *D.* the younger ſon refuſed to conſent: Lord Chan. *King* ſaid, that then he would not decree the truſtee to join, for that he would not take away any man's right; ſo diſmiſſed the bill as to *B.* and *D.* with coſts, but decreed *A.* and *C.* ſpecifically to perform the covenant.

1 Abr. Equ. Caſes, 386. Frewin v. Charleton.

Likewiſe, where *J. S.* by a marriage ſettlement was *tenant for* 99 *years, if he* ſhould ſo long live, with remainder *to truſtees and their heirs during his life*, to ſupport contingent remainders, with remainder *to his firſt and every other ſon ſucceſſively in tail male*, remainder *to truſtees for* 500 *years*, in truſt *to raiſe portions for daughters*, if there were *no iſſue male*, or that ſuch iſſue male died without iſſue before 21; *J. S.* had iſſue a ſon, and being of age and about to marry, he and his father bring a bill to have the truſtees join in making an eſtate, in order to ſuffer a common recovery, that he might be enabled to make a ſettlement on his

marriage; and it was urged, that the truſtees were only truſtees for the ſon, and ought to execute eſtates as he ſhould direct, he having the inheritance in him, and that the end of the truſts was to hinder the father from defeating the ſon of the eſtate. On the other ſide, it was urged, that theſe truſtees were not only truſtees for the eldeſt ſon, but were deſigned as a guard to the whole ſettlement; that the mother being living there might be other children, and for the truſtees to join would be a breach of truſt, and if there ſhould be daughters, they would by this means be entirely ſtripped of their portions; and though the term for raiſing them was unſkilfully drawn, in putting it behind the eſtate-tail to the ſons, yet this court had ſet it ſometimes before thoſe eſtates. There being a daughter in this caſe, my Lord *Harcourt* directed, upon *giving ſecurity for the daughter's portion, that* the truſtees ſhould join in a recovery.

[On a bill to compel truſtees to join in a ſale, which would deſtroy the contingent remainders, and likewiſe the uſes in a ſettlement made before marriage, it appeared, that the limitations were to the huſband for 99 years, if he ſo long lived, to the wife for her life, remainder to truſtees to ſupport contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the huſband; and that the firſt declaration under it was, that it was the intention of the ſettlement to make a proviſion for the children of the marriage, with a covenant on the part of the huſband, that he would not bar the eſtate-tail to the wife, but would preſerve the uſes before limited and appointed. Lord *Hardwicke* diſmiſſed the bill, and ſaid—There are many caſes in which the court will compel the truſtees to join in ſuch conveyance as will deſtroy contingent remainders; but then it muſt be in ſome meaſure to anſwer the uſes intended by the ſettlement, and has been uſually done in the caſe of old ſettlements, as in *Winnington* v. *Foley*, (*ſupra*); but, I believe, there is no inſtance where they have compelled ſuch truſtees to join with the father, termor for years, and the ſon to ſell the eſtate. The old notion was, that theſe truſtees were only honorary; but this has been varied ſince, for in the caſe of *Pigot* v. *Pigot*, Lord *Harcourt* was of a different opinion, and in *Manſell* v. *Manſell*, (*ſupra*,) Lord Chancellour *King*, aſſiſted by Lord Chief Juſtice *Raymond* and Lord Chief Baron *Reynolds*, was of opinion, that *truſtees for preſerving contingent remainders, joining to deſtroy them, were guilty of a breach of truſt, and that there was no diverſity, whether the ſettlement be voluntary, or for a valuable conſideration, or by will only.* But the reaſon of thoſe caſes turned upon what the court do, after truſtees had actually deſtroyed the remainders: here the caſe is different, for the application to the court is to compel the truſtees to do an act which would deſtroy the remainders. There is another difficulty, which is, the huſband's actually covenanting in the ſettlement, that he will not bar the eſtate-tail to the wife, but preſerve the uſes before limited; and even though the huſband were dead, the wife could not do any act by which ſhe could bar the eſtate-tail, notwithſtanding the

Symance v. Tattam, 1 Atk. 613.

the truſtees ſhould conſent to join with her; for ſhe is abſolutely reſtrained from barring it by 11 *H.* 7. *c.* 20. If it had been an application only to deſtroy the contingent remainders, I ſhould have taken more time to conſider: but here, it would overturn all the uſes of a marriage ſettlement, which would be aſſuming too much power, and would be making a decree to compel a breach of the huſband's own covenant.

Woodhouſe v. Hoſkins, 3 Atk. 22.

J. H. deviſed his lands, after the death of his wife and a truſt-term of 1000 years, to his ſon *B. H.* for 99 years, if he ſhould ſo long live, without impeachment of waſte, remainder to two truſtees and their heirs during the life of his ſon *B.*, to preſerve contingent remainders, remainder to the firſt and other ſons of *B.* in tail-male, remainder to *H. H.* his ſecond ſon for 99 years, if he ſhould ſo long live, remainder to the ſame truſtees and their heirs during the life of *H. H.* to preſerve contingent remainders, remainder to his firſt and every other ſon, remainder to his other ſons in like manner, remainder to *J. H.*'s daughters, remainder to the teſtator's heirs. There was a power for the ſons, when in poſſeſſion, to make jointures and leaſes, except as to particular lands, and another power for *B.* and the other ſons within two years after being in poſſeſſion, and having a ſon of the age of 18, to revoke the former uſes, and to limit new uſes, ſo that the premiſes be limited to the heirs-male of the ſons in the ſame manner as theſe limitations, and to ſettle ſuch like power of revocation. The teſtator died. *B. H.* his eldeſt ſon died without iſſue. *H. H.* the ſecond ſon married and had a ſon *C. H.*, now above 21. *H. H.* and his ſon became indebted by bonds to creditors, and made aſſignments of the ſettled eſtates in truſt for creditors, and agreed to ſuffer a common recovery, to make the aſſignment and proviſion for the creditors effectual. A bill was brought by the creditors againſt *H. H.* and his ſon *C.*, and againſt *T. H.* (the fifth ſon of *J. H.*), (all the ſons who had intermediate remainders as before, being dead without iſſue,) and againſt *A. B.* the heir of the ſurviving truſtee, to preſerve contingent remainders, in order to compel her to join in a common recovery, and that the plaintiffs might have an effectual ſecurity and ſatisfaction for their debts. Lord *Hardwicke*—It is agreed, there is no precedent where the court have decreed in ſuch caſes the truſtee to join; and I am of opinion, this is not ſuch a caſe, where the court ought to decree it. Truſtees of this kind are called *honorary* truſtees, and entruſted by parties to preſerve the contingent remainders: but, I will not ſay, if the truſtee who is appointed ſhould join, it would be ſuch a breach of truſt, that this court would decree a ſatisfaction. The reaſon of making the father tenant for 99 years is, in order to preſerve the eſtate. It may likewiſe be the deſign of ſuch ſettlements to prevent the father's influence over the ſon when of age, if the father were ſeiſed of the freehold, to get the ſon to deſtroy the ſettlement. Here the intention is to pay the debts of the father. The objection is, that the truſtee is truſtee for the firſt tenant in tail, and that when the tenant in tail is ſeiſed of the freehold, then he has a power to bar, and not before. As to the

the caſes, there are but few: Mr. *Winnington*'s was in order to let in the jointure, and a proviſion for younger children, which was ſtill carrying it on in the family. The argument made uſe of by the plaintiff's counſel, was, that here it is prayed to execute the truſt of articles; and to be ſure, it is true; but this court is not to decree every truſt created by the parties; and though, as has been ſaid before, the court might not condemn the truſtee, if he conſented, yet it does not follow that the court will compel the truſtee, and I think *this* the very caſe which was intended to be prevented by the truſt; wherefore the bill muſt be diſmiſſed.

Barnard v. Large, 2 Cox's P. Wms. 684. note. 1 Br. Ch. Rep. 534. S. C. Ambl. 774. S. C.

F. B. deviſed freehold and copyhold eſtates to *T. C. B.* for 99 years, if he ſhould ſo long live, remainder to the defendant *L.* during the life of *T. C. B.* in truſt to preſerve contingent remainders, remainder to the firſt and other ſons of *T. C. B.* in tail male, remainder to *J. W.* in fee. *T. C. B.* had iſſue only one ſon, who had attained 21 years of age, and the father and ſon now filed a bill againſt *L.* the truſtee, and *J. W.* the remainderman, ſtating, that they were deſirous of ſuffering a recovery and limiting the eſtate ſo as to preſerve the contingent remainders to the ſecond and other ſons of *T. C. B.*, and praying, that *L.* the truſtee might be decreed to join in making a tenant to the *præcipe* for that purpoſe, ſubmitting to declare the uſes of the recovery to the ſecond and other ſons of *T. C. B.* by way of contingent remainders as limited by the will, and to limit an eſtate to a truſtee for the purpoſe of ſupporting and preſerving thoſe contingent remainders. The Maſter of the Rolls, Sir *Thomas Sewell*, obſerved, that, with reſpect to remainders to remote relations in *ſettlements*, where the perſons to whom they were limited were not the immediate objects of the parties, or, where they ſtand in oppoſition to the firſt tenant in tail, deſiring a reaſonable benefit, conſiſtent with the intentions of the creator of the limitations, their pretenſions have not been much conſidered; but in the principal caſe, all took as volunteers, and were all equally to be attended to. His Honour then conſidered the ſeveral caſes on this ſubject, and ſaid, that, from a view of them all, it ſeemed, that when the eldeſt ſon, tenant in tail, is of age, and about to marry, and thereby *continue*, inſtead of *deſtroying* the purpoſes of the ſettlement, and in ſome caſes where there has been particular diſtreſs under particular circumſtances, which ought to have induced the truſtee to join, the court has interfered; otherwiſe not: that in the principal caſe he was called upon to diſturb the teſtator's diſpoſition merely for the ſake of diſturbing it, for which he ſaw no reaſon, and diſmiſſed the bill with coſts.]

2 P. Wms. Rep. 134. Carteret v. Carteret.

Ceſtui que truſt in tail under a deviſe of lands charged with annuities, brings a bill againſt the truſtees, to the intent they ſhould join in a recovery. This is not proper, but it is proper to pray, that the truſtes may convey the premiſes to *ceſtui que truſt* in tail, who may then ſuffer a recovery; though if the truſtees are alſo truſtees for an annuity ſubſiſting, they are not compellable to part with the legal eſtate out of them to the *ceſtui que truſt* in tail.

Note;

Howard v. Hall, Hill. 1744. MS. Rep. [The

Note; A deviſe to truſtees, and their heirs in truſt to ſell, is deemed equitable aſſets, in order to make an equal diſtribution among all the creditors.

rule now ſeems to be, that wherever the character of truſtee can be faſtened on the deviſee, the aſſets ſhall be equitable. Lewin v. Oakley, 2 Atk. 50. Silk v. Prime, 1 Br. Ch. Rep. 138. Batſon v. Lindegreen, 2 Bro. Ch. Rep. 94.]

(H) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.

2 Abr. Eq. Caſ. 395.

IT is now conſtantly held in Chancery, that if lands are veſted in truſtees to the uſe of one and the heirs of his body, with remainder over, that the truſtees are not to convey a fee, but an eſtate-tail, though he will have power to bar the entail, when the conveyance is made to him, and it would avoid circuity. So, if a ſum of money be appointed to be laid out in a purchaſe, and the lands to be ſettled in tail; the purchaſe and ſettlement ſhall be made accordingly, *and not the money paid to the party;* for the remainder-man has a chance for the eſtate, in caſe the tenant in tail in poſſeſſion die without iſſue before any recovery ſuffered, which he may omit through ignorance or forgetfulneſs, or he may be prevented by death before he has completed it.

2 Abr. Eq. Caſ. 392.

So, where an eſtate was limited to *A.* and *B.* in truſt for *C.* and the heirs of his body, *proviſo*, that if he die without iſſue, then in truſt for *D.* for life, with remainder over, and *C.* brought his bill to have the truſtees make a conveyance of the legal eſtate to him, and that it might be to him in fee, to prevent him from ſuffering a recovery, the truſtees by anſwer ſubmitted to the court; but the other remainder-men, who were defendants, oppoſed the executing any legal eſtate to *C.*, becauſe he would then ſuffer a recovery, and defeat the intent of the donor, which was, that it ſhould be preſerved for them, in caſe *C.* had no iſſue. They alleged, that *C.* had married improvidently and was extravagant, and would ſpend the eſtate, and cited the caſe at the end of *Twine's* caſe, 3 *Co.* where, if an improvident man makes a voluntary ſentiment to put it out of his power to ſpend his eſtate, this ſettlement ſhall be ſupported even at law; and therefore a court of equity will never help an extravagant man to deſtroy ſuch a ſettlement as this; and that, in the caſe of Sir *Fra. Garrard*, the Lord Ch. *Jefferies* had refuſed to decree the truſtees for Sir *Francis* and the heirs of his body, with a remainder to a charity, to convey the legal eſtate, ſo as to enable him to ſuffer a recovery. On the other ſide, it was ſaid, there was no reaſon my truſtee ſhould hold my eſtate, whether I will or no; and that, if a court of equity did not decree a conveyance in ſuch caſe, it would be eſtabliſhing a perpetuity; and that the conſtant courſe of this court is, that when money is given to be laid out in a purchaſe to be ſettled in tail, with remainders over, the court will decree the money to him that was to be tenant in tail, if he deſire it, to prevent circuity. But the Maſter of the Rolls decreed the

the truſtees to execute a conveyance to *C.* in tail, but would not decree the conveyance to be in fee, though preſſed to it; and he ſaid there may be many reaſons why a court of equity would not decree a conveyance at all, in ſuch a caſe, ſometimes for a politick reaſon, as if it were to enable a nobleman to ſuffer a recovery, and leave the *honour* bare, without eſtate; or, if the party were a notorious ſpendthrift, or, when the eſtate-tail was only by implication, as he ſaid he took it in Sir *Fra. Garrard*'s caſe; and he thought it would be an ungodly thing in the truſtees to execute a conveyance of the legal eſtate in ſuch caſe as this at the bar, without a decree of the court. *Hil.* 1701, *Saunders* and *Nevil. Note;* Though the court would not decree a conveyance in Sir *Fra. Garrard*'s caſe, yet he ſuffered a recovery as *ceſtui que truſt* in tail, which was held good, and the eſtate enjoyed under it diſcharged of the charity.

Where a queſtion ariſes how a truſt ought to be executed by a conveyance, there is *no better rule than* to obſerve and follow *what has been done at law in executing conditions* that are matters *executory*, and to be performed ſo far as the caſe will admit of. *Per Cowper*, C. 2 Vern. 736. pl. 644. Newcomen v. Barkham.

If *tenant for life and remainder-man in tail join* in a bill againſt truſtee, the court will decree the *truſtee to convey to them*, or to whom they appoint, and poſſibly he may pay coſts for refuſing to convey and putting his *ceſtui que truſt* to the charge of an unneceſſary ſuit. 2 Vern. 346. Bowater v. Elly.

A. deviſed lands to a company in truſt to convey to *B.* for life, remainder to his firſt, *&c.* ſons for their lives ſucceſſively, and ſo to their iſſue male for their lives only, remainder over. *Per cur.*—An attempt to make a perpetual ſucceſſion of eſtates for life is vain, and an *impracticable perpetuity*. However the truſtees *muſt make as ſtrict a ſettlement as may be;* ſo that the perſons in being are to be made only tenants for life; but, where the limitation was to be to the ſon not in being, there, he muſt be made tenant in tail male. 2 Vern 737. pl. 646. Humberſton v. Humberſton.

A huſband, as adminiſtrator to his wife, obtained a decree againſt the truſtees to raiſe her portion; but he, being a younger brother, having made no ſettlement on her, and having a ſon by her, the money was decreed to be raiſed, and put out for his benefit for life, then to the ſon for life, and if he leaves iſſue, and the father ſurvives, he to have it. 1 Eq. Abr. Caſ. 392. Whytham v. Cawthorn.

[*A.* in conſideration of an intended marriage, entered into articles, by which he covenanted with truſtees to ſettle an eſtate to the uſe of himſelf for life, without impeachment of waſte, remainder to his intended wife for life, remainder to the uſe of the *heirs males* of his body upon the body of his intended wife to be begotten, and the heirs males of ſuch heirs males iſſuing, remainder to the right heirs of the ſaid *A.* for ever; and covenanted, that in caſe the ſaid limitations were not thereafter well raiſed according to the intent of the ſaid articles, that he and his heirs would ſtand ſeiſed of the premiſes, until a further aſſurance thereof ſhould be made to ſuch uſes, intents, and purpoſes, as in the 1 Eq. Abr. 387. Trevor v. Trevor.

artioles were before expreſſed and declared. The marriage took effect, and *A.* had iſſue four ſons and two daughters. The articles were laid *by unnoticed* for ſeveral years; and *A.* levied a fine of the lands (ſuppoſing himſelf to be tenant in tail under the articles); and afterwards, both the truſtees being dead, without requeſting a ſettlement, *A.*'s eldeſt ſon having married againſt his father's conſent, and by ſeveral other acts of weakneſs and diſobedience much offended him, *A.* by deed reciting the ſaid articles, and the weakneſs and diſobedience of his eldeſt ſon, declared, that the ſaid fine ſo levied by him, ſhould enure to the uſe of himſelf for life without impeachment of waſte, remainder to his wife for life, remainder to his ſecond ſon in tail male, with like remainders to his two younger ſons, with remainder to his own right heirs; and after making a like ſettlement of other lands, *A.* died inteſtate, leaving a great perſonal eſtate, and leaving a real eſtate in *Ireland*, and new-purchaſed lands in *England*, together of the value of 1000 *l. per annum* and upwards. Upon his death, the eſtate in *Ireland* and the new-purchaſed lands deſcended to his eldeſt ſon, who alſo became entitled to his ſhare (upwards of 9000 *l.*) of the perſonal eſtate. The ſecond ſon entered upon the ſettled eſtates, and the eldeſt ſon having got poſſeſſion of the articles, which it appeared had been thrown by ſeveral years as uſeleſs, brought his bill for a ſpecifick performance thereof.

It was inſiſted for the defendant, that though by the firſt part of the articles they ſeemed to be *executory*, yet by the covenant to ſtand ſeiſed in the laſt part of them, they were actually and immediately *executed*; that he thereby covenanted to ſtand ſeiſed to the before-mentioned uſes, till a ſettlement was made accordingly; that no ſettlement having been made, the uſes continued to be executed by virtue of that covenant; that by theſe uſes he was plainly tenant in tail, and by the fine had bound his iſſue, and made himſelf maſter of the eſtate, and might diſpoſe of it as he thought fit. But Lord Chancellour ſaid, that upon articles the caſe was ſtronger than on a will: that articles were only minutes or heads of the agreement of the parties, and ought to be ſo modelled when they come to be carried into execution, as to make them effectual. That the intention was to give *A.* only an eſtate for life; that if it had been otherwiſe, the ſettlement would have been vain and ineffectual, and it would have been in *A.*'s power, as ſoon as the articles were made, to have deſtroyed them; that the covenant to ſtand ſeiſed was, until ſuch time as the ſaid uſes were well raiſed, according to the true intent and meaning of the articles. That if a ſettlement had been made defective in any particular, it would not have been final or concluſive; that a ſecond ſettlement muſt have been made *till the uſes were well and truly raiſed*; and that this covenant for ever ſubſiſted till ſuch ſettlement ſhould be made; that he hoped never to ſee the time when the court would ſo far have power as to judge what behaviour of a ſon ſhould amount to a forfeiture of his eſtate; and therefore thought, if a ſettlement had been made, no miſbehaviour of the

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ſon could amount to a forfeiture of it. That this eſtate being ſpecifically agreed to be ſettled, it was a truſt for the eldeſt ſon, which paſſed with the lands into whoſe hands ſoever they came, and could not be defeated by any act of the father or the truſtees. And therefore he decreed a conveyance to the plaintiff, and the heirs male of his body, and an account of the profits from his father's death, and the deeds and writings to be delivered up. This decree was afterwards affirmed in the Houſe of Lords.

2 Brown. Caſes Parl. 122.

So where the huſband, before marriage, agreed by articles to ſettle lands to the uſe of himſelf and his intended wife for their lives, and the life of the ſurvivor, and afterwards to the uſe of the heirs of his body on the wife, and after the marriage, by ſettlement reciting the articles conveyed the lands to the uſe of himſelf and his wife for their lives, and the life of the ſurvivor, remainder to the uſe of the heirs of his body by his wife; it was held not to be a *proper execution* of the articles, though the articles did not expreſsly mention the intent to provide for the iſſue. For, Lord *Talbot* obſerved, it could not be doubted but that, upon an application to the court for carrying the articles into execution, it would have decreed it to be done in the ſtricteſt manner, and would never have left it in the huſband's power to defeat and annul every thing he had been doing; and the *nature of the proviſion* was ſtrong enough for that purpoſe, without any expreſs words.]

Streatfield v. Streatfield, Caſ. temp. Talb. 176.

Upon a marriage, articles were entered into, whereby it was agreed, that the wife's portion ſhould be laid out in the purchaſing of lands, which ſhould be ſettled on the huſband and wife for their lives, and the life of the longeſt liver of them, and after to the heirs of the body of the wife, by the huſband to be begotten; yet the Maſter of the Rolls decreed the ſettlement to be to the firſt and other ſons, &c. ſo as the huſband and wife might not have power to bar the iſſue.

1 Eq. Abr. Caſ. 392. Jones v. Laughton.

So, where on a treaty of marriage between the defendant and the plaintiff *Joanna*, the defendant entered into a bond to the plaintiff *Joſeph*, father of the plaintiff *Joanna*, with condition to ſurrender certain copyhold lands to the uſe of himſelf for life, remainder to the plaintiff *Joanna* for life, remainder to the heirs of their two bodies to be begotten, with remainder to the heirs of the huſband; the marriage took effect, and a bill was brought againſt the huſband to compel a ſurrender purſuant to the intent of this bond; the huſband, making default at the hearing, was decreed to ſurrender to the uſe of himſelf for life, remainder to the uſe of his wife for life, remainder to the uſe of their firſt and other ſons in tail general ſucceſſively, with a remainder to the daughters of their two bodies to be begotten in tail general; and in the mean time, till ſuch ſurrender was made, the court declared that the copyhold land ſhould be held and enjoyed according to theſe uſes.

Nandick v. Wilkes, 1 Eq. Ca. Abr. 393. Gilb. Eq. Rep. 112. S. C. under the name of Nandike v. Wilkes, *in totidem verbis*. Note; This decree was on a bond, where though the penalty ſeems to have been the only ſanction intended for ſecuring the performance of the condition; yet a ſpecifick execution was decreed, and in ſuch a manner too, as effectually to ſecure the iſſue from being defeated by making them purchaſers. But note, in Gilbert, there is no mention in the decree of the remainder to the wife for life.

Cuſack v. Cuſack, 1 Br. Caſ. Parl. 470.

[Where articles were entered into by the huſband, in which he covenanted that as well all the real eſtate that he had then in *Ireland*, as all the lands and tenements which he ſhould purchaſe during the life of his intended wife, ſhould *deſcend and come to the heirs male* to be begotten *on the body of the intended wife by the huſband*, and ſhould be ſecured and ſettled on the ſaid *heirs male* by the huſband, as the counſel of the intended wife ſhould adviſe. Upon an appeal to the Houſe of Lords, from a decree of the court of Chancery in *Ireland*, the decree was reverſed; and it was ordered that a ſon of the marriage ſhould be deemed a *tenant in tail*, under the articles, and to hold and enjoy the lands againſt all perſons claiming under a ſubſequent ſettlement by his father; who had *levied fines and ſuffered recoveries* to bar the *ſuppoſed entail*.

Nandick v. Wilkes, 1 Eq. Abr. 393. c. 5. Gilb. Eq. Rep. 114.

And in a caſe where the *huſband* entered into a bond to ſurrender copyholds to the uſe of himſelf for life, remainder to his wife for life, remainder to the heirs *of their bodies*, then to the huſband in fee; upon a bill againſt the huſband, after the marriage, for execution of this engagement; the decree was, for him to ſurrender to the uſe of himſelf for life, remainder to the uſe of his wife for life, remainder to the uſe of the firſt and other ſons in tail general ſucceſſively, with remainder to the daughters in tail general.

Vide Burton v. Haſtings, *infra*, 167.

So, where the intended wife's eſtate was articled to be ſettled on the huſband and wife, and on the *heirs of their two bodies*, Lord *Cowper* admitted, that if no ſettlement had been made, the court would have taken care to ſecure to the daughters the proviſion intended them by the articles.

Whately v. Kemp, cited 2 Vez. 398.

Where by articles previous to marriage it was agreed to purchaſe lands, and ſettle them to the uſe of the huſband for life, then of the wife for life, remainder to the uſe of the *heirs of her body by him*; they purchaſed and joined in a recovery to the uſe of a mortgagee in fee. Upon a bill by the eldeſt ſon after the death of his mother, inſiſting that he was entitled, on the conſtruction of theſe articles in equity, to have the eſtate ſettled to the firſt, *&c.* ſon in tail male, Sir *Joſeph Jekyll* ſaid, that if this had been a *common limitation*, he ſhould have thought what was inſiſted on was right, and that the mortgagee muſt have loſt his eſtate. But that this was particular to *the heirs of the body of the wife by the huſband*, and being *ex proviſione viri*, would ſecure the children againſt the father alone; and that it might be the real intent that *both might bar*, comparing it to a *power of revocation both by father and mother*; and the defendant was therefore well barred.

Green v. Ekin, 2 Atk. 473.

So, in a ſubſequent caſe, Lord *Hardwicke* ſaid he might compare it to the caſe where, by a ſettlement of lands, the wife has an eſtate *ex proviſione viri*, the court has refuſed to interpoſe to ſettle the eſtate *otherwiſe*, becauſe the intent will prevail, ſince ſhe cannot alien by ſtat. 11 *H.* 7.

Highway *et al.* v. Banner *et al.* 1 Br. Chan. Caſ. 584.

Again, by marriage-articles cuſtomary lands of inheritance of the intended huſband, holden by copy of court-roll, were agreed to be ſettled to the uſe of the intended huſband for life, remainder to his intended wife for life, and after the deceaſes of

of both, to the uſe of the heirs of *her* body by him if *he* ſurvived her, but if *ſhe* ſurvived him, to the heirs of *his* body on her body to be begotten, remainder to his own right heirs. The marriage was had and the huſband afterwards ſurrendered the lands to the uſes mentioned in the articles, and was admitted accordingly. And at the ſame court he and his wife ſurrendered to certain uſes. And on a queſtion between a ſon of the marriage claiming under the entail in the articles, and others claiming under the ſaid ſurrender by the huſband and wife; one of the points made, and that on which the deciſion proceeded, was, Whether the ſurrender to the uſes in the articles was a due execution of the uſes of the articles; and whether, by the ſubſequent ſurrender, the huſband gained an abſolute power over the wife? We are to obſerve, that eſtates-tail were barrable by ſurrender, according to the cuſtom.

The Maſter of the Rolls ſaid, that the rule had been ſettled and adhered to in many caſes, that articles for a ſettlement on a huſband, and the *heirs of his body*, ſhould be carried into execution in ſtrict ſettlement; and it had been conſidered as vain to make a ſettlement which inſtantly might be defeated by a recovery; but the doctrine had never gone ſo far, where that party could not ſuffer a recovery *alone*. He obſerved, that it was anciently a common mode of ſettlement to the huſband for life, to the wife for life, and to the heirs of the body of the wife by the huſband; it was thought a ſufficient precaution to preſerve the entail, that it could not be deſtroyed unleſs *both* huſband and wife concurred. That in the principal caſe, the limitations appeared to be anxiouſly worded; the concurrence of *both parties* was neceſſary to deſtroy the entail; it was out of the power of the *ſurvivor*. He was not to look to the impropriety of what had been done, but to the power the parties had to do it, and he thought that point clear.

In a caſe where money, in the hands of truſtees, was articled to be laid out in the purchaſe of lands to be ſettled on the huſband for life, remainder to the intended wife for life for her jointure, remainder to the firſt and other ſon and ſons of the marriage in tail male ſucceſſively, chargeable with 2000*l.* for younger children, remainder to the huſband in fee; and the huſband's father by the ſame articles covenanted to ſettle other lands on the huſband, and the *heirs male of his body*, remainder to the heirs of the father: upon a queſtion, Whether a ſubſequent ſettlement of the laſt-mentioned lands by the huſband's father, on the huſband and *the heirs male of his body*, with remainder to the father in fee, was a good performance of the agreement; or whether the limitation ought not to have been on the huſband *for life*, with remainder to the firſt and other *ſons in tail male* ſucceſſively in *ſtrict ſettlement?* Lord Chancellour *King* held, that the ſettlement was a *good execution* of the agreement, and therefore confirmed the ſettlement. He ſaid, that by the articles thoſe lands were not intended to be ſettled as a *proviſion for the children* of that marriage, *they* were *taken care of* by the *other part* of the articles

Chambers v. Chambers, Fitzgibb. Rep. 127. 2 Eq. Abr. 35. c. 4.

articles by the truſt-money; and it was not like the common caſe of articles for a ſettlement on the iſſue of the marriage where *no other proviſion* or *care is taken* for them; and the *different manner* of penning the articles in relation to the *truſt-money*, and as to *thoſe lands*, the one to be in *ſtrict ſettlement* to the firſt, *&c.* ſon of that marriage, the other limited to the huſband and the *heirs male of his body* generally, and not tied up to *the iſſue of that marriage*, ſhewed plainly the parties *underſtood*, and had in contemplation the *difference* between a ſtrict *ſettlement upon the iſſue of that marriage*, and a *general ſettlement* upon the huſband and the *heirs male* of his body.

Howell v. Howell, 2 Vez. 358.

And accordingly, in a caſe of marriage-articles, where *part* of the eſtate was limited to the huſband for life, remainder to the wife for life, and after the death of the ſurvivor, remainder to the *heirs of the body of the wife by the huſband*, another part to the huſband for life, remainder to the *heirs of his body*, remainder to the wife; upon a bill filed by the eldeſt ſon to have the articles carried into execution ſtrictly to the firſt, *&c.* ſon in tail, Lord *Hardwicke* obſerved, there was a difference in the penning of the two limitations; on the firſt they might have it in view to leave it in the power *not* of the *father only*, but *of both* to vary; but on the ſecond there could be no ſenſe of the limitation, but as the ſon contended for; otherwiſe it would be abſolutely in the power of the father, by fine, to bar it, and defeat all the iſſue. They intended the wife ſhould have a jointure in the one, in the other not. It ſeemed a ſtrong diſtinction on the face of the articles, and there had been caſes adjudged on that.—That where by articles part of an eſtate was limited to father for life, to wife for life, to firſt and every other ſons and daughters in tail, another part to teſtator for life, and the heirs male of his *body by that wife*, Lord *Macclesfield* ſaid, if that had been the *ſole limitation*, he ſhould, without ſcruple, decree in *ſtrict ſettlement* according to the common rule; but where the parties had ſhewn they *knew the diſtinction* when to put it *out of the power of the father*, and when to leave it *in his power*, he would not vary the laſt limitation; decreeing to the father *in tail* as to the laſt, though not as to the firſt.—That as in the principal caſe there was a difference in the penning of the articles, in one of which they might intend to leave it in the power of the father, in the other not in his power to do it alone, it was a reaſonable way.

The report in Vezey does not ascertain the caſe thus cited by Lord Hardwicke.

Honor v. Honor, 2 Vern 658. 1 P.W. 123.

Articles were made previous to, and in conſideration of a marriage, for ſettling lands to the uſe of the huſband for life, remainder to the wife for life, remainder to the heirs of the body *of the wife* by the huſband begotten, remainder to the huſband in fee; and before the marriage a ſettlement was made reciting the *articles*, and expreſſed to be in *purſuance thereof*, limiting the lands to the uſe of the huſband for life, remainder to the wife for life, remainder to the *heirs of the body of the huſband* by the wife, remainder to him in fee. There was iſſue of the marriage one ſon; the father married again, had ſeveral other children, and having procured his ſon, without any conſideration, to join with him in mortgaging

mortgaging the eſtate, and limiting the fee-ſimple and equity of redemption to the father. Upon a bill afterwards brought by the ſon to compel his father to reſettle the land on the ſon, after his (the father's) death, purſuant to the articles.

Lord Chancellour held it was a plain miſtake in making the ſettlement vary from the articles, which were prudent articles; and the ſettlement, ſaid to be made *purſuant thereto*, ſhewed there was *no alteration* of the intention, nor any new agreement between the making of the articles and the ſettlement; and this appearing on the face of the articles and ſettlement, the length of time (about 25 years) was immaterial. And he decreed the father and his ſecond wife to join in a conveyance to ſettle the eſtate as by the articles, *viz.* to the father for life, remainder to the ſon in tail; but as to the mortgage, the ſon having joined in it, the court could not ſet it aſide, but directed the father to keep down the intereſt during his life.

But, where marriage-articles were entered into for ſettling the wife's eſtate on *the huſband and wife, and* on *the heirs of their two bodies to be begotten:* after the marriage, a ſettlement was made of the lands upon the huſband and wife for their lives, remainder to the heirs of the body of the wife by her ſaid huſband: there was iſſue of the marriage one daughter only: and after the death of the huſband, his widow married again, joined in a fine of the lands, and ſettled them to other uſes: a bill was brought by the daughter of the firſt marriage, to carry the articles into execution; for that no care was taken of the daughters by the ſettlement, as the limitation to the heirs of the body of the wife by her firſt huſband made her tenant in tail; and conſequently left her the power to bar them, which was contrary to the intent of the articles, that being to make an effectual proviſion for all the iſſue of that marriage. But Lord *Cowper* diſmiſſed the bill; ſaying, if no ſettlement had been made, and application had been made to the court for making one purſuant to the articles, the court would have taken care to have ſecured to the daughters the proviſion intended them by the articles. But a ſettlement having been actually made and accepted by the parties, he could make no alteration in it.

Burton v. Haſtings, Gilb. Eq. Rep. 113. Eq. Abr. 393.

Again, articles were entered into for ſettling lands to the uſe of *B.* the intended huſband for life, without waſte, remainder to *M.* the intended wife for life, remainder to *the heirs male of the body of* B. *by* M., remainder to the heirs male of the body of *B. by* any other wife, remainder to *the heirs female* of the body of *B.* by the ſaid *M.*, with leaſing and jointuring powers to *B.* Afterwards, and before the marriage, a ſettlement was made, and mentioned to be *in purſuance and performance* of the articles; and the lands were thereby limited to *B.* for life, remainder to *M.* for life, remainder to the firſt, *&c.* ſon of the marriage ſucceſſively in tail male, remainder to the firſt, *&c.* ſon of *B.* by any other wife in tail male ſucceſſively, remainder *to the heirs of the body of the ſaid* B. *by the ſaid* M., remainder over. They had iſſue only one daughter, who died, leaving two

2 P. Wms. 349. Weſt v. Erriſſey.

daughters. *B.* having an eſtate-tail under the limitation to the *heirs of the body*, &c. ſuffered a recovery, ſold part of the lands, deviſed the reſidue, and died. The grand-daughters brought their bill in the Exchequer againſt the executors of *B.* to rectify the miſtake in the ſettlement, in limiting an eſtate-tail to *B.*, inſtead of limiting it in ſtrict ſettlement, as by the articles it ought to have been. The articles were made in *December*, the ſettlement in *March* 1685; the ſale of the lands in 1698, and the will in 1722: the defendant pleaded the ſettlement, the recovery, the will, and the long enjoyment; but the plea was over-ruled by Lord Ch. B. *Gilbert*, and the other Barons; and after hearing the cauſe, Lord Ch. B. *Pengelly* and the other Barons diſmiſſed the bill without coſts; it appearing to them dangerous to ſet aſide a ſettlement, which ſeemed to have been ſolemnly and deliberately made. But on an appeal to the Lords, this diſmiſſion was reverſed, and the lands *not ſold* were decreed to be conveyed to *the grand-daughters and heirs female* of their bodies, as tenants in common, with croſs remainders to them in tail female; and the deviſee to account for the profits, and the executor to account for the purchaſe-money received by *B.* for the lands by him ſold, and to pay intereſt for the ſame; the writings to be brought into the court of Exchequer, and poſſeſſion to be delivered to the appellants; and the principal monies ariſing by the ſaid ſale to be laid out in lands, to be ſettled to the ſame uſes as the lands unſold were decreed to be conveyed to.

3 Br. Caſ. Parl. 527.

Powell v. Price, 2 P. Wms. 535.

Marriage-articles were entered into for ſettling lands to the uſe of the huſband *D.* for life without waſte, remainder to truſtees and their heirs during his life, to ſupport contingent remainders, remainder in part to the wife *E.* for her jointure, remainder as to the whole to firſt, &c. ſon of the marriage in tail male ſucceſſively, remainder to the *heirs male of the body of the huſband*, (*i. e.* by any wife,) remainder to the *heirs of his body by his ſaid wife* E., remainder to his own right heirs, with a clauſe empowering huſband and wife to make leaſes; and alſo a clauſe, that if he ſhould die without iſſue male by his ſaid wife, if there ſhould be one daughter, ſhe ſhould have 3000*l.*, and if there were more daughters than one, they ſhould have 4000 *l.* among them; which portions were to be ſecured on ſome part of the eſtate. It happened there was iſſue of the marriage only one daughter. *D.* ſurvived his wife, and ſuffered a common recovery of the lands, and made another ſettlement of them in conſideration of, and previous to, his ſecond marriage; ſubject as to part to a truſt for raiſing 3000 *l.* for his daughter by his firſt wife, in ſatisfaction of the portion ſhe was entitled to under the firſt articles, and maintenance for her in the mean time. The queſtion was, (here being notice of the firſt articles,) whether the limitation in the firſt articles *to the heirs of the body of* D. *by* E. *his wife*, ſhould not be taken as if it had been to the daughters of *D.* by his ſaid firſt wife? For then they could not be barred by the recovery (conſidering the preceding intermediate limitation to the heirs male of his body at

the ſame time as words of purchaſe. It was inſiſted, that here the limitation to the heirs of the body of *D.* by *E.* his firſt wife, muſt be the ſame as if it had been to the *daughters*; for it could not be intended in favour of the ſons of that marriage, there being an expreſs limitation before to them; and though in the caſe of a ſettlement, there being a precedent eſtate for life to *D.*, it would have been an eſtate-tail in him barrable by the common recovery, yet it was otherwiſe where it reſted upon articles; and the caſe of *Weſt* v. *Erriſſey* was cited. *Supra.*

On the other ſide it was ſaid, and reſolved, that the 3000 *l.* ſecured by the ſettlement on the ſecond marriage, was an actual ſatisfaction of all demands under the articles; and that though a limitation by articles to the *heirs male* of the marriage, after an expreſs eſtate for life to the father, ſhould be taken to mean a remainder to the firſt *&c.* ſon, it does not follow that a limitation to the *heirs of the body* muſt be equivalent to a remainder limited to daughters; eſpecially in this caſe, where they were poſtponed to the limitation to the heirs male of the body of *D* by any wife; and where there was an *expreſs pecuniary proviſion* made for the daughters by the firſt wife; which was all they were to depend upon.

And the following diverſities were taken by the court, between this laſt caſe and the caſe of *Weſt* and *Erriſſey*; in the caſe of *Weſt* and *Erriſſey*, no portions were provided for the daughters of the firſt marriage; in the laſt caſe, portions in all events were ſecured to ſuch daughters. In the caſe of *Weſt* v. *Erriſſey*, after the limitation in the articles to the *heirs male* of the body of the huſband and wife, and the remainder to the *heirs male* of the body of the huſband by any wife, came the remainder to the *heirs female* of the body of the huſband by the firſt wife *&c.* ſo that the daughters were more immediately in the view and contemplation of the parties, than in the laſt caſe. See Fearne's C. R. 147, &c.

An eſtate was articled to be ſettled on the huſband for life, *ſans* waſte, remainder to the heirs male of his body, with power to raiſe portions for younger children. A ſettlement was afterwards made, before marriage, *in purſuance of the articles*, and obſerving the very words of the articles. The huſband afterwards levied a fine to the uſe of himſelf in fee, and by will made a proviſion for his ſon's debts. Lord *Hardwicke* ſaid it was the common caſe; the variation from the intent of the articles, and from the ordinary courſe of ſettlements not ariſing from any new agreement, (being made *in purſuance* of the articles,) but from miſtake in not attending to a ſtrict ſettlement. The reaſon of which was unanſwerable, *viz.* that on a ſettlement for valuable conſiderations to make the father *tenant in tail*, would be nugatory, and the ſame as making him tenant in fee. But the ſon having ſubmitted to and taken a benefit under his father's will, muſt be bound thereby; and therefore, though he was entitled to have the ſettlement rectified according to the true intent of the articles, he could not retain both, but muſt make his election. Roberts v. Kingſley, 1 Vez. 238. *Vid.* 1 Br. Chanc Caſ. 587. of election in theſe caſes.

By articles previous to marriage it was agreed that 3000 *l.* ſhould be laid out in the purchaſe of a freehold eſtate, to be ſettled Dodd v. Dodd, Ambl. Rep. 274.

ſettled on the huſband for life, remainder to the wife for life, remainder to the uſe of ſuch iſſue of their bodies, in ſuch parts and manner as the huſband and wife ſhould by deed or writing appoint; and for want of appointment to the uſe of *the iſſue of their bodies*, remainder to the right heirs of the huſband. There was no proviſion for younger children. The huſband died without appointment, leaving his wife and two ſons and a daughter. Upon a bill by the eldeſt ſon to have the money laid out, according to the articles, in land to be ſettled on him in tail, remainder to his brother and ſiſter in tail, with reverſion in fee to himſelf; and a croſs bill by the younger children to have the lands to be bought ſettled on them equally with the eldeſt ſon. The Maſter of the Rolls was of opinion, that the lands to be purchaſed ought to be ſettled in ſtrict ſettlement, and limited to the firſt, *&c.* ſons in tail, with remainder (the daughter being dead without iſſue) to the right heirs of the huſband; and decreed accordingly.

Caſ. temp. Talb. 20. Legg v. Goldwire.

Lord *Talbot* laid it down as a rule, that where articles are entered into before marriage, and a ſettlement made *after marriage*, different from thoſe articles, (as if by articles the eſtate was to be in ſtrict ſettlement, and by the ſettlement the huſband is made tenant in tail,) the court will ſet up the articles againſt the ſettlement. But, where both articles and ſettlement are *previous* to the marriage, at a time when all parties are at liberty, the ſettlement differing from the articles, will be taken as a new agreement between them, and ſhall controul the articles. And although in the caſe of *Weſt* and *Eriſſey* the articles were made to controul the ſettlement made *before* marriage, yet that reſolution did not contradict the general rule; for in that caſe the ſettlement was expreſsly mentioned to be made *in purſuance and performance of the ſaid marriage-articles*, whereby the intent appeared to be ſtill *the ſame* as it was at the making of the articles.

Warwick v. Warwick and Kniveton, 3 Atk. 291. Glanville v. Payne, 2 Atk. 39. S. P.

Articles were entered into for ſettling an eſtate to the huſband for life, after his death to his intended wife for her life, and after her death to the uſe of *the heir male of the huſband to be begotten on the body of the wife;* afterwards, and before marriage, by a ſettlement declared to be in *part performance of the ſaid articles*, the lands were ſettled upon the huſband for life, then to the wife for life, and after her death to the uſe of the *heirs male* of the huſband begotten on the body of the wife. Afterwards the marriage took effect, and the huſband ſuffered a common recovery, and mortgaged the land in fee; which mortgage was afterwards aſſigned to another mortgagee. After the father's death, his eldeſt ſon brought his bill for an account of the rents and profits, and for poſſeſſion, and to have the full benefit of the marriage-articles; inſiſting that his father was intended to be tenant for life only, with remainder to his firſt and other ſon and ſons ſucceſſively in tail; that he was a purchaſer under thoſe articles, and they ought to be conſidered as if they had been ſtrictly carried into execution. The mortgagee denied notice of the articles, and inſiſted on his being a purchaſer for valuable conſideration. Lord *Hardwicke* ſaid it was certainly true, from the general principles of

of the court, that if articles on marriage are to ſettle an eſtate to *A.* for life, remainder to his wife for life, remainder to the heirs male of the body of *A.*, it is taken in that court to be in *ſtrict ſettlement*, and an eſtate for life only in the father and mother; and if the ſettlement be made after marriage, it ſhall be rectified by the articles before;—that the caſe of *Weſt* and *Erriſſey* was both upon articles and a ſettlement before marriage; and was the firſt caſe where the court altered a ſettlement, and made it conformable to articles, and relieved on the head of miſtake, *the ſettlement referring expreſsly to the articles.* But that was between the parties to the articles and ſettlement, and their repreſentatives, and *mere volunteers;* and had not been carried into execution againſt a *purchaſer;*—that it was true, the court had given relief againſt perſons who claimed under the ſettlement and their repreſentatives; but no caſe had gone ſo far as to relieve againſt purchaſers.—He alſo obſerved, that there was no caſe, but where there are *articles as well* as a ſettlement, in which the court will conſtrue words which make a legal eſtate-tail, to be carried into ſtrict ſettlement. And upon the whole, Lord *Hardwicke*, after delivering his opinion that there was not ſufficient proof of notice of the articles in the aſſignee of the mortgagee, diſmiſſed the bill ſo far as it prayed to be relieved againſt the mortgage; but decreed that the plaintiff might be at liberty to redeem.

And the court have refuſed to rectify a ſettlement according to articles, for want of the production of the articles themſelves. The articles were previous to marriage, for ſettling, by the wife's father, certain eſtates to the uſe of the huſband and wife for their lives, and the life of the ſurvivor, and after the death of the ſurvivor to the uſe of the *heirs of the body* of the huſband on the wife, remainder over. A ſettlement was made after marriage *reciting* the articles, and ſaid to be made in conſideration of the marriage, and *purſuance and performance of the articles.* Upon a bill by a ſon of the marriage, to have the articles carried into execution, Lord *Hardwicke* diſmiſſed it, for want of the articles being produced; by which alone, he ſaid, he could alter the ſettlement. It was impoſſible, he ſaid, for him to determine otherwiſe, unleſs the *whole of the inſtrument* was before him; for the true conſtruction depended on *words*; and *other parts* of the deed might be *material* to find out the true meaning. He could not ſee reaſon to lay it down as a rule, that in *all caſes* of *articles*, the huſband was to be only tenant for life.

Cardwell v. Makrill, Ambl. Rep. 515.

and *vide* Ambl. Rep. 148.

The huſband, upon his marriage, covenanted to levy a fine of freehold, and ſurrender copyhold lands to the uſe of himſelf for life, remainder to his wife for life, remainder to the heirs male of his body by his wife, remainder to the *heirs of their two bodies.* He afterwards died, without levying the fine or making the ſurrender, leaving a ſon and a daughter by his wife. The ſon afterwards, for indemnifying ſome ſureties for him, covenanted to levy a fine of the freehold, and ſurrender the copyholds; and died, having ſurrendered the copyhold; but without levying a *fine* of the freehold. Upon a bill by his ſiſter and her huſband

White v. Thornburgh, 2 Vern. 702.

to have the freehold and copyhold lands aſſured to her according to the *intent of the ſettlement*, Lord *Harcourt* conſidered the deed by the father in the *nature of articles*, to be executed in a ſtricter manner than in the words of the deed, and that a *remainder* might be limited to the daughters; ſo that a fine by the ſons could not have barred it. But upon a rehearing before Lord *Cowper*, he held that the ſettlement, by the deed to lead the uſes of the fine, was not to be conſidered *as articles*, but a *defective ſettlement*, and the uſes *not to be altered or varied:* but that a court of equity would *aſſiſt* it ſo far, as to conſider it as if a fine had been levied (by the huſband), and then the plaintiff would not have been barred *without a fine* (by her father), and ſhe was to be conſidered as *heir of the body* of her father. And that the limitation in the deed to the heirs of the bodies, could be inſerted for no other end or purpoſe, but to carry the eſtate to the *daughters of the marriage;* it being before limited to the *heirs male;* and therefore he confirmed the decree as to the *freehold*. But, as to the *copyhold*, there appearing no particular cuſtom in the manor for ſuffering a recovery, he held the ſurrender (by the ſon) would have barred the *entail*, in caſe the copyhold had been well ſettled; and therefore varied the decree, and diſmiſſed the bill as to that.]

2 Vern. 536. Sweetapple v. Bindon.

W. B. deviſed 300 *l.* to her daughter *M.* to be laid out by her executrix in lands, and ſettled to the only uſe of her daughter *M.* and her children; and if ſhe died without iſſue, the lands to be equally divided between her brothers and ſiſters then living: the plaintiff married *M.* the legatee, and had iſſue by her, but ſhe and her child being both dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in lands, and ſettled on him for life, as being tenant by the curteſy, or, in lieu of the profits of the lands, might have the intereſt of the money during his life. It was held by the court, that if it had been an immediate deviſe of land, *M.* the daughter would have been by the words in the will tenant in tail, and conſequently the huſband would have been tenant by the curteſy; and in caſe of a voluntary deviſe, the court muſt take it as they found it; although upon the like words in marriage-articles it might be otherwiſe, where it appeared the eſtate was intended to be preſerved for the benefit of the iſſue, and therefore decreed the money to be conſidered as lands, and the plaintiff to have the intereſt or proceed thereof for his life, as tenant by the curteſy.

Legat v. Sewell, 1 Eq. Abr. 395.

[So, upon a deviſe for the ſettling of lands on *A.* for life, and after his deceaſe to the *heirs male of his body*, and the *heirs male of the body of every ſuch heir male, ſeverally and ſucceſſively as they ſhould be in priority of birth and ſeniority of age*, remainder to *B.* In arguing the queſtion, Whether *A.* was tenant for life only or in tail, the common caſe of marriage-articles was cited, where, though they were ſo worded as to give the huſband an eſtate-tail, yet the court had decreed a ſettlement on the huſband for life only, and then upon the firſt and other ſon and ſons, *&c.* Upon which part of the argument Lord Keeper obſerved, that where *ſettlements*

were

were agreed to be made upon valuable conſideration, the court would aid in artificial words, and make an artificial ſettlement: but he never knew it done *for a bare volunteer*.

Lands were deviſed to truſtees and their heirs for payment of debts and legacies, and afterwards, to *ſettle* what ſhould remain unſold, one moiety to the teſtatrix's ſon *H.*, and the heirs of his body by a ſecond wife, with remainder over; and the other moiety to the teſtatrix's ſon *F.*, and the heirs of his body, with remainders over; taking ſpecial care in *ſuch ſettlement*, that it ſhould *never be in the power* of either of the ſons to *dock the entail of either of their moieties*. Upon a queſtion, Whether the ſons were entitled to have eſtates-tail conveyed to them, or only eſtates for life? the court held, that the ſons muſt be made only tenants for life, and ſhould not have eſtates-tail *conveyed* to them; but their eſtates for life ſhould be without impeachment of waſte. Becauſe in that caſe an eſtate was *not executed*, but only *executory*; and therefore the intent and meaning of the teſtatrix was to be purſued. She had declared her mind to be, that her ſons ſhould not have it in their power to bar their children, which they would have, if an eſtate-tail were to be conveyed to them. And the court took it to be as ſtrong in the caſe of an *executory* deviſe for the benefit of the iſſue, as if the like proviſion had been contained in marriage-articles; but had ſhe by her will deviſed to her ſons an eſtate-tail, the law muſt have taken place; and they might have barred their iſſue, notwithſtanding any ſubſequent clauſe or declaration in the will, that they ſhould not have power to dock the entail. Leonard v. Earl of Suſſex, 2 Vern. 526.

Again, *A.* deviſed a ſum of money to truſtees in *truſt*, to be laid out in lands, and to be ſettled on *B. for life, without impeachment of waſte*, remainder to truſtees and their heirs during the life of *B.*, to ſupport contingent remainders, remainder to the *heirs of the body of B.*, remainders over, with a power to *B.* to make a jointure.—The univerſality of the rule reſpecting the union of the limitation to the anceſtor for life, with that to the *heirs of his body*, &c. was urged in ſupport of *B*'s being entitled to an eſtate-tail in the lands to be purchaſed. To which it was anſwered, that the rule in conſtruction of wills was, that the intention of the party ought to take place, however improperly expreſſed. That it would be a downright violation of the teſtator's intention, to conſtrue the eſtate deviſed to *B.* to be an eſtate-tail. For 1ſt, the eſtate was deviſed to *B.* for *his life*, expreſsly; 2dly, it was to *B. without impeachment of waſte*, which would be vain words, if *B.* were to have more than an eſtate for life; 3dly, the eſtate was deviſed to truſtees, *during the life of B.*, to preſerve *contingent remainders*, ſo that the teſtator expreſſed his intention, that the remainders limited to the iſſue of *B.* ſhould *be contingent remainders*; and what could be more contradictory to this expreſs and plain intent, than to ſay thoſe remainders ſhould not be contingent, but give a veſted eſtate-tail to *B.* As to the notion that the *conveyance directed by a will* ſhould be in the words made uſe of in the will, it was impoſſible that rule could univerſally hold: for 2 P. Wms. 471. Papillon v. Voice.

Vide Earl of Stamford v. Sir John Hobart, *infra.*

for ſuppoſe the direction of the will was, that the truſtee ſhould convey the lands to *A.* for life, remainder to *B. for ever;* this in a deed would not convey *a fee*, as it would in a will; and therefore there was no neceſſity that the words in *the conveyance* ſhould purſue thoſe *in the will.* So, if the words of the will had directed the eſtate to be conveyed to *A.* for life, remainder to the *iſſue of his body*, (he having none at that time born,) this would be an *eſtate-tail* in a will, but in a *deed* it would not be ſo. Again, if the words in a will were that the *conveyance* ſhould be to *A.* and his heirs male, this would be an eſtate-tail; but put ſuch words into a *deed*, and there, for want of ſaying of *whoſe body* the heir muſt be, they would give a fee-ſimple; to which the court agreed. And the Lord Chancellour *King* declared the court had a power over the money directed to be inveſted in land: that the diverſity was between the will's paſſing a *legal* eſtate and leaving the eſtate *executory*, ſo that the party muſt come into the court of Chancery, in order to have the benefit of the will; that in the latter caſe the intention ſhould take place, and not the ſtrict rules of law; and he decreed, that *B.* ſhould have but an eſtate for life on the lands to be purchaſed.

Lord Glenorchy v. Boſville, Caſ. temp. Talb. 3.

In another caſe, of a deviſe to truſtees and their heirs, in truſt, till the marriage, or death of the teſtator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance, and as to the reſidue to pay his debts and legacies, and after payment thereof in truſt for his grand-daughter; and if ſhe married a proteſtant, after her age, or with conſent, *&c.* then to *convey* the eſtate after ſuch marriage to the uſe of her for life, *without impeachment of waſte*, remainder to her huſband *for life*, remainder to the *iſſue of her body*, with ſeveral remainders over. A queſtion aroſe, Whether under the will the teſtator's grand-daughter (Lady *Glenorchy*) was tenant for *life* or *in tail?* which depended on two points: Firſt, Whether the words of the will, in an *immediate deviſe* of a legal eſtate, would have carried an eſtate-tail? Secondly, if ſo, Whether the court would make any difference between a *legal* title and a *truſt eſtate executory?*

Lord *Talbot* ſaid, he ſhould upon the firſt queſtion have made no difficulty of determining it an *eſtate-tail*, had it been the caſe of an *immediate deviſe.* He thought, in caſes of *truſts executed*, or immediate deviſes, the conſtruction of the courts of law and equity ought to be the ſame, for *there* the teſtator did not ſuppoſe any *other conveyance* would be made. But in *executory truſts* he left ſomething to be done; the truſts to be *executed in a more careful and more accurate manner.* That in the caſe of *Legat* and *Sewell*, the words, if in a ſettlement, would have made an *eſtate-tail*, and in that of *Baile* v. *Coleman*, the execution was to be of the *ſame eſtate* he *had in truſt*, which, in conſtruction of law, was an eſtate-tail. That the caſe of "*Papillon* and *Voice*" ſeemed a ſtrong authority for executing the intent in *executory truſts*, as well as in articles; and he accordingly decreed the Lady *Glenorchy* but an eſtate for life, with remainder to her firſt and other ſons, *&c.*

Sir

Earl of Stamford v. Sir John Hobart, 1 Br. Parl. Caſ. 288.

Sir *John Maynard*, after deviſing his eſtates in remainder after the deceaſe of his wife (afterwards *Counteſs of* Suffolk) to truſtees and their heirs, he directed them, *after his wife's deceaſe*, to *convey* certain parts thereof to the uſe of, or in truſt for, Sir *H. Hobart* and *Elizabeth* his wife for their lives and the life of the longer liver of them; the remainder to the *firſt ſon* of the ſaid *Elizabeth* for *ninety-nine* years, if he ſhould ſo long live; the remainder to the *heirs male of the body of ſuch firſt ſon:* the remainder to all and every the ſons of the ſaid *Elizabeth* for 99 years, if every ſuch ſon reſpectively ſhould ſo long live; the remainder to the *heirs male* of every of them, to take, not jointly, but ſucceſſively, one after the other, according to the births of each of them; each ſon to take the term of 99 years, with *immediate remainder to his ſaid heirs male;* the remainder thereof to *Mary Maynard* (afterwards Counteſs of *Stamford*) for her life; the remainder thereof to all and every her ſons for ſuch like term of 99 years, and with remainder to the heirs male of the body of every ſuch ſon immediately after each term. The teſtator left the ſaid *Elizabeth Hobart* and *Mary Maynard* his grand-daughters and coheirs at law, who neither of them had any iſſue male at the time of his deceaſe. Afterwards, on ſome diſputes between Sir *H. Hobart* and his lady, Lord *Stamford* and his lady, and the Counteſs of *Suffolk*, an act of parliament was obtained, whereby it was enacted that the real eſtate, by the ſaid Sir *John Maynard*'s will given or appointed, *ſhould go unto, and be held and enjoyed by ſuch perſon and perſons, to and for ſuch eſtates and intereſts, and under and ſubject to ſuch charges, limitations, and appointments, and in ſuch manner and form, as was in the ſaid will expreſſed.* And the ſaid truſtees were thereby authoriſed and empowered to *convey* the ſaid manors and lands *immediately*, unto ſuch perſon and perſons, and for ſuch eſtate and eſtates, as the ſame were in and by the ſaid will limited and appointed to be conveyed, as if the ſaid Counteſs of *Suffolk were dead.*

After the deceaſe of Sir *H. Hobart* and his wife, upon a bill filed by Sir *John Hobart*, their only ſon, the truſtees were directed to convey the lands *according to his will and the words of the act of parliament.* And a draft of conveyance being accordingly ſettled by the maſter to truſtees, *habendum* to them and their heirs, *to the ſeveral uſes, intents, and purpoſes in the ſaid will and act of parliament limited, expreſſed, and declared, and to and for no other uſe, intent, or purpoſe whatſoever;* the plaintiff excepted to it, for that the premiſes ought, at leaſt, to have been limited to the *uſe* of the ſaid truſtees and their heirs; and only in *truſt* for ſuch perſon and perſons, and ſuch eſtate and eſtates, as were in and by the ſaid will and act of parliament limited; whereby the *legal eſtate* might be veſted in the ſaid truſtees, for the better preſervation of the *contingent limitations*, which otherwiſe, as the draft was prepared, were liable to be deſtroyed, and the teſtator's intention plainly defeated.

Upon the hearing of this exception, Lord Chancellour *Cowper* declared, "that in matters *executory*, as in caſes of articles, or a "will

" will *directing a conveyance*, where the words of the articles or " *will* were improper, or informal, that court would not direct a " conveyance according to ſuch improper or informal expreſſions " in the articles or *will;* but would order the *conveyance or ſettle-* " *ment* to be made in a proper and legal manner, ſo as might beſt " anſwer the *intent* of the parties; and in that caſe his lordſhip " conceived the true intent of the will to be, that the eſtates " ſhould be *ſecured*, as far as the rules of law would admit, to " the iſſue male of the reſpective deviſees, and that it was de- " ſigned to be as ſtrict a ſettlement as poſſible by law." His lordſhip therefore decreed, that in the ſaid conveyance, where any part of the eſtate was limited in uſe to the plaintiff for 99 years, if he ſhould ſo long live, there ſhould be a limitation over to truſtees and their heirs *during his life*, to preſerve the contingent uſes in remainder; and then to the firſt and other ſons of the plaintiff in tail male ſucceſſively.

Upon an appeal to the lords from this *laſt decree*, it was contended, among other things, that the act of parliament, which was ſo very expreſs in confirming the eſtates appointed by the will, could never intend that a court of equity ſhould have power to *direct* a conveyance to *other uſes*, than what were *mentioned in the will;* but the decree complained of did ſo, and was therefore repugnant both to the will and act of parliament, as well as to the *former decree*. To this it was anſwered, that in caſes of *executory articles*, for the ſettling of eſtates, in proſpect of *future conveyances* to be *afterwards made*, it was uſual for courts of equity to help informalities and ſupply defects, eſpecially when the things ſupplied were neceſſary to *ſupport the main intent* of the parties, and to carry ſuch articles into execution, according to that intent, ſo far as it might agree with law, though not ſtrictly according to the words and penning of the articles; and *à fortiori* would courts of equity do ſo in the caſe of *a will*, where the ſame was only *executory* by a *conveyance to be made*. That the act of parliament made *no alteration* in the *will*, in the point in queſtion; it only haſtened the time for the truſtees to convey, even in the lifetime of the Counteſs of *Suffolk*, and in ſome other particulars not relative to the queſtion. But in all other reſpects the act *confirmed the will*, and being ſtrictly *relative to it*, the intent of the will ought to be the *rule for the conveyance*. The decree was accordingly affirmed by the Lords.

Allgood v. Withers, in Chanc. in 1735, cited 2 Bur. 1107. 1 Vez. 150. 2 Atk. 582. 2 Vez. 648.

and *vide* Aſhton v. Aſhton, cited 1 Vez. 149. 2 Atk. 582.

In a caſe where one by deed conveyed his freehold land to truſtees and their heirs, and his leaſehold to truſtees and their executors, upon truſt to apply the rents and the benefit of the redemption to *W.* for life, and after her death to the *heirs of the body of the* ſaid *W.*, and of *G.* and of *M.*, *their heirs*, *executors*, *and aſſigns*, during the continuance of the eſtate in the premiſes; upon a queſtion, Whether *W.* took for *life*, or in *tail?* Lord *Talbot* held, that ſhe took an eſtate *for life*, and that the heirs took by purchaſe. In which caſe, we may obſerve, the limitation to the heirs of the body of *W.* was blended with that to the heirs of the bodies of ſeveral others, who could take no otherwiſe than by purchaſe;

purchaſe; and there were words of limitation not only to the heirs, but to the *aſſigns* of all the ſaid heirs of the bodies alike.

A. deviſed lands to five truſtees, their heirs and aſſigns *in truſt*, by rents and profits, *ſale or mortgage*, to pay his debts, *&c.*, and *after payment thereof*, he deviſed the ſame eſtates to three of the ſame truſtees, their executors, *&c.* for 500 years, upon truſt to pay his legacies, and an annuity of 200*l. per ann.* to his ſiſter for life; and after the determination of the ſaid eſtate for years, he deviſed the ſame premiſes to all the ſaid truſtees and their heirs in truſt, as to a moiety, to the uſe of *T.* his nephew for life, without impeachment of waſte; and after the determination of that eſtate, to the truſtees and their heirs during the life of *T.* to ſupport contingent remainders, and after his deceaſe to the uſe of the heirs of the body of *T.* lawfully begotten, and for want of ſuch iſſue, then to the uſe of his nephew *B.* for the term of his *natural life*, without impeachment of waſte; and after the determination of that eſtate, *to the ſame truſtees during the life of* B. *to preſerve contingent remainders*, and after his deceaſe, then to the uſe of *the heirs of the body of* B. lawfully begotten, with like remainders to other nephews. The firſt deviſee *T.* died without iſſue; upon whoſe deceaſe *B.*, the next in remainder, filed his bill againſt the truſtees and all proper parties, praying, amongſt other things, to be let into poſſeſſion of a moiety of the eſtates: afterwards *B.* dying pending the ſuit, his widow and deviſee brought a bill of revivor and ſupplemental bill, charging that *B.* in his lifetime, by bargain and ſale enrolled, conveyed his moiety of the eſtates to two perſons and their heirs, to make them tenants of the freehold, and ſuffered a recovery thereof (in which he was vouched) to the uſe of himſelf in fee; and afterwards deviſed his ſaid moiety to his ſaid widow in fee, and died without iſſue. The general queſtion between the parties was, Whether an *eſtate-tail*, or an eſtate for *life* only, paſſed by the will of *A.* to *B.*? It was inſiſted for the plaintiff, that it was an eſtate-tail; upon the general rule, that where lands are limited to a man for life, with a limitation in the ſame deed or gift to the heirs of his body, that this makes an eſtate-tail, and that a deviſe of lands in the ſame way paſſed the ſame eſtate; that the limitation was either a *legal eſtate*, or a *truſt veſted or executed*, and not *executory*. On the other hand it was contended, that thoſe rules were artificial, not founded in juſtice, but for ſupport of the feudal tenures, and therefore the judges ought to ſhew themſelves *aſtuti* in ſupporting exceptions to ſuch rules. The Maſter of the Rolls, however, held it to be a *truſt*, and *not a legal eſtate;* but decreed that *B.* was entitled to an *eſtate-tail* in the moiety ſo deviſed to him; as it was the caſe of an immediate deviſe, and not a deviſe of lands *to be ſettled*. Upon an appeal to Lord *Hardwicke* from this decree, he agreed that this deviſe was only *a truſt* in equity; the deviſe being to *truſtees and their heirs*, which carried the whole fee in point of law, and the deviſe *to ſell* being ſufficient to carry the fee, if the word *heirs* had been omitted; and therefore the whole fee being in the truſtees, no *legal* remainder could be limited to *B.*; and as to its being

1 Vez. 142. 2 Atk. 246. 570. 577. Bagſhaw v. Spencer.

conſidered as an *executory deviſe* to *B.* (which, it ſeems, had been contended at the bar), it was too remote to be good in that view; being after all debts indefinitely paid, which, in point of time, might exceed a life or lives in being, or any other time allowed by law; and beſides, in *that caſe* the recovery by *B.* being before the debts were paid, and conſequently whilſt the legal fee remained in the truſtees, *B.* could make no good tenant to the præcipe; and that would prevent it from paſſing by *B.*'s will: for whatever made that recovery void, equally defeated the plaintiffs' title; which made it neceſſary for the plaintiffs to admit that all the deviſes ſubſequent to that to the truſtees were *truſts* in equity. That the main queſtion, whether it was an equitable *eſtate-tail*, or for *life* only, depended on the conſtruction of the words *heirs of the body*, whether they ſhould be taken as words of limitation or of purchaſe.—That the intent was clear that they ſhould be taken as words of purchaſe, from the clauſe *without impeachment of waſte*, and the limitation to truſtees *to ſupport contingent remainders*. That there were ſeveral caſes even at law, where they had been taken as words of purchaſe, as *Archer*'s caſe; that the words of limitation added there, and in all ſuch caſes, were only demonſtration of the intent of the teſtator in uſing the firſt words. That the caſe of *Colſon* and *Colſon*, which was objected as an authority, that the interpoſition of truſtees to ſupport contingent remainders is not ſufficient to turn theſe ſubſequent limitations to the *heirs of the body* into words of purchaſe, differed from the principal caſe; here being (in the principal caſe) a clauſe without impeachment of waſte; although that might be thought of little weight; but the *great difference* was, that *this* was a deviſe of a *truſt in equity*, *that* of a mere *legal* eſtate, *the words of which muſt be taken as they ſtood, according to the ſtrict legal determination*. That here all the limitations were the direction of a *truſt*, which the court was bound to carry into execution according to the intent of the teſtator.

Sed vide Wright v. Pearſon, Ambl. 358. but more fully Fearne's C. R. 187. Auſten v. Taylor, Ambl. 376. Jones v. Morgan, 1 Br. Ch. Ca. 206.

That as to the difference between truſts *executed* and *executory*, the diſtinction had never been eſtabliſhed by any direct reſolution. That all truſts in notion of law were executory, and to be carried into execution by the court by *ſubpœna*. That if *B.* had himſelf come to have a conveyance decreed him, the queſtion would have been, whether the court ſhould have inſerted truſtees to ſupport contingent remainders, if they had not, they would have departed from the words of the will; if they had, the remainder muſt have been to firſt, *&c.* ſon and ſons in ſtrict ſettlement, for otherwiſe there would have been no remainders to be preſerved; and therefore, if the court muſt at all events depart from the words of the will, ſuch departure muſt rather be to ſupport than to fruſtrate the plain intent of the teſtator. For theſe reaſons Lord *Hardwicke* reverſed ſo much of the decree at the Rolls as gave *B.* an eſtate-tail under the will.

One deviſed lands to truſtees and their heirs for payment of debts and legacies, and after debts and legacies paid, willed that one-fourth part ſhould be and remain in truſt for *E.* for life, with power of leaſing; and after her deceaſe, in truſt for *C. for and during*

during the term of his life, with like *power of leaſing*, and after his deceaſe to the *heirs male* of the body of *C.*, remainder over. Now this was the deviſe of a *truſt;* and Lord *Cowper* conceived that it differed from an *immediate deviſe*, and that it was rather to be looked upon in the nature of an executory deviſe, to take effect after debts paid, which were conſiderable; or in nature of marriage-articles: beſides, that the enabling *C.* to make leaſes, ſeemed to imply very ſtrongly that he was to have no power to diſpoſe of the inheritance. But the cauſe coming on before Lord *Harcourt* upon a re-hearing, he ſaid the caſe of a will *differed* from the ſeveral caſes of marriage-articles, in the nature of which the iſſue were particularly conſidered, and looked upon as purchaſers. That in caſe of a *will*, where the parties claim voluntarily, the teſtator's intent muſt be preſumed to be conſiſtent with the rules of law; that at law thoſe words would certainly create an eſtate-tail; and it could not be inferred (with any certainty) from the power of leaſing, that no eſtate-tail was intended; ſuch power being more beneficial than that given to tenant in tail by the ſtatute; and as the debts were admitted by the pleadings to be all paid, the ſame conſtruction was to be made as if there had been originally no truſt; and ſo decreed *A.*'s ſhare to be conveyed to him and the heirs male of his body, remainder over.

Baſe v. Coleman, 2 Vern. 670. 1 P. Wms. 142.

Peere Williams ſtates it as a deviſe to four perſons for *payment of debts*, afterwards to the uſe of them and their heirs; and that the teſtator by codicil deviſed that his will ſhould ſtand, ſaving that one of the ſaid deviſees ſhould have his eſtate for life, with power of leaſing, remainder to the heirs male of his body. But conſidering the firſt deviſe for *payment of debts*, the deviſee's *beneficial* intereſt in either ſtate of the caſe, appears to have been in the nature of a *truſt*. 1 P. Wms. 242.

Where there was a deviſe of lands to a truſtee, *in truſt* to pay the rents and profits to *S.* for her ſeparate uſe for life, as if ſhe were ſole, and after her deceaſe to pay the ſame to *E. her ſon for life*, and afterwards to pay the ſame *to the heirs of his body*, and for want of ſuch iſſue, to pay the ſame to all and every other ſon or ſons of the body of *S.* begotten, *&c.*; upon the queſtion, whether *E.* was entitled to the lands in tail or for life only, Lord *Hardwicke* proceeded on this principle, *viz.* that in limitations of a *truſt*, either of a real or perſonal eſtate to be determined in that court, the conſtruction ought to be made according to the conſtruction of limitations of a *legal* eſtate, unleſs the intent of the teſtator or author of the truſt *plainly* appears to the contrary. He laid it down as a rule (he ſaid) that he was not, in a court of equity, to over-rule the *legal* conſtruction of the limitation, unleſs the intent of the teſtator or author of the truſt appears by declaration plain, that is, by *plain expreſſion* or *neceſſary implication*. And upon this ground Lord *Hardwicke* decreed a conveyance in tail to *B.* of the real eſtate ſo deviſed.]

Garth v. Baldwin, 2 Vezey, 646.

A ſurrender was made of an eſtate of the nature of *borough Engliſh*, to the uſe of truſtees, in truſt after payment of an annuity and ſome particular debts, to ſurrender the ſame to the uſe of the heirs of the body of the huſband and wife. The huſband and wife had two ſons, and when the annuity, *&c.* were at an end, they each of them claimed the ſurrender in their favour; the eldeſt ſon as heir of the body by the common law of *England*, and the

Starkey v. Starkey, in Exch. Trin. 19 G. 2. MSS. Rep. [Roberts v. Dixwell, 1 Atk. 610. a ſimilar de-

eiſion by Ld. Hardwicke on an eſtate in gavelkind.] younger as heir by the cuſtom of *borough Engliſh*, of which nature this eſtate was. But, as this was a truſt merely executory, the court directed a ſurrender to be made to the eldeſt ſon, as heir general by the common law.

(I) Truſtee in what Caſes favoured, and in what Caſes decreed to account.

2 P. Wms. 455. Balſh v. Hyham. IT is a rule that the *ceſtui que truſt* ought to ſave the truſtee harmleſs, as to all damages relating to the truſt, and it is within the reaſon of that rule, that where the truſtee has honeſtly and fairly, without any poſſibility of being a gainer, laid down money, by which the *ceſtui que truſt* is diſcharged from being liable for a greater ſum lent, or from a plain and great hazard of being ſo, that the truſtee ought to be paid.

Trafford v. Boehm, 3 Atk. 444. [And if a truſtee errs in the management of the truſt, and is guilty of a breach of truſt, yet, if he goes out of the truſt with the approbation of the *ceſtui que truſt*, the breach of truſt ought rather to fall upon the eſtate of *ceſtui que truſt*; for the courts are ever anxious to deliver the truſtee from any miſapplication of the truſt-money.

Robinſon v. Pett, 3 P. Wms 251. See Harwood v. Harriſon, Moſ. 128. But it is an eſtabliſhed rule, that a truſtee, executor, or adminiſtrator, ſhall have no allowance for his care and trouble: the reaſon of which ſeems to be, that on theſe pretences, if allowed, the truſt-eſtate might be loaded and rendered of little value. Beſides, the great difficulty there might be in ſettling and adjuſting the *quantum* of ſuch allowance, eſpecially as one man's time may be more valuable than that of another, and there can be no hardſhip in this caſe upon any truſtee, who may chooſe whether he will accept the truſt or not.

Could v. Fleetwood, *ibid.* In Ayliffe v. Murray, 2 Atk. 60. Lord Hardwicke is reported to ſay, "If a "truſtee "comes in "a fair and "open "manner, "and tells "the *ceſtui* "*que truſt*, "that he "will not act in ſuch a troubleſome and burdenſome office, unleſs the *ceſtui que truſt* will give him a "further compenſation, over and above the terms of the truſt, and it is contracted for between them, I "will not ſay this court will ſet it aſide, though there is no inſtance where they have confirmed ſuch a "bargain." An executor in truſt who had no legacy, and where the execution of the truſt was likely to be attended with trouble, at firſt refuſed, but afterwards agreed with the reſiduary legatees, in conſideration of 100 guineas, to act in the executorſhip, and he dying before the execution of the truſt was completed, his executors brought a bill to be allowed theſe 100 guineas out of the truſt-money in their hands, inſiſting, that the reſiduary legatees might as well make a contract with the executor, touching the overplus, (which was their own property,) as the teſtator himſelf; and that no harm could happen thereby to the truſt-eſtate. But the court ſaid, all bargains of this kind ought to be diſcouraged, as tending to eat up the truſt; and here the executor had died before he had finiſhed the affairs of the truſt: wherefore the plaintiff's demand was diſallowed.

Ibid. It ſeems to be owing to this jealouſy, which a court of equity entertains of an executor or truſtee, that if *they* compound debts or

or mortgages, and buy them in for leſs than is due thereon, they ſhall not take the benefit of it themſelves, but other creditors and legatees ſhall have the advantage of it, and for want of them, the benefit ſhall go to the party who is entitled to the ſurplus; whereas, if one who acts for himſelf, and is not in the circumſtances of an executor or truſtee, buys in a mortgage for leſs than is due, or for leſs than it is worth, *he* ſhall be allowed all that is due thereon. Thus in the caſe of *Baldwyn* v. *Baniſter*, heard at the Rolls, *Paſchæ*, 1718. The caſe was, a mortgagor in fee died, and the mortgagee bought in the mortgager's wife's right of dower. Decreed, that the heir of the mortgagor, on his bringing a bill to redeem, ſhould have the benefit thereof, on this principle, that the mortgagee is but a truſtee for the mortgagor after the money paid. So, in the caſe of *Powell* v. *Glover*, *Mich.* 1721, at the Rolls, where a guardian compounded debts, decreed, that it ſhould be for the benefit of the infant.

1 Salk. 155. 1 Vern. 476. 2 Atk. 54.

So, it hath been holden upon the ſame principle, that a truſtee ſhall not be allowed to become the purchaſer of that which he holds in truſt. It is ſaid indeed in one caſe (*a*), that if the title be *re vera* in a third perſon, the truſtee may purchaſe as well as any one elſe.]

Whelpdale v. Cookſon, 1 Vez. 9. Killick v. Flexney, 4 Br. Ch. Rep. 161.

(*a*) Leſlie's caſe, 2 Freem. 52.

A truſtee ſhall not be charged with imaginary values, but only as bailiff, though very ſupine negligence might indeed, in ſome caſes, charge a truſtee with more than he had received; but the proof thereof muſt be very ſtrong; and it is a hardſhip on him, that he is allowed nothing for his pains. *It has been ſaid likewiſe, that it was a hard rule to charge a truſtee with what he had made, or might have made, without his wilful default; but the reaſon was, becauſe the court could never yet find where elſe to fix the meaſure.*

1 Vern. 144. Palmer v. Jones.

The defendant was truſtee to the plaintiff an infant, and received for him 40*l.* in gold; the truſtee was robbed by his own ſervant, who lived with him in the houſe, of 200*l.* together with this 40*l.* which laſt ſum was only proved by the defendant's own oath; yet my Lord Chancellour allowed it on account, for he was but to keep it as his own.

2 Chan. Ca. 2. Morley v. Morley.

If a truſtee ſued for the truſt-eſtate, obtains a decree with coſts of courſe, and the coſts taxed him are ſhort of his real coſts; and the *ceſtui que truſt* exhibits a bill for an account of the truſt-eſtate; the truſtee, in his diſburſements, ſhall be allowed the full and neceſſary coſts, and ſhall not be concluded by the coſts taxed. [If a truſtee has not miſbehaved himſelf, it is the rule to allow him his coſts. Perrott v. Treby, Pr. Ch. 254. 1 Eq. Ca. Abr. 125. pl. 4. S. C. *Secùs*, if he has miſbehaved himſelf. Dawſon v. Parrott, 3 Br. Ch. Rep. 236. Ball v. Montgomery, 2 Vez. jun. 191. Horſley v. Challoner, 2 Vez. 83.]

2 Chan. Ca. 138. Amand v. Bradburne.

If two eſtates are conveyed to a truſtee for payment of ſeveral and diſtinct debts, and the heir at law brings a bill for an account, and afterwards prays that the bill may be diſmiſſed as to one of the eſtates, yet an account ſhall be taken of both eſtates.

1 Vern. 78. Pureſoy v. Pureſoy.

A. deviſed 100*l.* a-piece to four children, payable at 21, or marriage, with maintenance not exceeding the intereſt in the mean time;

2 Vern. 137. Franklin v. Green.

time; *B.* was appointed truſtee of a truſt-eſtate, to raiſe and pay the legacies as aforeſaid; and he paid 20*l.* in placing out one of the children apprentice, who died before his age of 21 years: the court held, that the 20*l.* was well laid out, and that the truſtee ſhould be allowed it; though the 100*l.* was limited over, in caſe of death before 21 or marriage.

2 Chan. Caſ. 232. Tilſly v. Throckmorton.

But, if a truſtee for the payment of children's portions pay one of them his full ſhare, and the truſt-eſtate decay, he ſhall not be allowed ſuch payment. It was urged, in this caſe, that though the appointment was to pay the eldeſt in the firſt place, *&c.* yet it would not be good, as it did not denote preference in the quantity of the ſum to be paid: but my Lord Keeper was of another opinion as to this point. It ſeems clearly agreed, however, that a ſpecifick legatee may be paid in the firſt place.

12 Mod. 560. Sutton the marſhal's caſe.

If one deviſe to truſtees, and by an expreſs clauſe give them power to appoint agents to manage the land, and they appoint one then ſolvent, and good, though after he prove inſolvent, they ſhall not anſwer for him; but it is otherwiſe, if he were not ſolvent at the time of nomination. But, if there were no ſuch direction or power in the will, the truſtees are bound to anſwer for their agents at all events. *Per* Lord Keeper *Wright.*

Brown v. Litton, 10 Mod. 21. [Eird v. Lockey, 2 Vern. 744. Perkins v. Bayntum, 1 Br. Ch. Rep. 375. Franklin v. Firth, 3 Br. Ch. Rep. 433. S. P. A truſtee neglecting to pay money into court after an order for that purpoſe, ſhall be charged with intereſt: but as light difference between the ſums remaining in his hands, and thoſe reported due by the Maſter, is not a ſufficient reaſon for the court to order him to pay intereſt. Sammes v. Rickman, 2 Vez. jun. 36.]

If a truſtee empowered to put money to intereſt, let the money lie by him, he ſhall be accountable for intereſt. *Per Harcourt,* Lord Keeper.

2 Vern. 548. Lee v. Lee. [1 Br. Ch. Rep. 375.

Likewiſe, although an executor or truſtee is not empowered or directed to place out money at intereſt; yet, if he makes intereſt, he ſhall be accountable for it. Decreed accordingly.

Perkins v. Bayntum, *Id.* 384. Treves v. Townſhend, *Id.* 359. Newton v. Bennett, 1 Vern. 196. Radcliffe v. Graves. S. P. And if a truſtee appear to have employed the truſt-money in trade, whence he has derived profits beyond the rate of intereſt, he ſhall account for the whole of thoſe profits. Brown v. Litton, 10 Mod. 21. Forbes v. Roſs, 2 Br. Ch. Rep. 430.]

1 Abr. Eq. Caſ. 398. Bromfield v. Wytherly. [The doctrine here advanced, though ſanctioned by great opinions in ſubſequent caſes, Adams v. Gale, 2 Atk. 106. Child v. Gibſon, *Id.* 613. is not to be conſidered as law. Newton v. Bennett, 1 Br. Ch. Rep. 359. Horſley v. Challoner, 2 Veſ. 85.]

But afterwards, a difference was taken by Lord *Macclesfield, viz.* that if an executor or truſtee of money places it out in the funds, or on other ſecurity, whereby he gains conſiderably, he ſhall have the whole benefit thereof to himſelf, in reſpect of the hazard he runs of being a conſiderable loſer thereby, which he muſt have borne; but, if ſuch truſtee or executor were an inſolvent perſon at the time of placing out ſuch truſt-money, there the *ceſtui que truſt* ſhall have the whole benefit gained thereby; as he only could have borne the loſs thereof, if any had happened; the truſtee or executor, by reaſon of his inſolvency, being incapable thereof, and conſequently running no hazard at all.

Rider v. Bickerſton. MS. Rep.

If a truſtee is directed to place out money on the beſt ſecurity that can be got, with the conſent of huſband and wife; and he puts

puts it into a banker's hand, and takes his note for it, and he becomes a bankrupt, by which the loſs happens; the truſtee ſhall be decreed to pay the money out of his own pocket, though no fraud appear, and though the conſent of huſband and wife be had to it. [*Vide* Ambl. 219. *contra.*]

[It hath been holden, that if an executor inveſt money in the funds, he ſhall not be liable to the fall of ſtocks; becauſe the court, if applied to, would have made the ſame appropriation. *Ex parte* Champion, cited in Hutcheſon, v. Hammond, 3 Br. Ch. Rep. 147.

Where a truſtee ſells out ſtock contrary to the truſt, the *ceſtui que truſt* may elect to have the ſtock reſtored, or the produce of it paid. But, if a truſtee for the benefit of the truſt-eſtate, ſells out of one fund, and inveſts the produce in another, or transfers the money from one real ſecurity to another, the property continues unaltered, and he ſhall not be chargeable.] Harriſon v. Harriſon, 2 Atk. 123. Boſtock v. Blakney, 1 Br. Ch. Rep. 1656. Waite v. Whorwood, 2 Atk. 159. Worſley v. Earl of Scarborough, 3 Atk. 392.

(K) How far Truſtees are anſwerable for each other.

EACH truſtee ſhall be charged for no more than what he actually received: but, where they join in receipts, there, they ſhall be all charged: *Per North*, K. Spalding v. Shalmer, 1 Vern 301. Bridgm. 37.

Townley v. Sherborn, S. P. *A.* and *B.* truſtees received 1000 *l.* each, on ſale of a truſt-eſtate, and both joined in receipt for the money, as they did in the ſale and the conveyances, *B.* became inſolvent. Wright K. doubted if *A.* ſhould anſwer the whole. 2 Vern. 504. pl. 453. Fellows v. Owen — 1 P. Wms. 81. pl. 83. S. C. And it is there ſaid that the *ceſtui que truſt* was preſent, and conſenting to the payment as above; and at his importunity the truſtees joined in acquittance for the whole. Decreed that *A.* ſhould not anſwer for *B.*'s 1000 *l.*

But, if two executors join in the ſale of the goods, *&c.* of the teſtator, they ſhall be both chargeable, though one of them only received the money, for there was no neceſſity for their joining. 2 Vern. 570. Muriel v. Cox. 1 Salk. 318. Churchill v. Hopſon,

S. P. [The diſtinction between executors and truſtees as to this point appears alſo in Applyn v. Brewer, Pr. Ch. 173. Attorney General v. Randall, 21 Vin. Abr. 534. pl. 9. *& infra. Ex parte* Belchier, Ambl. 219. Leigh v. Barry, 3 Atk. 584. Read v. Truelove, Ambl. 417. And notwithſtanding the inclination expreſſed by Lord Harcourt in Churchill v. Lady Hobſon, 1 P. Wms. 241. and 1 Salk. 318. and by Lord Northington in Weſtley v. Clarke, 1 Cox's P. Wms. 82. to favour executors equally with truſtees; yet the diſtinction ſtill prevails, and where by *any act done* by one *executor*, any part of the eſtate comes to the hands of another executor, the former will be liable for his companion in the ſame manner as if he had enabled a ſtranger to receive it. Sadler v. Hobbs, 2 Br. Ch. Rep. 117. Scarfield v. Howes, 3 Br. Ch. Rep. 90. In Weſtley v. Clarke, one of the executors had actually received the money without the concurrence of his co-executors, and they ſigned the receipt afterwards, ſo that, as Lord Thurlowe obſerved in commenting upon that caſe, there was no act done by the co-executors which put it into the power of the executor who received the money to get at it, ſince in fact he had it at the time; for Lord Northington ſaid, that he ſhould have thought the co-executors *liable*, if they had been preſent at the time when the money was paid. See Cox's P. Wms. 241. note. In Churchill v. Lady Hobſon, *ubi ſupra*, where Lord Harcourt held, that where two executors joined in the receipt, and one only actually received the money, the latter only ſhould be chargeable to legatees, though it would be otherwiſe as to creditors (a diſtinction by the way not to be found in the decree, nor adopted in later caſes, Sadler v. Hobbs, 2 Br. Ch. Rep. 117. though to be met with in an earlier caſe. Gibbs v. Herring, Pr. Ch. 49.); it appeared that the executor who received the money had been the teſtator's banker, and that circumſtance has been conſidered as having had ſome weight in the determination.]

2 Abr. Eq. Caſ. 742. Lord Chancellour ſaid, that it could not be expected that all the truſtees ſhould meet together to receive the money; but, if they had, either one muſt have

J. S., by will, 1724, gave 650*l.* to *R.* and two other truſtees, *in truſt* to build and endow an alms-houſe in *Cornwall* for maintenance of five poor women, and made *M.* and *N.* executors, and appointed the 600*l.* to be paid within ſix months after his death, with intereſt. *R.* lived in *London*, and the other truſtees in *Cornwall*. *R.* called on the executors for the money, who refuſed to pay it, unleſs the two other truſtees would join in a receipt. *R.* procured a receipt, and received all the money, and paid at times, by directions of the other truſtees for building, *&c.* 400*l.*; and about four years after the money firſt received, failed, and was then inſolvent. On a bill for an account againſt all the three truſtees, Lord Chancellour decreed *R.* only to be chargeable.

had the cuſtody of the whole, or it muſt be divided into ſhares. Suppoſe all the money had been lodged in a banker's hands *bonâ fide*, and he had failed, ſhould the truſtees have been anſwerable, *&c.* And if they intruſt one of themſelves for *convenience* or *neceſſity*, at a time when he is ſolvent, which is no more than making him their banker, ſhall equity puniſh where there is no default? and this is the very caſe of Churchill v. Hopſon; and to charge truſtees in ſuch a caſe, would make the caſe of the truſtees, who are neceſſary for the common good and convenience of families, *&c.* very perilous, and his Lordſhip ſaid, he ſaw no reaſon why truſtees may not make one of themſelves their caſhier, where there is no fraud. That this was a reaſonable thing, *R.* at that time being the only truſtee, who lived in London, where the money was paid, *&c.* And as to an objection made as to letting the money lie ſo long in *R.*'s hands, he ſaid the caſe of *R.* differs from the caſe of a common banker, where the money may be drawn out at pleaſure; but here *R.* had as good a right to the keeping of it as the others, and all was paid out to about one third, and he was intruſted by the teſtatrix as much as the other. *Ibid.*——If *one truſtee directs the payment of the truſt-money over to the others*, and *joins in the deed*, he charges and makes himſelf liable for the default of the other. Said to have been ſo lately held in Chancery in the caſe of Serjeant Webb's will. *Ibid.*——[For where, by any act or agreement of a truſtee, money gets into the hands of his companion, they ſhall both be chargeable. Sadler v. Hobbs, 2 Br. Ch. Rep. 116. Keble v Thompſon, 3 Br. Ch. Rep. 110. So, if a truſtee know of the embezzlement of the truſt-fund by his companion, he ſhall be charged with the amount. Boardman v. Moſman, 1 Br. Ch. Rep. 68.]

Bridgm. 38. Townly v. Sherborne.

But if, upon the proofs or circumſtances, the court be ſatisfied that there be *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his *companion to receive the whole profits*, he may be charged, though he received nothing.

Bridgm. 38. Townly v. Sherborne. Cro. Car. 312. S. C. The truſtees both ſealed the counterpart of the aſſignment, and joined in acquittances for rent for a year and

If there are two truſtees, and one of them without warrant of the party that truſts him, or of a court of equity, aſſigneth his eſtate, and the aſſignee receives the profits, and becomes inſolvent, he that made the aſſignment ſhall anſwer it for him; but the other original truſtee ſhall anſwer for no more than what he receiveth, becauſe the aſſignee cometh not in by him, or by his aſſent or appointment; and in caſe ſuch original truſtee, who did not make the aſſignment, receive the whole profits and become inſolvent, neither the aſſignor or aſſignee ſhall be anſwerable for them.

an half; but one of them never meddled further. Reſolved by Lord Keeper, aſſiſted by four judges, whereof Croke, J. was one, that the other, being only a party intruſted, ſhall not be anſwerable for more than came to his hands; for it was the default of him who put them in truſt, to repoſe truſt in one who was not able to pay; and he being truſted as well as the other, the other ſhall not be compellable to make good his defect; and ſo reverſed a decree whereby the other truſtee was made liable to pay.—S C. cited 2 Vern. 516. and it is there ſaid, that the making joint truſtees by the joining in receipts to be anſwerable for each other (as in the above caſe) ſeemed to be againſt natural juſtice, unleſs they had ſo joined in receipt, as not to be diſtinguiſhed what had been received by one, and what by the other; that there indeed, of neceſſity, they muſt both be charged with the whole; and that is from their own neglect or default; as, if another man ſhould blend his money with mine, by rendering my property uncertain he loſes his own; and that there was a difference between joint truſtees and executors; executors may act ſeparately, if they think fit; but if a truſt-eſtate is to be ſold, the truſtees muſt join in conveying,

conveying, and alſo in receipts; otherwiſe no one will purchaſe. And ſince one truſtee has equal power, authority, and intereſt, with the other, the one cannot in reaſon inſiſt, or deſire to receive more of the conſideration-money than the other, or to be more truſtee than his partner or co-truſtee.

(L) In what Caſes Truſtees ſhall give Security; and when be diſcharged or removed.

WHERE a truſtee *is inſolvent*, the court of Chancery will compel him to give ſecurity before he ſhall enter upon the truſt. Carth. 458. The King v. Raines.

One truſtee was *decreed, at his own requeſt, to releaſe to the other* and his heirs his truſt, and that the other ſhould ſell the premiſes deviſed to be ſold. Fin. Rep. 380. Travell v. Danvers. Meers and Holbetch.

Likewiſe, a truſtee was removed out of the truſt, though much againſt his will. 2 Chan. Ca. 130. Uvedale v. Ettrick.

(M) The Power of *Ceſtui que Truſt*.

Ceſtui que truſt hath *jus habendi* and *jus diſponendi*, and though in law he hath neither *jus in re*, nor *jus ad rem*, yet in equity he hath both. Mod. 38. Smith v. Wheeler. 1 Rep. 121. b. Chudleigh's caſe —So. where he is *ceſtui que truſt of a poſſibility*. Mo. 806. pl. 1093. Cole v. Moore.—But *ceſtui que truſt of a ſurplus* has but a bare poſſibility, and *cannot ſell*. Chan. Ca. 208. Arg. Lord Cornbury v. Middleton —Unleſs the truſtees are parties. Chan. Ca. 175. Backhouſe v. Middleton.—Any diſpoſition by *ceſtui que truſt is binding upon the truſtee* in a court of equity, and even at law. Chan. Prec. 415.

Ceſtui que truſt of a perſonal eſtate may *ſue in* Chancery to have an account againſt the executor or adminiſtrator, and at the ſame time in the *Prerogative Court*, to enforce them to bring in an inventory. 3 Chan. Rep. 72. Digby v. Cornwallis.

Likewiſe *ceſtui que truſt* may bring *account* againſt the *bailiff appointed* by his truſtee to manage the eſtate of *ceſtui que truſt*, after ſuch bailiff has accounted to the truſtee. 2 Chan. Ca. 121. Pollard v. Downes.

Mortgagor in fee, after the mortgage-money paid, is a *ceſtui que truſt;* and *a will of the lands*, made by ſuch mortgagor, before the mortgage, (notwithſtanding ſuch mortgage, and that for want of a re-conveyance the eſtate in law was in the mortgagee, and ſo a verdict at law paſſes againſt the deviſee of ſuch mortgagor,) is good, and not revoked by ſuch mortgage, eſpecially in this caſe, where there was no republication after the diſcharge of the mortgage. 2 Chan. Rep. 297. Hall v. Dench.

It has been held by ſome, that even a *bargain and ſale* enrolled by *ceſtui que truſt of an eſtate-tail* ſhall bind the iſſue, in regard that ſuch a truſt is not within the ſtatute *de donis*. 1 Vern. 440. pl. 412. Carpenter v. Carpenter, alias Waſhborne v. Downes. [So, in North v. Champernoon, 2 Ch. Ca. 64. it is ſaid by Lord Chancellour Finch, that tenant in tail of a truſt may bar his iſſue by a feoffment, or bargain and ſale. Beverley v. Beverley, 2 Vern. 131. Baker v. Bailey, *Id.* 225. It was determined in Bowater v. Elly, 2 Vern. 344. that *ceſtui que truſt*, if the truſtees join, may bar the entail by a feoffment. But in Legatt v. Sewell, 1 P. Wms. 91. and 2 Vern. 552. Lord Cowper intimated a doubt, "whether only a deed, "executed by *ceſtui que truſt* in tail, ſhould bar the remainder-man, or even the iſſue, in regard a deed "may be made at a tavern and by ſurpriſe; but a recovery is a ſolemn and deliberate act." And indeed it ſeems to be now ſettled, that the iſſue in tail is not barred without a recovery actually ſuffered. Weale v. Lowe, (cited) 2 Vern. 306. Kirkham v. Smith, Ambl. 518.]

Id. ibid. It had been doubted, whether the recovery of *ceſtui que truſt* in tail, with the remainder to another in tail, ſhould bar the remainder, becauſe it was no ſettled intereſt veſted; and Bridgman, Ch. J. was of opinion it ſhould not. But it was referred to a caſe and the judges to conſider of it. Chan. Ca. 68. Ld. Digby v. Langworth.

But a *common recovery* ſuffered, or a *fine* levied by *ceſtui que truſt* of an eſtate-tail, has the ſame effect in equity as it would have at common law, in caſe the legal eſtate was in him. Reſolved by Ld. Chan.

1 Lutw. 577. Lynch and Templeman v. Clemence.

A *tender to ceſtui que truſt* of money due on bond, and a refuſal, is a good plea to an action of debt on the bond made to truſtee.

[*Vide ſupra*, tom. 5. pag. 163.]

(N) Of Forfeitures by *Ceſtui que Truſt*.

Hard. 467. Pawlet v. The Attorney General.

Ceſtui que truſt for years may *forfeit* his intereſt for *felony*, but *ceſtui que truſt* in fee cannot. *Per Hale*, Ch. J.

3 Chan. Rep. 36, 37. 5th Reſolution. Attorney General v. Sands.

A truſt of a *leaſe in groſs* ſhall be forfeited for felony, as the Earl of *Somerſet*'s caſe in *Hob. Daccomb*'s caſe, and *Cro.* J. *Babington*'s caſe, and Sir *W. Raleigh*'s caſe: but otherwiſe of a term aſſigned over to wait on the inheritance.

Godb. 319. Sheffield v. Radcliff.

Ceſtui que truſt of an eſtate for life levies a fine: it is no forfeiture, but good by the ſtat. of 1 *R.* 3. *c.* 1. during his own life, and if proclamations paſs there needs no claim or entry within five years.

3 Ch. R. 34. Attorney General v. Sands.

But *ceſtui que truſt* in fee or fee-tail *forfeits the ſame by attainder* of treaſon, and the eſtate is to be executed to the king in a court of review by ſtat. 33 *H.* 8. 27 *H.* 8. *c.* 10.

3 Ch. R. 35. Attorney General v. Sands, cites Holland's caſe.

Where an *alien* is *ceſtui que truſt* of an eſtate, the truſt belongs to the king.

3 Ch. R. 36. Attorney General v. Sands.

If *ceſtui que truſt die without heir*, the land ſhall be diſcharged of this truſt; as, if a tenant in fee of a rent-charge die without heir, or be attainted of felony, the land is diſcharged.

3 Ch. R. 35. Attorney General v. Sands.

If *ceſtui que truſt be indebted to the king*, he ſhall have execution of this truſt both by the common law, and the practice of the court of Exchequer.

1 Chan. Ca. 268. Clifford v. Aſhley.

A *fine* with proclamation and non-claim will *bar* a truſt; and ſo it was reſolved in the Exchequer, and an *entry* on the land by a *ceſtui que truſt* is not a ſufficient *claim*, but it muſt be a *ſubpœna*. *Per* Lord Keeper *Finch*.

1 Abr. Eq. Caſes, 131. Attorney General v. Hindley.

If a truſtee by fraud and combination with the *ceſtui que truſt*, *endeavour to evade any penal law*, as the ſtatute of ſimony, *&c.* under pretence that a truſt is only cognizable in equity, and that equity ſhould not aſſiſt a penalty or forfeiture; yet Chancery will aid remedial laws, and not ſuffer its own notions to be made uſe of to elude any beneficial law.

Of Uſury.

USURY, in a ſtrict ſenſe, is a contract upon the loan of money to give the lender a certain profit for the uſe of it upon all events, whether the borrower make any advantage of it, or the lender ſuffer any prejudice for the want of it, or whether it be paid on the day appointed or not. 1 Hawk. P. C. c. 82. §1.

And in a larger ſenſe it ſeemeth, that all undue advantages taken by a lender againſt a borrower, came under the notion of uſury, whether there were any contract in relation thereto, or not; as, where one in poſſeſſion of land, made over to him for the ſecurity of a certain debt, retains his poſſeſſion after he has received all that is due, from the profits of the land. *Id.* §2.

The conſideration of this offence may be reducible to the following heads, wherein we ſhall inquire,

(A) Of Uſury at Common Law.

(B) Of Uſury by the Statute Law.

(C) What Kinds of Agreements or Contracts ſhall be deemed uſurious, and what not.

(D) What Kind of Hazard or Caſualty will bring an Agreement, *&c.* out of the Statute of Uſury.

(E) In what Caſes Securities ſhall be forfeited or avoided on account of Uſury.

(F) In what Caſes a Forfeiture of treble Value ſhall be incurred on account of Uſury.

(G) In what Caſes Relief is given againſt uſurious Contracts.

(H) How far Sureties are affected by uſurious Contracts.

(I) What Informations will lie in Caſes of Uſury, and where they are good, and where not.

(K) Of the Pleadings in Caſes of Uſury.

(L) Of the Trial and Evidence in Caſes of Uſury.

(A) Of Uſury at Common Law.

Hawk. P.C. c. 82. § 4. But *per* Hale, C. J. Jewiſh uſury, being 40 *per cent.* and more, was prohibited at common law, but no other. Hard. 420. Anon.

ANciently it was holden to be abſolutely unlawful for a Chriſtian to take any kind of uſury, and that whoſoever was guilty of it was liable to be puniſhed by the cenſures of the church in his lifetime; and that if after death any one was found to have been a uſurer while living, all his chattels were forfeited to the king, and his lands eſcheated to the lord of the fee.

Hawk. P.C. c. 82, § 5. Alſo, it ſeemeth to have been the opinion of the makers of ſome acts of parliament, as 5 *Ed.* 6. *c.* 20. 13 *El. c.* 8. § 5. and 21 *Jac.* 1. *c.* 17. § 5. that all kinds of uſury are contrary to a good conſcience.

Id. § 6. And agreeably thereto it ſeemeth formerly to have been the general opinion, that no action could be maintained on any promiſe to pay any kind of uſe for the forbearance of money, becauſe that all ſuch contracts were thought to be unlawful, and, conſequently, void.

Id. § 7. But it ſeemeth to be generally agreed at this day, that the taking of reaſonable intereſt for the uſe of money is in itſelf lawful, and, conſequently, that a covenant or promiſe to pay it, in conſideration of the forbearance of a debt, will maintain an action; for why ſhould not one who has an eſtate in money, be as well allowed to make a fair profit of it, as another who has an eſtate in land? And what reaſon can there be, that the lender of money ſhould not as well make an advantage of it as the borrower? Neither do the paſſages in the *Moſaical* law, which are generally urged againſt the lawfulneſs of all uſury, if fully conſidered, ſo much prove the unlawfulneſs, as the lawfulneſs of it; for if all uſury were againſt the moral law, why ſhould it not be as much ſo in reſpect of foreigners, of whom the *Jews* were expreſsly allowed to take it, as in reſpect of thoſe of the ſame nation, of whom alone they were forbidden to receive it? From whence it ſeems clearly to follow, that the prohibition of it to that people was merely political, and, conſequently, doth not extend to any other nation.

(B) Of Uſury by the Statute Law.

BY the 37 *H.* 8. *c.* 9. and the 13 *Eliz. c.* 1. the rate of intereſt is not to exceed 10 *l.* in the 100 *l.* By—

The 21 *Jac.* 1. *c.* 17. § 2. *None ſhall upon any contract, directly or indirectly, take for the loan of any money, or other commodities, above the rate of* 8 *l. for* 100 *l. for one whole year, in pain to forfeit the treble value of the money, or other things lent.*

§ 5. *This law ſhall not be conſtrued to allow the practice of uſury in point of religion or conſcience.*

By

By the 12 *Car.* 2. *c.* 13. § 2. *None ſhall take, directly or indirectly, for the loan of money, or other commodities, above the value of* 6 *l. for the forbearance of* 100 *l. for one year, and ſo after that rate, and all bonds, contracts,* &c. *whereupon more ſhall be reſerved, ſhall be void. They that receive more, ſhall forfeit the treble value of the money or other things lent.*

A mortgage was made at 8 *l.* per cent. *before the making of this ſtatute* reducing intereſt to 6 *l. per cent.* The mortgagor *continued paying intereſt of* 8 *l.* per cent. *for* 15 *years after this ſtatute*, and then the mortgagee entered. The mortgagor brought a *bill to redeem.* The queſtion was, Whether the 2 *l. per cent.* received for the 15 years ſhould not be allowed in diſcharge of ſo much principal? The court denied relief as to the money paid by the plaintiff; but decreed 6 *l. per cent.* only, to be allowed from the defendant's entry on the eſtate. 2 Vern. 42. pl. 37. Walker v. Penry.——On a re-hearing the decree was confirmed, as to the 2 *l. per cent.* Ibid. 78. pl. 73. Lord C. Jefferies having been of opinion, that the ſtatute had *no retroſpect* beyond 1660, but looked forwards to contracts and agreements then after to be made, and not to any contracts and agreements before that time, and having decreed account to be taken accordingly, as above, now upon the bill of review, Lord Commiſſioner Trevor, becauſe there was a decree already made in it, would not reverſe it; but Lords Commiſſioners Rawlinſon and Hutchins, on reading the act of parliament, held the act had a retroſpect, and makes it unlawful to take more than 6 *l. per cent.* upon any contracts whether made before or after the act of parliament; but that part of the ſtatute which adds penalties, relates only to contracts and agreements then after to be made. 2 Vern. 145, 146. pl. 141. Walker v. Penry.——Abr. Eq. Ca. 288. (D) pl. 1. cites 2 Vern. 145. S. C. And adds, that Rawlinſon and Hutchins, Lords Commiſſioners, held the decree ſhould be reverſed, againſt Lord Trevor.

But the 12 *Ann. ſtat* 2. *c.* 16. Enacts, *That no perſon upon any contract, which ſhall be made after the* 29*th of* September 1714. *ſhall take for loan of any money, wares,* &c., *above the value of* 5 *l. for the forbearance of* 100 *l. for a year; and all bonds and aſſurances for payment of any money to be lent upon uſury, whereupon or whereby there ſhall be reſerved or taken above five in the hundred, ſhall be void; and every perſon which ſhall receive, by means of any corrupt bargain, loan, exchange, chevizance, ſhift, or intereſt of any wares, other things, or by any deceitful way, for the forbearing or giving day of payment for one year, for their money or other things, above* 5 *l. for* 100 *l. for a year,* &c. *ſhall forfeit treble the value of the monies or other things lent.*

It ſeems to be now ſettled that the ſtatute of 12 *Ann. c.* 16. which reduces the intereſt of money to 5 *l. per cent.* has not a retroſpect to any debts contracted before; but that they ſhould carry intereſt according to the intereſt allowed, or agreement made at the time of the debt contracted.—And Serjeant Hawkins, from the expoſitions made of former ſtatutes, ſays that a contract made before the ſtatute is no way within the meaning of it, and therefore it is ſtill lawful to receive 6 *l. per cent.* in reſpect of any ſuch contract. Hawk. P. C. c. 82. § 10.

The expoſitions which have been made of the former ſtatutes being very applicable to the laſt, which is almoſt in the ſame words, the proper conſtruction of it will be beſt collected by a due attention to the following heads.

[By *ſt.* 3 *G.* 1. *c.* 8. § 39. the Governor and Company of the Bank of *England* are enabled to borrow money at ſuch rate of intereſt as they may think fit, although the ſame may happen to exceed the intereſt allowed by law to be taken.

It is declared by 14 *G.* 3. *c.* 79. that all mortgages and other aſſurances of lands, and their aſſignments or transfers, in *Ireland* and the plantations, for ſecuring money already executed in *Great Britain*, ſhall be as valid as if executed on the mortgaged lands, and ſhall continue to carry intereſt at the rate allowed of by the laws of the colony where the mortgaged lands lie: but, as to future loans, the act limits them to 6 *l. per cent.*, and provides againſt fraud by confining the loan to the real value of the lands, &c. It likewiſe

This act relates only to mortgages and other ſecurities relating to *lands* in Ireland and the Weſt Indies, but does not extend to

perſonal contracts. Dewar v. Span, 3 Term Rep. 425.

likewiſe gives treble forfeiture of the ſum borrowed beyond the value of the land mortgaged; and, for greater notoriety and certainty, requires all ſuch mortgages or transfers to be regiſtered in the country where the lands lie, elſe to remain liable to the 12th of *Anne*.]

(C) What Kinds of Agreements or Contracts ſhall be deemed uſurious, and what not.

Hawk. P. C. c. 82. § 3.

IT hath been reſolved, that an agreement to pay double the ſum borrowed, or other penalty on the non-payment of the principal debt at a certain day, is not uſurious, becauſe it is in the power of the borrower wholly to diſcharge himſelf, by repaying the principal according to the bargain.

Hawk. P. C. c. 82. § 19.

But, if it were originally agreed, that the principal money ſhould not be paid at the time appointed, and that ſuch clauſe were inſerted only with an intent to evade the ſtatute, the whole contract is void; for the conſtruction of caſes of this nature muſt be governed by the circumſtances of the whole matter, from which the intention of the parties will appear in the making of the bargain, which, if it was in truth uſurious, is void, however it may be diſguiſed by a ſpecious aſſurance.

Cro. Jac. 509. pl. 20. Roberts v. Trenayne.

So, if both principal and intereſt be ſecured, yet, if it be *at the will* of the party who is to pay it, it is no uſury; *per Doddridge*, J. As, if I lend to one 100*l.* for two years, to pay for the loan thereof 30*l.*, and if he pay the principal at the year's end, he ſhall pay nothing for intereſt, this is not uſury; for the party has his election, and may diſcharge himſelf by paying it at the firſt year's end.

Vent. 254. Hedgeborough v. Roſenden.

But, if a man contracts *to pay more intereſt than the ſtatute allows, if the plaintiff requires it*, though the plaintiff *never does require it*, yet it is within the ſtatute of uſury *.

* It has been held, that an aſſurance for the payment of fifty ſhillings for the uſe of 100*l.* for ſix months, the computation ſhall be by calendar and not by lunar months, becauſe by the latter the intereſt would exceed the rate allowed by the ſtatute. Hawk. P. C. c. 82. § 13.

Mallory v. Bird, cited in Pollard v. Scoly. Cro. Eliz. 26.

Neverthelefs it has been held, that if one *contracts to have more than the ſtatute allows, but he takes nothing of the intereſt contracted for*, he is not puniſhable by the ſtatute; *but if he takes any thing, if it be but a ſhilling*, it is an affirmance of the contract, and he ſhall render for the whole contract.

Le. 96. pl. 125. in Sir Woollaſton Dixy's caſe.

So, if I lend 100*l.* *without any contract for intereſt*, and afterwards at the end of the year the borrower gives me 20*l.* for the loan thereof, the ſame is within the ſtatute; for my *acceptance* makes the offence without any contract or bargain. *Per Gent*, J.

Br. Uſury, pl. 1. But, if the condition be that the vendor

Where a man *for* 100*l.* *ſells his land, upon condition* that *if the vendor or his heirs repay the ſum before the feaſt of* Eaſter, or ſuch like, then next following, that then *he may re-enter*, this is no uſury; for he may repay the next day, or any time before *Eaſter*,

Eaſter, and therefore he has no gain certain to receive any profits of the land. repay ſuch a day, a year, or two years after, this is uſury; for he is ſure to have the land and the rents and profits for that year or for thoſe two years. *Id. ibid.*

But, where *B. delivered wares of the value of* 100*l.* and no more, and *took a bond*, with a condition to *redeliver the wares to* B. *within a month, or to pay* 120*l. at the end of the year.* The obligation was adjudged void by the ſtatute of uſury. Mo. 397. pl. 520. Reynolds v. Clayton, cites it as adjudged in B. R. Becher's caſe.

So, if *A.* comes to borrow money, and *B.* ſays he will not lend money, but *he will ſell corn*, &c. and give day for payment at ſuch a rate, which *rate* exceeds 10*l.* in the 100*l.*, it is uſury. Mo. 398. pl. 520. cites it as Wick's caſe of Glouceſterſhire.

If one gives the *profits of his lands*, worth 10*l.*, for intereſt for a year of 100*l.*, though he *receives part* of the profits *daily*, this is not uſury above 10*l.* for the 100*l.* *Per Popham, Gawdy*, and *Yelverton*; but *Fenner è contra.* Mo. 644. pl. 890. Worley's caſe.

So, where *one mortgaged land for* 100*l.* and *took bond for the intereſt of* 8*l. a-year, payable half-yearly*; the queſtion was, Whether that makes the bargain uſurious againſt the ſtatute, becauſe, as it was inſiſted, the uſe ought not to be paid until the end of the year, and contracting to have half of it *half-yearly*, it is not warrantable by the ſtatute? But the court held, that it is not any uſurious contract contrary to the ſtatute, becauſe the 100*l.* is lent for a year, and the reverſion is not of more than what is permitted by the ſtatutes; and the reſerving it half-yearly is allowable; for he does not receive any intereſt for more or leſs time than his money is forborne. It was adjudged for the plaintiff, and affirmed in error. Cro. C. 283. Gryſill v. Wytchott.

It is to be obſerved, that the loan of money for intereſt allowed by the ſtatute, ſhall not be conſtrued to be within the purview of it, in reſpect of any expectations which the lender may have of a voluntary gratuity to be given him by the borrower, if there be no kind of agreement relating to it. Hawk. P. C. c. 82. § 18.

But a contract reſerving to the lender a greater advantage than is allowed by the ſtatute, is equally within the meaning of it, whether the whole be reſerved by way of intereſt, or in part only under that name, and in part by way of rent for a houſe, let at a rate plainly exceeding the known value. *Id.* § 22. [3 Atk. 154. Cowp. 795.]

A bankrupt having *borrowed* a great ſum of *money* of the defendant *for one quarter of a year, he was to give* the defendant 6*l. for every* 100*l.* that he borrowed; *and ſome ſilk being the ſecurity, he was to give him one pound more* for every 160*l.* for that quarter, *for the uſe of his warehouſe.* The queſtion upon the trial was, Whether this contract made between the bankrupt and the defendant is a uſurious contract? and the jury having found a verdict for the defendant, Serjeant *Cheſhire* moved for a new trial; for he ſaid the verdict was againſt law. *Holt*, Ch. J. ſaid he thought it was a wrong verdict, and it was ordered to be moved again. Holt's Rep. 706. Le Blanc & *al.* v. Harriſon.

[One

Jeſton v. Brooke, Cowp. 793.

[One broker had borrowed of another on a note of hand 45*l.* on demand, to purchaſe certain goods that were then on ſale, on condition of having the future profits on the re-ſale. The goods were purchaſed and re-ſold for 5*l.* profit, the lender demanded his money within two hours after the lending, which made it carry intereſt; and the action was brought for 2*l.* 10*s.* over and above the principal and intereſt: the plaintiff was nonſuited: for Lord *Mansfield* was of opinion, in which the three other judges concurred, "that the intention of the contract was to get more "than principal and legal intereſt on the note, which is *uſury* "within the meaning of the ſtatute."

Floyer v. Edwards, *Id.* 112.

The plaintiffs, who were gold-refiners, had advanced gold wire to others in the ſame trade, upon the terms of paying ſuch a price, if the money were paid within three months; and if not, then to pay at the rate of an halfpenny an ounce *per* month over and above the price agreed for; which in fact, upon calculation, exceeded the rate of 5 *per cent.* This at the trial was found to be the conſtant uſage of the trade. A verdict was given for the plaintiff, and a queſtion reſerved for the opinion of the court, Whether this contract were uſury? Under all the circumſtances, eſpecially the conſtant uſage of the trade, the court was of opinion, that it did not amount to uſury within the ſtatute. But though this tranſaction cannot be conſidered as uſury within the ſtatute, yet in a ſubſequent caſe under theſe circumſtances, where the defendant had paid into court the principal and intereſt at 5*l* *per cent.* from the time of the bargain, the court would not allow the plaintiff in an action for money had and received to recover the exceſs of intereſt, notwithſtanding it appeared manifeſtly at the trial, that ſuch exceſs was only to be taken in caſe of delay of payment at the end of three months, and for no other reaſon whatever.]

Plumbe v. Carter, *Id.* 116.

If a ſum of money is given in conſideration of an annuity, though the yearly payment exceeds the rate of intereſt, yet it is not uſury. Thus,

And. 121. pl. 169. Finch's caſe.

Where *A. aſked to borrow of B.* upon intereſt, and *B. refuſed to lend* for intereſt; *but ſaid that for rent or annuity he would;* and ſo it was agreed, and a rent granted for twenty-three years, amounting to more than the ſtatute allows for intereſt, *&c.*; it ſeems, that this is not uſury within the ſtatute.

4 Le. 208. pl. 334. Fuller's caſe.

If *A.* gives 300*l.* to *B.* to have *an annuity of* 5*l.* aſſured to him *for* 100 *years, if A.* and his wife and four of his children *ſo long ſhall live;* this is not within the ſtatute of uſury. So, if there had not been any condition. But care is to be taken, that there be no communication of borrowing of any money before.

5 Rep. 69. Burton's caſe.

So, where *A.* on the 17th of *July* 1579, lent 100*l.* to *B.*, who thereupon granted to *A.* and his heirs an *annuity of* 20*l.* *a-year, on condition that if* the ſaid *B.* the *grantor paid to* A. *at Chriſtmas* 1580, *the ſaid* 100*l.* that then *the annuity ſhould ceaſe*; adjudged, this is not within the ſtatute; for nothing was to be paid for intereſt within a year and a quarter after the grant; and if the 100*l.* had

had been paid on the day, the annuity was to ceaſe without paying any thing; ſo that it is only a plain bargain, and a conditional purchaſe of an annuity.

But, if it had been *agreed* between *A.* and *B.*, *that notwithſtanding ſuch power of redemption, the* 100 l. *ſhould not be* paid *at the day*, and *ſo* that the *clauſe of redemption was inſerted to evade the ſtatute*, then this had been a uſurious contract and bargain within the ſtatute; for if in truth the contract be uſurious againſt the ſtatute, no colours or ſhew of words will ſerve, but the party may ſhew it, and he ſhall not be concluded or eſtopped by any deed in any other matter whatſoever; for the ſtatute gives averment in ſuch caſe. 5 Rep. 69. Burton's caſe.

Where *A.* for 100 l. *granted a rent* of 20 *l. for eight years, another of* 20 l. *a year for two years, if* B., C., *and* D. *ſhould ſo long live*; in replevin the defendant avowed for the rent, and the plaintiff pleaded the ſtatute of uſury, and ſet forth the ſtatute and a ſpecial uſurious contract; it was ſaid, that, if it had been laid to be upon a loan of money, then it was uſury; but, if it be a bargain for an annuity, it is no uſury; but *that* this was alleged to be upon a lending. Brownl. 180. Cotterel v. Harrington.

So, where in debt upon bond, the defendant *pleaded* the ſtatute of uſury, and *that he came* to the plaintiff *to borrow of him* 120 *l. according to the rate of* 10 l. per cent. *who refuſed to lend* the ſame, *but corruptly offered to deliver* 120 l. *to him, if he would be bound to pay him* 20 l. per ann. *during the plaintiff's wife's and his ſon's lives*; whereupon he entered into a bond; it was reſolved, that this, being an abſolute bargain, in conſideration of the payment of 20 *l. per ann.* during two lives, and no longer, and *no agreement to have the principal money*, was out of the ſtatute of uſury; *but, if* there had been *any proviſion for the repayment of the principal, although not expreſſed within the bond*, it had been a uſurious agreement within the ſtatute. And judgment for the plaintiff. Cro. J. 252. pl. 7. Fountain v. Grymes, Hawk. P.C. c. 82. § 15. ſays, that the *grant of an annuity for lives not only exceeding the rate allowed for intereſt, but alſo* exceeding *the known proportion for contracts of this kind*, in conſideration of a certain ſum of money, is not within the meaning of the ſtatute, unleſs there were ſome underhand bargain for the ſecurity of the repayment of the principal or conſideration-money. [And Mr. J. Burnet, in Cheſterfield v. Janſen, 2 Veſ. 142 ſays—" Suppoſing there is a purchaſe of an annuity at ever ſuch an under price, if the bargain was " really for an annuity, *it cannot be uſury*: but, if the communication was about borrowing and lending, " it may be uſury within the ſtatute: and how? If by reaſon of all the circumſtances and the com- " munication, the exility of the ſum given, the original contract being a borrowing and lending, the " court thinks the annuity was a mere device to pay the principal with uſurious intereſt to evade the " ſtatute, this will be within the ſtatute; though in the face of the bargain it appears ever ſo fair a ſale " of an annuity; the contrivance of the annuity as the uſurious reward for the loan of money ſhall " not evade the ſtatute made for the benefit of mankind. This I take to be the ſum and ſubſtance " to be collected out of the ſeveral caſes. Tanfield v. Finch, Cro. El. 27. Fuller's caſe, 4 Leon. 203. " and *ſupra*. Symonds v. Cockerill, Noy, 151. Cotterell v. Harrington, Brownl. 180. & *ſupra*, " and King v. Drury, 2 Leon. 7."]

A. after the ſtatute 12 *Car.* 2. *viz.* 3 *June*, 13 *Car.* 2. *agreed to lend* B. 100 *l.* and that for the forbearance thereof for the time underwritten, *B.* the defendant *ſhould pay* to *A.*, the plaintiff, 120 l. *as follows*, viz. 40 l. *upon the* 20*th of* Jan. *and* 20*th* July, *by equal portions annually next after* the 20th day of the then inſtant month *July, till the* 120 l. *be paid*; which exceeded the rate of 6 l. *per cent.* *And for the further ſecurity* B. *gave a bond of* 200 l. *and confeſſed a judgment.* *Twiſden*, J. ſaid that the contract Sid. 182. pl. 1. Rowe v. Bellaſis. The plea in this caſe was held ill, being after judgment.

here was not uſurious, but was a purchaſe of an annuity for three years.

It is to be obſerved, that if the *agreement* of the parties be *honeſt*, but is *made otherwiſe by the miſtake of a ſcrivener*, yet it is not uſury.

2 Mod. 307. Ballard v. Oddey. See *poſt*, letter (E).

[An annuity was granted at ſix years purchaſe for the life of the grantor, a clergyman, then of the age of 32 years, charged upon his living, with a clauſe for redemption at the option of the grantor after the expiration of five years for five years and a half's purchaſe. It was recited in the annuity deed, that the agreement had been made for a loan of the money, which was paid as the price or conſideration for the annuity. But it appeared to the court, that this recital was made by the attorney without the privity or direction of his client, who really and ſubſtantially meant to purchaſe an annuity. The court determined, that the annuity was not uſurious, and that the inaccuracy of the recitals in the inſtrument ſhould not vitiate a contract, that otherwiſe ſeemed to be a fair one. *De Grey*, C. J. in giving judgment in this caſe, obſerved, "That it was eſſential to the nature of a "uſurious contract, that there muſt be, 1. a loan. 2. That illegal "intereſt is to be paid for ſuch loan. And it is eſſential to the "nature of a loan, that the thing borrowed is at all events to be "reſtored (*a*). If that be *bonâ fide* put in hazard, it is no loan, "but a contract of another kind. So alſo, if illegal intereſt is to "be certainly paid, or even upon a reaſonable poſſibility, the con-"tract is uſurious." To evade theſe principles many expedients have been tried. 1. To make the intereſt precarious and uncertain. 2. To make the principal itſelf precarious. 3. Communication concerning a *loan* has ſometimes infected the caſe, and turned a contract into uſury. But then the communication muſt be mutual, and it muſt be with the party himſelf, and not with his attorney. There is no caſe where even a meditated loan has been *bonâ fide* converted into a purchaſe, and afterwards held uſurious. 4. Inequality of price is alſo a ſuſpicious circumſtance, eſpecially if very inadequate. 5. If a power of redemption be given, though only on one ſide, it is a ſtrong circumſtance to ſhew it a loan, as in *Hooper* v. *Lawley*, 3 *Atk.* 278. But that alone will not be concluſive. 6. The form of the inſtrument. If that imports a loan, and it was ſo meant, the contract may become uſurious. At the ſame time if the tranſaction be *bonâ fide*, the blunder of an agent ſhall not make it otherwiſe, as in *Buckley* v. *Guildbank*, *Cro. Ja.* 677. where intereſt was made payable by ſuch miſtake two days after. 7. Subſequent acts of the parties may alſo be a material evidence of intention.

Murray v. Harding, 2 Bl. Rep. 859. 3 Wilſ. 390. S. C. In Lawley v. Hooper, 3 Atk. 278. Lord Hardwicke in determining that an annuity granted by Lawley for his life, with a proviſo for repurchaſing or redeeming it, upon giving ſix months notice to the grantee, was a loan, ſeemed to lay great ſtreſs upon the effect of the proviſo. From the language his lordſhip uſed upon that occaſion, an idea prevailed for a conſiderable time, that the inſerting of ſuch a proviſo infected the deed with uſury. It is manifeſt, however, from this caſe of Murray v. Harding, that a right in the grantor to determine the annuity for his own benefit, does not create that neceſſity or obligation of repaying the principal loan in all events, without which the courts have repeatedly declared uſury againſt the ſtatutes cannot be committed. And Lord Thurlowe, in Irnham v. Child, 1 Br. Ch. Rep. 92. ſaid, *To ſell an annuity, and make it redeemable, is not uſury, becauſe it is not a loan.* (*a*) That there muſt be a loan to conſtitute uſury is laid down in ſeveral other caſes. 2 Anderſ. 15. pl. 8. 22 Vin. Abr. 300 S. C. Loveday's caſe, 8 Co. 65. But there may be uſury, where a party takes more than the law allows for the forbearance of a debt, and yet in that caſe there is no loan in the ordinary acceptation of the term. Thus in Pollard v. Scholy, Cro. El. 20. "Pollard ſold to the defendant ſome oxen to be paid for at a given time; "when

" when the time was arrived, Scholy required a longer day for payment, and Pollard granted it, paying " to him ſo much wheat, as exceeded in value the legal rate of intereſt. The defendant in debt pleaded " the ſtatute, and would avoid the contract, and the opinion of the juſtice was, that the ſtatute doth " not make the contract void, which was duly made, but doth only avoid all contracts for uſury: and " this laſt contract is void, being againſt the ſtatute, but the firſt was good, being made *bonâ fide.*" See alſo Spurrier v. Mayoſs, 1 Veſ. jun. 531. *4 post. 196. See further Plowd. on Usury 194. 195. &c. Ord on Usury 29.*

If in truth it appear on the whole of the tranſaction that a loan was intended under colour of an annuity, and the mode of annuity was forced by the lender on the borrower, the court will conſider it as uſurious, notwithſtanding a colourable contingency, as that the lender at the end of a given time engage to ſupply the borrower with money to redeem. Richards v. Brown, Cowp. 770.

Dr. *Battie*, at the requeſt of *Moore*, ſold out 1000*l.* *South Sea* annuities, at a loſs upon the whole of 76*l.*, and took a mortgage for 1000*l.* from *Moore* at 5*l. per cent.* reducible to 4*l. per cent.* if the money were repaid in a given time. Dr. *Battie* afterwards ſold out, at Mr. *Moore*'s requeſt, 1400*l.* *S. S.* annuities at a loſs upon the whole of 267*l.* 15*s.*, and took another mortgage from *Moore* for 1400*l.* with intereſt at 5*l. per cent.*, with a power to *Moore* to reinſtate the 1400*l.* at any time within two years. Upon a bill for foreclоſure, the Maſter reported the two principal ſums of 1000*l.* and 1400*l.* with intereſt and coſts due thereupon; which having been paid by the plaintiff into court, he brought his bill (*inter alia*) to be paid the ſeveral ſums of 76*l.* and 267*l.* 15*s.* with intereſt, inſiſting, that the defendant ought to have been charged with them in the account. The defendant pleaded the proceedings under the decree in bar: his plea on being argued was ordered to ſtand for an anſwer, and two queſtions were made, 1. Whether it were uſury? 2. Whether the court would relieve? As to the firſt, Lord Keeper *Henley* was clearly of opinion, that it was a ſhift within the ſtatute; the plaintiff having received but 924*l.* inſtead of 1000*l.*, and 1132*l.* 5*s.* inſtead of 1400*l.*, and yet having paid as much intereſt as was equal to 5*l. per cent.* upon the ſums of 1000*l.* and 1400*l.* His lordſhip therefore decreed payment. Moore v. Battie, Ambl. 371.

But a mere loan of ſtock is not uſurious, nor the payment of the dividends in the mean time, though they exceed the legal rate of intereſt. Thus, where *A.*, to accommodate *B.*, ſold out ſtock, and lent *B.* the money produced by the ſale, on an agreement that *B.* ſhould replace the ſtock on a certain day, or repay the money lent on a ſubſequent day, with ſuch intereſt in the mean time as the ſtock itſelf would have produced; it was adjudged, that this was not uſurious, though the intereſt exceeded 5*l. per cent.* The loan was not originally uſurious, becauſe for a limited time, the party borrowing had it in his power to repay the money or replace the ſtock itſelf, if he had choſen. Tate v. Wellings, 3 Term Rep. 531.

Where the borrower of money gave a bond for the payment of the principal and intereſt at 5*l. per cent.*, and covenanted at the ſame time alſo to pay the lender a certain portion of the profits of a trade carried on by him in partnerſhip with another perſon, it was adjudged to be uſury; for the principal was no farther Morſe v. Wilſon, 4 Term Rep. 353.

hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; as between the lender and the partners in the business, he was not liable to contribute to the losses in the trade. Here is a provision to receive the profits, but none to engage for the losses of the trade.

Spurrier v. Mayoss, 4 Br. Ch. Rep. 28. 1 Vez. jun. 531. S. C.

On a bill praying that the defendants might be decreed to complete their purchase of certain houses, the defendants insisted that the contract for the purchase was usurious. The agreement was, to purchase the houses for 430*l.*, 200*l.* to be paid in money, and the remainder on a future day, with 5*l. per cent.* interest, or in default of payment, to pay a rent of 42*l. per ann.* till payment, subject to a deduction of 5*l. per cent.* for so much of the remaining sum of 230*l.* as should be then paid. Possession was delivered to the defendants. Adjudged not to be usury.

See ant. 194 at the bottom in the note.

Massa v. Dauling, 2 Str. 1243.

A person paid 197*l.* for a note of 200*l.* which had three months to run, and at the expiration of that time took another note of 200*l.* upon advancing 3*l.* more for other three months. Upon an issue out of Chancery, *Lee*, C. J. held it usury. However in the case of *Lloyd* v. *Williams*, 2 *Bl. Rep.* 793. *Blackstone* J. said, "he conceived that interest may as lawfully be received before-"hand for forbearing, as after the term is expired for having "forborne. And it shall not be reckoned as merely a loan for "the balance; else every broker in *London*, who takes 5*l. per* "*cent.* for discounting bills, would be guilty of usury. For if "upon discounting a 100*l.* note at 5*l. per cent.* he should be "construed to lend 95*l.* only, then at the end of the time he "would receive 5*l.* interest for the loan of 95*l.* principal, which "is above the legal rate." It has been since determined, that in discounting notes the common usage of charging something for trouble, *&c.* beyond the rate of legal interest is not usurious, provided no corrupt bargain be made for taking usurious interest. So, in an action for usury, tried before *Buller*, J. against a banker at *Sudbury*, it appeared, that it was their constant usage to discount bills in *London* for their correspondents at *Sudbury*, for which the bankers charged beyond the legal interest for the time the bills had to run 5*s. per cent.* on the gross sum, without any reference to the time the bills had to run. The jury found for the defendant under the judge's direction.

Auriol v. Thomas, 2 Term Rep. 32.

Winch v. Fenn, Sitt. after Hil. 1786.

Lowe v. Waller, Dougl. 736.

Where upon a negotiation for a loan of money, the lender said, he could not advance money, but would furnish goods, which the borrower took, and sold by the intervention of a broker recommended by the lender, and upon the issue of the negotiation the borrower, instead of 200*l.* which he meant to borrow, received only 117*l.* 2*s.* 2*d.*; the court held the transaction to be a loan of money for more than 5*l. per cent.* under colour of a sale of goods, and therefore usurious.

Barker v. Vansommer, 1 Br. Ch. Rep. 149.

B., a student of a college in *Oxford*, applied to *A.* a Jew to raise him a sum of money: *A.* recommended one *P.*, and *P.* introduced him to *V.*, who let him have the goods to the amount. *A.* attended, and recommended the choice of the silks, for which *B.* gave

B. gave his note for 2224*l.* at twelve months date. The ſilks were afterwards bought by one *R.* for about half the price. The note was afterwards indorſed by *V.* to *D.* in the ſettlement of an account, who was completely ignorant of the tranſaction with *B.* Upon *B.*'s application to the court to compel the delivery up of the note, on payment of what the ſilks actually produced, Lord *Thurlowe* ſaid, "I am to inquire whether, under the maſk of "trading, this is not a method of lending money at an extra- "ordinary rate of intereſt; and there is not a doubt, that in this "caſe the tranſaction was merely for the purpoſe of raiſing "money, to ſupply the neceſſities of this young man. Do they "deny knowing the goods were to be ſold? I take it therefore "as an advancement of goods inſtead of money to ſupply his "neceſſities." In arguing this caſe, ſeveral other caſes of a like tendency were cited: as, that of Cecil v. Sutton and Roundtree in the Exchequer, where the defendants ſupplied the plaintiff with goods, in order to enable him to take up a note, and the court granted an injunction till the amount for which the goods ſold ſhould appear. In Lord Polwarth v. Cooke, his lordſhip had applied for the loan of 150*l.*, and Cooke gave him 50*l.*, a gold watch, and a Cremona fiddle; and the court ordered the ſecurities to be given upon payment of what was obtained by ſale.

A. applied to *B.* for the loan of 1500*l.* on mortgage: *B.* ſaid his money was in the funds, and that he had purchaſed at 75*l.*; if therefore *A.* would have ſtock at that value, he would transfer as much as would amount to that ſum; which he did, and *A.* gave a mortgage accordingly for 1500*l.* *A.* loſt two and a half *per cent.* on the ſale of the ſtock. The executor of *B.* could not maintain an ejectment on the mortgage deed; for in fact the deed was void by the ſtatute: and moreover, no action could be maintained on a contract uſurious at common law. Daviſon v. Barnard Pitt, Eſpin. N. P. 1.

So, if the diſcounter of a bill of exchange make the holder take goods at a higher price than they are worth upon a fair eſtimate, it is uſury. Pratt v. Willey, *Id.* 40.

But in the Duke of *Ancaſter* v. *Pickett*, the court refuſed to relieve the Duke who had purchaſed goods of *Pickett*, and had ſold them again for leſs money: for the jewels were ſold in the common courſe of trade, and not with any view of accommodating the Duke with the means of raiſing or borrowing money upon them. 1 Br. Ch. Rep. 151.

An action was brought here upon a bond entered into at *Calcutta*, where both parties then reſided, and the plaintiff ſtill reſided; but the defendant was in *England;* and nine *per cent.* was the rate of intereſt made payable by the condition of the bond. Lord *Mansfield* ſaid, "The plaintiff is in juſtice entitled to reco- "ver the ſum really lent to the defendant, together with *Indian* "intereſt till the ſigning of the judgment: but with only legal "intereſt of this country (which is no more than five *per cent.*) "from the time of the liquidation of the debt by the judg- "ment." Bodily v. Bellamy, 2 Burr. 1094.

A ſpecial memorandum was indorſed on a bond given for the payment of 100*l.* with intereſt at 5*l.* *per cent.* in payments of 20*l.* yearly by quarterly payments of 5*l.* each. The indorſement was to this effect: that at the end of each year, the year's intereſt due was to be added to the principal ſum: and then the Le Grange v. Hamilton, 4 Term Rep 613. 2 H. Bl. 142. S. C. in error.

20 *l.* received during the year to be deducted, and the balance to continue as principal. As the intention of the parties did not appear to be uſurious; as not the intereſt on the whole 100 *l.*, but the intereſt due, was to be added to the principal at the end of the year, and the intereſt due could only be taken to mean what was legally due; as there was no loan, but the conſideration of the bond was the giving up of an annuity; the court of K. B. *diſſent. Kenyon*, C. J., held, that the contract was not uſurious, and that opinion was afterwards affirmed in the Exchequer-chamber.]

(D) What Kind of Hazard or Caſualty will bring an Agreement, &c. out of the Statute of Uſury.

Show. 8. Martin v. Abdee.

IT has been held, that if principal and intereſt be in hazard upon a contingency, it is no uſury, *though the intereſt* do exceed the allowed rates *per cent.* And when there is a *hazard that the plaintiff may have leſs than his principal*, it is no uſury. Thus—

Cro. J. 308. pl. 20. Roberts v. Trenayne.

If *S.* lend 100 *l.* to have 120 *l.* at the year's end upon caſualty, if the *caſualty goes to the intereſt only, and not to the principal*, it is uſury; for the party is ſure to have the principal again, come what will; but, if the *intereſt and principal are both in hazard*, it is not then uſury. *Per Dodderidge*, J.

Moor, 397. pl. 528. Reynolds v. Clayton. All the court held, upon the two ſtatutes of 37 H. 8. and 13 Eliz. that the bond was void, becauſe it appears to be made by corrupt means to have more than 10 *l. per cent.* which the ſtatute of 37 H. 8. intended to puniſh. And by the *proviſo* it appears that the intent was, *if one was indebted* to another *truly without loan and intention of uſury*, then in ſuch caſe *bonds and conveyances of land for ſecuring the true debt, are out of the ſaid ſtatute*; but if there is a borrowing of money, and a communication for intereſt, the deviſe to be beyond the rate of 10 *l. per cent.* is fraudulent, and within the ſaid ſtatute, otherwiſe the ſtatute would be vain; for he might as well have made the condition, that if 20 perſons, or any of them, ſhould be living at the day, &c. then he ſhould have 33 *l.* And of this opinion were Popham, Ch. J. of B. R. and Periam, Ch. B. 2 And. 15. pl. 8. S. C. 5 Rep. 70. Clayton's caſe, S. C. reſolved that it was a uſurious contract.

In debt upon obligation of 60 *l.* the defendant pleaded the ſtatute, and *ſhewed that it was agreed* between the plaintiff and defendant, 14 *December, that the plaintiff ſhould lend* the defendant 30 *l. to be repaid the firſt of* June *following, and* the plaintiff *ſhould have* 3 l. *for the forbearance, if the plaintiff's ſon ſhould be then living; and if he died, then to pay but* 26 *l. of the principal* money. The court inclined that it was within the ſtatute of uſury; whereupon the plaintiff, who had demurred, became nonſuit.

Cro. Eliz. 642. pl. 43. C. B. Button v. Downham. 3 Salk. 390. pl. 3. Maſon v. Abdy. Comb. 125. S. C.

So, where *A.* agreed with *J. S.* to give him 10 *l.* for the forbearance of 20 *l.* for a year, *if* B. *his ſon were then alive;* it was held by three Juſtices (*Glanvil abſente*) to be uſury, by reaſon of the corrupt agreement, and it is the intent makes it ſo or not ſo.

Likewiſe, where the obligor was bound in a *bond* of 300 *l.* conditioned *to pay* 22 *l.* 10 *s.* premium *at the end of the firſt three months* after the date, &c. *and* 6 *d. in the pound at the end of ſix months*, as a farther premium, *together with the principal* itſelf, *in caſe the obligor be then living; but if he dies within that time*, then *the principal to be loſt;* this was adjudged a uſurious contract, becauſe there was *a poſſibility* that the obligor might live ſo

ſo long; *and* there is *an expreſs proviſion to have the principal again.*

But, where the bargain is merely caſual, and the whole depends on a contingency, there, the contract is not uſurious. Thus—

Mr. *Spencer* being in poſſeſſion of an eſtate of 7000 *l.* a year, and of a perſonal eſtate in goods and plate, *&c.* worth 20,000 *l.*, and owing about 20,000 *l.* to tradeſmen, being about 30 years of age, of a hale conſtitution, but impaired by irregularity, and the Ducheſs of *Marlborough*, his grandmother, being then 78, and of a good conſtitution, made the defendant a propoſal, that for 5000 *l.* paid down, he would engage to pay 10,000 *l.* if he ſurvived the Ducheſs, which after ſome deliberation was accepted by the defendant; and Mr. *Spencer* gave him a bond for the payment of 10,000 *l.* in ſix months after the death of the Ducheſs, in caſe he ſhould be then living. The Ducheſs lived ſix years after and then died, giving Mr. *Spencer* by her will a very conſiderable eſtate. Then Mr. *Spencer* confeſſed a judgment to the defendant for 10,000 *l.*, and afterward paid him 2000 *l.* in part of it, and then died, about a year and eight months after the Ducheſs. A bill was brought to be relieved againſt this demand, upon payment of the principal ſum with legal intereſt, on account of its being an unconſcionable bargain, and againſt the publick good.

Earl of Cheſterfield & *al.* executors of Mr. John Spencer, v. Sir Abraham Janſen, MS. Rep. in Canc. Trin. 24 G. 2. And ſee the caſe very fully reported in 1 Atk. 301. [2 Vez. 125. S. C. 1 Wilſ. 286. S. C.]

Lord Chancellour called to his aſſiſtance Lord Chief Juſtice *Lee*, Lord Chief Juſtice *Willes*, Sir *John Strange*, Maſter of the Rolls, and Mr. Juſtice *Burnet*; who gave their opinions in *Hil.* term 1750, that no contract can be fraudulent within the ſtatute, where it is not for the forbearance. There may be many contracts which this court ſets aſide, though not uſurious, as marriage-brocage bonds, place-brocage bonds, *&c.* but here appears no fraud or impoſition in this caſe, and the party himſelf has confirmed it: This was a mere contingency, and the whole money might have been loſt; it is a bargain of chance, and a mere wager; and the relief prayed by the plaintiffs was refuſed.

So, where *A.* delivered to *B.* 100 *l.* who by indenture covenanted with *A. to pay to every one of* A.*'s children which then were and ſhould be living at* 10 *years end* 80 *l.*, *A.* having then five daughters; and for aſſurance mortgaged a manor, and was bound in a ſtatute of 500 *l.*; it was adjudged not to be uſury, but a mere *caſual bargain.* But, if it had been to pay 400 *l.* at 10 years end, *if any were living*, then it had been a greater doubt; or, if it had been to pay 300 *l.* if any were living at one or two years end, that had been uſury, becauſe of the *probability* that one of them would continue alive for ſo ſhort a time; but in 10 years are many alterations.

Cro. Eliz. 741. pl. 15. Bedingfield v. Aſhley.

But, where *M.* lent *C.* 150 *l.* for repayment of which *C. leaſed a cloſe to* M. *for* 60 *years, to begin at the end of two years*, upon condition that *if he paid the* 150 *l. at the end of the two years, the leaſe to be void*; and it was agreed that, for the deferring and giving a day of payment for the two years, *C. ſhould pay to* M. *for intereſt* 22 *l.* 10 *s. quarterly, if* M. *ſhould ſo long live*; in purſuance of which agreement *M.* lent the 150 *l.* and *A.* made the leaſe, and granted

Cro Ja. 507. pl. 20. Roberts v. Trenayne.

by fine to *M.* the rent of 22*l.* 10*s.* to be paid quarterly, if *M.* ſhould ſo long live; this was held to be a uſurious contract, for by intendment *M.* might have lived above the two years, and it was an *apparent poſſibility* that he ſhould receive that conſideration, whereby ſhe is within the ſtatute; and alſo that *the leaſe* taken *for the payment of the principal money, and not for any part of the uſury, is within the ſtatute*, becauſe it is for ſecurity of money lent upon intereſt, and for the ſecuring of that which the ſtatute intended *M.* ſhould loſe.

(E) In what Caſes Securities ſhall be forfeited or avoided on account of Uſury.

Hawk. P.C. c. 82. § 21.

HERE it is to be premiſed, that it is not material whether the payment both of the principal and alſo of the uſurious intereſt be *ſecured by the ſame or by different conveyances*, but all writings whatſoever for the ſtrengthening of ſuch a contract are void.

2 Le. 39. Arg. in Van Henbeck's caſe.

Where a bond is made *for more than legal intereſt, but* at the payment the *obligee takes only legal intereſt;* he ſhall not be puniſhed for the contract; but perhaps the bond ſhall be void. Thus—

4 Le. 43. pl. 117. Brown v. Fulſby.

Where *A. borrowed of* B. 80*l. and was bound in a bond to pay him* 90*l. at the end of the year; per cur.* Though the 90*l. was tendered, and* B. *did tell the ſame, yet if* B. *takes but* 80*l. it is* not uſury within 5 *Eliz.* to make a treble forfeiture; but yet in that caſe the obligation itſelf is void.—The *bond* is void preſently, and if he receives exceſſive intereſt, he ſhall *forfeit the treble value. Per Clerk*, J.

3 Le. 205. pl. 260. Body v. Taſſel.

Bulſtr. 17.

Where the firſt contract is not uſurious, it ſhall never be made ſo by *matter ex poſt facto. Per Williams*, J. Thus—

Noy, 171. Dalton's caſe. S. P. and reſolved by the whole court, that the taking the uſe-money within the year, ſhall not avoid the obligation, and is no uſury within the ſtatute, becauſe it was not uſurious at the beginning. And judgment for the plaintiff. Bulſt. 17.

In debt upon an obligation, where the ſtatute of uſury was pleaded, it was ſaid by *Popham* upon the evidence, that if a man *lends* 100*l. for a year, to have* 10*l. for the uſe* of it, if the *obligor pays the* 10*l. twenty days before it be due*, that does not make the obligation void, becauſe it was not corrupt. But, *if* upon making the obligation *it had been agreed, that the* 10*l. ſhould have been paid within the time*, that would have been uſury, becauſe he had not the 100*l.* for the whole year, when the 10*l.* was to be paid within the year; and a verdict was given accordingly.

7 Mod. 119. The Queen v. Sewel, *alias* Beaus.

Likewiſe, if a man *makes a uſurious contract* with another, and gives him unlawful intereſt, *and agrees to give* him *a bond for the principal, and after*, by a ſubſequent agreement, *gives a bond for the ſum lent to* J. S., *to whom the lender owes ſo much*, in ſatisfaction of his debt; this bond is not voidable by the ſtatute. *Per Holt*, Ch. J.

So,

So, if a man *lend money on a legal intereſt, and after a ſubſequent agreement be made* for more intereſt, which is uſury; that will not avoid the firſt contract. *Per Holt*, Ch. J. Far. 119. The Queen v. Sewel, *alias* Beaus.

For the words of the ſtatute are, "That all aſſurances for the payment of any principal, &c., *where-upon* or *whereby* there ſhall be reſerved or taken above the rate of 5 *l.* in the hundred, ſhall be "void."

But, if a ſecond bond be made after the forfeiture of a former, and conditioned for the receipt of intereſt according to the penalty of the forfeited bond, this is as much within the ſtatute as if it had been made before the forfeiture; for if ſuch a practice ſhould be allowed, nothing could be more eaſy than to elude the ſtatute; and though the whole penalty be due in ſtrictneſs to the obligee, yet the true principal debt is in conſcience no greater after the forfeiture of the bond, than it was before. Hawk. P.C. c. 82. § 23.

A bond made, to ſecure a juſt debt payable with lawful intereſt, ſhall not be avoided by reaſon of a corrupt agreement between the obligors, to which the obligee was no way privy: As, where *A.* being indebted to *B.* in 100 *l.* agrees to give him 30 *l.* for the forbearance of that 100 *l.* for a year, and gives him a bond for 60 *l.* for payment of the 30 *l.*, and for the payment of the 100 *l.* enters into a bond of 200 *l.* together with *B.* for the payment of a true debt of 100 *l.* due from *B.* to *C.* Hawk. P.C. c. 82. § 11.

So, where W. was *indebted* in 100 *l.* to *A. upon a uſurious contract on a bond*, and *A. being indebted to* E., *transferred the debt to* E., and W. *became bound for the ſame uſurious debt to* E., *whoſe debt was juſt, and he ignorant of the uſury;* it was adjudged upon great deliberation, that the obligation made by *W.* to *E.* was not avoidable for the uſurious contract made between *W.* and *A.*, becauſe it was given to *E.* for a true debt, and he knew nothing of the uſury, though the ground between *A.* and *W.* was uſurious. Moor, 752. pl. 1035. Ellis v. Warnes.

Likewiſe, an aſſurance made in purſuance of a fair agreement for ſuch intereſt as is allowed by the ſtatute, ſhall not be avoided by the fault of the ſcrivener, who draws it up in ſuch a manner as to bring it within the expreſs letter of the ſtatute: As, where the parties agree, that 5 *l.* ſhall be paid for the loan of 100 *l.* for one year, and the ſcrivener, in drawing the bond for it, doth, without the knowledge of the parties, who are illiterate perſons, make the 5 *l.* payable at the end of half a year: or, where on the fair loan of 100 *l.* agreed to be paid with common intereſt, a mortgage is made for the 100 *l.*, with a proviſo, that it ſhall be void on payment of 105 *l.* at the end of one year, without any covenant for the mortgagor to take the profits till default be made of payment, ſo that in ſtrictneſs the mortgagee is entitled both to the intereſt and profits. Hawk. P.C. c. 82. § 17. [Murray v. Harding, *ſupra* 194.]

It is to be obſerved, that a fine levied, or judgment ſuffered, in purſuance of a uſurious contract, may be avoided by an averment of the corrupt agreement, as well as any common ſpecialty, or parol contract. And in an *aſſumpſit* if it appear, either upon the evidence, or from the plaintiff's own expreſs ſhewing in his declaration, that the contract was uſurious, he cannot recover. Hawk. P.C. c. 82. § 20. [A bill of exchange given upon a uſurious conſideration is void

But

in the hands of an indorſee for a valuable conſideration without notice of the uſury. But a ſpecialty cannot be avoided by uſury appearing on evidence or on the face of the condition, but it muſt be pleaded. Lowe v. Waller, Dougl. 736.]

Vin. Abr. tit. Uſury, 304. If a judgment be given upon a uſurious contract, and it be *part of the agreement to have a judgment*, yet the defendant may avoid ſuch judgment by *audita querela*, or by *ſcire facias* brought on the ſame.

Le. 307. pl. 427. Carter v. Claycole. Where *A. mortgaged to* B. on a uſurious contract for 100 *l.*, and before the day of payment *B. is ouſted by* C., and *B.* brings an action againſt *C.*, *C.* cannot plead the ſtatute of uſury; for he has *no title*; the eſtate being void againſt the mortgagor. *Per Periam.*

7 Mod. 119. The Queen v. Sewel, *alias* Beaus. But, where *A.* lent *B.* 45 *l.* *on a pledge of jewels*, and it was agreed to pay 9 *l.* for it for a year; *afterwards* B. *gave a bond* for the ſame money; *per Holt, at Niſi Prius*, It is a queſtion if the bond be void or not.

(F) In what Caſes a Forfeiture of treble Value ſhall be incurred on account of Uſury.

Hawk. P.C. c. 82. § 12. THOUGH the receipt of higher intereſt than is allowed by the ſtatute, by virtue of an agreement ſubſequent to the firſt contract, does not avoid an aſſurance fairly made and agreeable to the ſtatute, yet it ſubjects the party to the forfeiture of treble value.

Hawk. P.C. c. 82. § 14. But the receipt of intereſt before the time when it is in ſtrictneſs due, being voluntarily paid by the debtor for the greater convenience of the creditor, or for any other ſuch like conſideration, without any manner of corrupt practice, or any previous agreement of this kind at the making of the firſt contract, does not make the party liable to the forfeiture of the treble value.

Raym. 196. The King v. Allen. An information upon the ſtatute 12 *Car.* 2. *c.* 13. ſet forth that the *defendant*, 16 November, 20 Car. 2. *lent* J. S. 20 *l.* *till* June *next following*, *and that afterwards*, (viz.) *ad finem termini prædict.* he *took* of the ſaid *J. S.*, *corruptè & extorſivè*, 30 *s.* *for the loan* thereof, which is more than the ſtatute allows. The jury found againſt the defendant. And it was moved, thar this corrupt agreement ought to be within the ſtatute at the making of the contract, and not at the end of the term, as laid in the information. *Twiſden*, J. took a difference upon the two *clauſes in the ſtatute*, that if the *lender contracts for more*, ſo that the agreement is corrupt at the time of the loan, all the *aſſurance is void*; *but, if he contracts for no more* than the ſtatute allows, *but will afterwards take more*, the *aſſurance ſhall not be avoided*, *but the party ſhall forfeit the treble value.* But judgment was ſtayed till the other ſide moved, becauſe the court would adviſe.

Saund. 294. Ferral v. Shaen. In debt upon bond the defendant pleaded, that *after the making of the bond the defendant corruptivè recepit* ſo much, *viz.* more than the

the ſtatute allows, and that therefore the bond was void. But adjudged upon demurrer, that the plea is not good; for *the bond* here was not for the payment of money (upon or for uſury) as the words of the ſtatute are; but *for any thing appearing to the contrary*, it *was for payment of a juſt debt, and ſo* the bond was *good when* it was *made*, and therefore a uſurious contract after cannot make it void; but it is a forfeiture of the treble value by the latter clauſe of the ſtatute. 3 Salk. 390. pl. 4. S. P. accordingly.

A. (when money was at 8 *l. per cent.*) lends money and takes bond for the ſame, and then the ſtatute 12 *Car.* 2. is made, and he will *continue the intereſt on that bond:* the bond ſhall not be avoided by ſuch acceptance of intereſt, but the party ſhall forfeit the *treble value* by the ſtatute. *Per Twiſden*, J. Raym. 197. The King v. Allen.

So, in debt on an obligation conditioned to pay by a certain day, the defendant *pleaded the ſtatute* 12 Car. 2. c. 13., *and ſaid, that the contract was uſurious:* but *per cur.* the contract being *made after the bond forfeited to receive intereſt according to the penalty*, which was double the principal, it doth not void the obligation that was good at firſt, but only ſubjects the taker to other penalties; and judgment for the plaintiff, *niſi*. 3 Keb. 142. pl. 13. Radly v. Manning.

(G) In what Caſes Relief is given againſt uſurious Contracts.

IT has been ſaid, that though the ſtatute does not go ſo far as to make the party receiving the uſurious intereſt liable to refund; yet having prohibited the taking beyond ſuch a ſum, and avoided the contract, the taking it is a breach of the ſtatute, and the actual receipt of the money will (in a court of equity) make him liable to refund; the wrong being the ſame, whether the uſurious intereſt hath been actually paid or not. Thus— Cas. temp. Talb. 114. Proof v. Hines.

Where *A.* entered into a *bond* to *B.* for a ſum of money, *to pay* 6 *l. per cent.* intereſt; afterwards *A.* being unable to pay off the bond, *conſented to pay* 10 *l. per cent.* for the money, *and continued paying at that rate for* 14 *years; B.* died, *A. became a bankrupt;* and the aſſignees of *A.* brought a bill; the *executors of* B. *were decreed*, by the Maſter of the Rolls, *to account;* and that, for what had been really lent, legal intereſt ſhould be computed and allowed, and what had been paid more ſhould be deducted out of the principal to be due on the account; *and if* B. *had received more than what was due with legal intereſt, the ſame to be refunded* by the executors, and the bond to be delivered up. And afterwards the Lord Chancellour affirmed the decree; but ſaid, he did not determine how it would be, had all the ſecurities been delivered up; that not being before him. *Id.* 38. Boſanquett v. Daſhwood.

The court decreed money to the plaintiff againſt the defendant; albeit he had judgment and execution, being upon the point of uſurious contract. Toth. 231. Langford v. Barnard.

A *wo-*

2 Vern. 170. pl. 156. Taylor & *al.* v. Bell, Bagnall, & *al. Ibid.* 173. Lord Hutchins ſaid, that if the ſureties had not been plaintiffs as well as the woman, he would not have relieved even againſt the penalty. Lord Chancellour, in the caſe of Boſapquett v. Daſhwood, ſaid, that as to the laws relating to gaming, the court would not interpoſe, becauſe gameſters on both ſides are equally guilty, and in ſuch caſes the court will ſtand neuter; but the borrower and lender are not in the view of gameſters. MS. Rep.

A *woman reſorted to gaming-places at court, and by ſupplying perſons of quality there with money, made great profit; for which purpoſe ſhe borrowed much money, and gave the lender great rewards* from time to time; but *afterwards ſhe borrowed more*, and being arreſted for this laſt money, *gives bond and judgment* for it, and then brings a bill to be relieved againſt the ſecurity, and to have an allowance for the former exceſſive premiums which ſhe had given, and to bring the defendant to an account. The defendant, by anſwer, confeſſed the receipt of five or ten guineas for the loan of ten guineas for a week or ten days; but *inſiſted that the ſums ſo received were paid as profit*, and not towards ſatisfaction of the money lent. The court ordered the plaintiff to pay principal, intereſt, and coſts at law, and here, or the bill to be diſmiſſed with coſts; for that it would not interpoſe or meddle with *play-debts*, or things of this kind. *Per* Lords Commiſſioners.

Skin. 411. pl. 7. Tomkins v. Barnet. 1 Salk. 22. S. C. though ſaid to be *coram* Treby, Ch. J., and that Treby, Ch. J. allowed, that where a man pays money on a miſtake in an account, or where one pays money under or by a mere deceit, it is reaſonable he ſhould have his money again: but, where one knowingly pays money upon an illegal conſideration, the party that receives it ought to be puniſhed for his offence; and the party that pays it is *particeps criminis*. And there is no reaſon that he ſhould have his money again; for he parted with it freely, and *volenti non fit injuria*. [See the obſervations on this caſe *ſupra*, Vol. 1. pag. 262. Notwithſtanding what is here advanced, courts of law now view the borrower in a more favourable light, and will permit him to recover the exceſs of intereſt in an action for money had and received. Browning v. Morris, Cowp. 792. But to entitle him to bring ſuch an action, he muſt ſhew that he has done all that equity requires. In an action, therefore, to recover goods which the plaintiff had pawned, upon a uſurious contract, the court held, that he muſt ſhew he had tendered all the money really advanced. Fitzroy v. Gwillim, 1 Term Rep. 153.]

Upon a truſt at *Guidhall*, in an *indebitatus aſſumpſit* for money received to the uſe of the plaintiff, the caſe was, The plaintiff was *co-obligor* with *J. S.* to the defendant, and between *J. S.* and the defendant there was a *uſurious contract*: the *plaintiff paid part* of the money to the obligee, and after *pleaded the ſtatute of uſury* upon this bond; which is adjudged a uſurious bond; he brought this action for the money, which he paid before the bond was proved uſurious; and the queſtion was if the action lay: And *Holt*, C. J. ſeemed to incline ſtrongly that it did not lie; for here there was a *payment actually made* by the plaintiff to the defendant, *in ſatisfaction* of this uſurious contract; and if they will make ſuch contracts, they ought to be puniſhed; and he was not for encouraging ſuch kinds of *indebitatus aſſumpſits*; for it is like to the caſe of bribes, and he who receives them ought to be puniſhed, but he who gives them ought not to be encouraged by any way to recover his money again.

3 Vin. Abr. tit. Uſury, 315. cites MS. Tab. tit. Uſury, Jan. 24, 1424. Brand v. Cumming. [1 Atk. 450. Earl of Suffolk v. Green. 2 Atk. 393. Chauncy v. Tahourden.]

It is ſaid, that defendant is not obliged to *diſcover* any uſurious contract, unleſs the plaintiff offers to waive the penalty.

(H) How far Sureties are affected by uſurious Contracts.

B. Was bound with *P.* as his ſurety to *J. S.* in a bond of 500 *l.*, and that bond was upon a corrupt and uſurious contract againſt the ſtatute, and *P.* was bound unto the plaintiff in a bond as a *counter-bond, to ſave the plaintiff harmleſs* from the ſaid bond of 500 *l.*; *B.* is ſued by *J. S.* upon the ſaid bond, and ſo damnified: And thereupon *B.* ſued *P.* upon the counter-bond, who pleaded the ſtatute of uſury, pretending that all aſſurances depending upon ſuch uſurious contracts are void by the ſtatute. But by the opinion of *Wray*, C. J. the ſame is no plea; for *the ſtatute is*, that *all bonds, collateral aſſurances*, &c. *made for the payment of money lent upon uſury*, ſhall be utterly void; but *the bond here*, upon which the action is brought, *was not for the payment* of the money lent, *but for the indemnity of the ſurety.* 2 Le. 166. pl. 200. Baſſet v. Prowe.

So likewiſe, in debt on *bond to ſave the plaintiff harmleſs from an obligation* wherein he and the defendant were bound to *W.* &c. *and from all ſuit concerning the ſame;* the defendant pleaded the ſtatute of uſury, and that it was made upon a corrupt agreement between him and *W.*, which the plaintiff might have pleaded in debt againſt him by *W.* But the court held the plea ill; for though the firſt obligation were void, yet the ſecond obligation is forfeited, becauſe the defendant hath not ſaved him harmleſs from ſuits concerning it, nor does the defendant anſwer thereto, but to the obligation only. Cro. Eliz. 642. pl. 43. Button v. Downham. 2 And. 121. pl. 65. S. C. accordingly. But it is there ſaid, that the plaintiff did not know of the corrupt bargain. Noy, 73. S. C. by the name of Downham v. Butter, and judgment for the plaintiff. But it is added, that Glanvil ſaid it would be a dangerous precedent to avoid the ſtatute. For the ſurety may be a friend of the uſurer's, who will not plead the ſtatute in an action of debt brought againſt him, and ſo the ſtatute would be to little purpoſe. And after the judgment given for the plaintiff, Glanvil ſaid that that judgment would be quickly carried to Cheapſide.

But where, in debt on bond, defendant *pleaded, that he himſelf borrowed* 100 l. *of* W., *paying for the forbearance exceſſive uſury, and the plaintiff was his ſurety for the payment, and that the obligation upon which the action is brought was given* by him to the plaintiff *to indemnify him againſt* W. *Manwood* held this a good bar; for when the plaintiff was empleaded upon the principal bond, he might have diſcharged himſelf upon this matter, and therefore the laches ſhall turn to his prejudice; and therefore the iſſue was joined upon the exceſſive uſury. 3 Le. 63. pl. 93. Potkin's caſe.

So likewiſe in debt upon an *obligation to ſave the plaintiff harmleſs* from an obligation, wherein the plaintiff, as ſurety for the defendant, was bound to *J. S.* to pay 100 *l.*, the *defendant ſaid the obligation* made *to J. S. was upon a uſurious contract*, &c. *and concluded* ſic non damnificatus. *Tanfield* ſaid, the plea is good, otherwiſe the ſtatute would be defrauded; for by a *compact*, the uſurer would ſue the ſurety, who ſhall pay him, and have his remedy on his counter-bond. But all the court held it no plea; for he Cro. Eliz. 588. pl. 22. Robinſon v. May. There is a note added, that the reaſon conceived was, that *the ſurety by intendment*

muſt

cannot know of the corrupt contract to plead it in avoidance of the bond, and therefore the principal ought to take care thereof. *Ibid.*—— *Goldſb.* 174. pl. 107. S. C. held accordingly *per tot. cur.* But the reporter adds, *ſed quære.*

must take care to ſave his ſurety harmleſs. And adjudged for the plaintiff.

(I) What Informations will lie in Caſes of Uſury, and where they are good, and where not.

1 Barn. Rep. in K. B. 209. Anon.

AN information was moved for againſt *Cawket*, a pawnbroker, for taking ſixpence a pound *per* month intereſt, which was ſaid to be extravagant uſury. The court, however, thought there was nothing ſo enormous in this offence, but that the common method of puniſhment would be ſufficient. But it was argued, that the ſtatute of uſury allows the penalty for uſury to be recovered by information, or action, and that was urged as a reaſon, why the court ſhould grant it. But the court ſaid, that was to be underſtood only of an information *qui tam*. And they farther obſerved, that the ſtatute chalking out a particular method of proceeding for a new offence, was a farther reaſon why the court could not grant an information; neither can the party be ſo much as indicted.

Le. 96. pl. 125. Sir Wollaſton Dixy's caſe. An information upon the ſtatute

The *place where defendant accepted* exceſſive intereſt ought to be ſhewn in the information, but not the place where the *contract for the loan* or forbearing was made; for that is not needful: But *per Clark*, J. and *per Gent*, J. and *Manwood*, Ch. B. the place where the corrupt bargain was made muſt certainly be alleged.

of uſury, for a *contract with perſons unknown*, recipiendo ultra 10 l. *in the hundred*, was held ill, becauſe an *informer, who is not party*, although the contract was *ultra* 10 *l. &c. per cent. ſhall not have any benefit unleſs there was a receipt of the uſury according to the contract.* And for that the *recipiendo* is naught, becauſe there is *no place nor time put of the receipt*, which is now traverſable in that information. Noy, 143. Naſie's caſe.

Le. 97. Sir Wollaſton Dixy's caſe.

The information likewiſe muſt *ſhew whoſe money* it is. *Per Manwood*, Ch. B.

Arg. 2 Le. 39. pl. 52. Martin Van Henbeck's caſe.

If an information be exhibited in the Exchequer againſt a uſurer, and it charge that he took more than 10 *l.* in the 100 *l.*, without *ſhewing how much*, ſuch information is utterly inſufficient; for the informer ought to ſet forth the quantity of the intereſt received, and yet the ſame is not to be recovered.

And. 48. Topeliff v. Waller.

Upon an information on the ſtatute of uſury, and ſubpœna awarded out of *C. B.* againſt the defendant, iſſue joined, and found for the informer, it was alleged in arreſt of judgment, that the court of C. B. is not to hold plea by *proceſs of ſubpœna*, but by *original*, and is not aided by the ſtatute of jeofails; for it is not a miſconceiving of proceſs, but a diſorderly award of it; and it was inſiſted likewiſe, that it is *not alleged* in the information *by whom, or to whom, nor what ſum, or at what place, nor when the money was lent, nor againſt the form of what ſtatute it is;* yet judgment was given for the plaintiff.

But, where an information was exhibited, and ſhewed the uſurious contract in certain, whereby it appeared that no more than 10 *l.* was reſerved and received for the loan of 100 *l.* and concluded *contra formam ſtatuti*, yet becauſe it did not expreſsly ſtate, that it was *per corruptam accomodationem*, according to the words of the penal ſtatute, the information was adjuged inſufficient. Arg. 11 Rep. 58. a. Dr. Foſter's caſe cites it as adjudged. And. 49. pl. 123. Emmot v. Fullwood, ſeems to be S. C., and the juſtices of both benches held, that thoſe words ought to be expreſsly alleged, and not by implication; and cited 10 H. 7. c. 10. and for default of thoſe words the judgment was reverſed. The defendant was *indicted for uſurious lending* 20 s. *eâ intentione* to receive 23 s. within a month, *and that the defendant did receive* 3 s. for the loan of 20 s. This, *per curiam*, is not good *without* ſaying, *quod corruptè agreatum fuit*, and for that reaſon it was quaſhed, being removed out of the inferior court. Keb. 629. pl. 111. The King v. Gaſt or Garth. Croke, J. took a *diverſity* between an *information* and a *verdict*, that *in an information the agreement ought to be expreſsly alleged to be corrupt*, and cited 11 Rep. Dr. Foſter's caſe, *and the Book of Entries*, 333. but that it is otherwiſe in a verdict, which is the finding of the lay gents. 2 Roll. Rep. 48. Roberts v. Tremoil.

An *information* upon the ſtatute of uſury, for a uſurious mortgage made, *charged the defendant*, *that* cepit ultra 10 *l.* *in* 100 *l.* for the forbearance of one year, and this was *out of the iſſues, rents, and profits, which he took in* Middleſex, *of lands in* Glamorganſhire *in* Wales, *mortgaged to the defendant*. *Manwood* ſaid, in the principal caſe, that the taking of the iſſues and profits ought to have been laid where the land was. And ſuch was the opinion of the whole court. 3 Le. 238. pl. 327. Owen Morgan's caſe.

In debt upon the ſtatute 37 *H.* 8. of uſury, the (count) was, that he *corruptivè lent* 40 l. *againſt the form of the ſtatute*, and that ſuch a day he lent him 20 *l.* &c. *againſt the form of the ſtatute;* but (*as to this*) *did not ſay corruptivè*. After verdict for the plaintiff, it was objected, that he ought not to have judgment for either of the ſums, it being clearly ill for the 20 *l.* for want of the word (*corruptivè*). But all the court held, that being good for part, he ſhall have judgment for that part; for being for ſeveral ſums it is in nature of two ſeveral actions. Cro. J. 104. pl. 40. Woody's caſe. And it was held, in this court, that if the defendant had demurred upon the declaration, it had been good for the one, and the plaintiff ſhould have had judgment for that part. Cro. J. 104. in S. C.

Information in the Exchequer, for that the defendant *per viam corruptæ barganiæ received*, &c. After verdict for the plaintiff, it was moved in arreſt of judgment, becauſe he *did not ſet forth what the bargain was*, but generally, *per viam corruptæ*, &c. *Sed non allocatur;* for this is *the uſual courſe of the Exchequer, and the bargain is to be given in evidence*. But it was agreed, that *in pleading to avoid a bond* or aſſurance, *it ought to be particularly ſet forth*, becauſe *the party is privy* to his own contract, but the informer is not; and therefore it is ſufficient for him to ſhew it particularly in evidence. Cro. J. 440. pl. 13. Bedo v. Sanderſon. Hawk. P. C. c. 82. § 24. ſays, that in pleading a uſurious contract by way of bar to an action, you muſt ſet forth the whole matter eſpecially, becauſe it lay within your own privity; but that in an information on the ſtatute for making ſuch a contract, it is ſufficient to ſet forth the corrupt bargain generally, becauſe matters of this kind are ſuppoſed to be privily tranſacted; and ſuch information may be brought by a ſtranger.

An information ſet forth *that the defendant, by way of a corrupt contract cepit & ad lucrum ſuum convertit* 40 s. *for deferring* the day of *payment of* 25 l. *from the* 29*th of* July *to the* 30*th of* May, (the day on which he took the 40 *s.*) *contra formam ſtatuti*. After a verdict it was moved, that it did *not appear that the* 25 l. *was money lent, but it* Sid. 421. pl. 9. the King v. Walker. Vent. 38. Anon. ſeems to be S. C.

ſays, it was moved that the time of forbearance was paſt, and the party might give what he pleaſed in recompence for it, there being no precedent agreement to enforce him to it. *Sed non allocatur*; for the court ſaid, they would expound the ſtatute ſtrictly; and if liberty were allowed in this caſe, the brokers might oppreſs the people exceedingly, by detaining the pawn, unleſs the party would give them what they pleaſe to demand for the time after failure of the payment.

it appears that the taking the 40 *s. was after lending, and there is no corrupt agreement laid, either before or at the time of lending.* But adjudged againſt the defendant; for though it be not well laid ſo as to give judgment againſt the defendant upon the ſtatute 12 *Car.* 2. *c.* 13. to pay treble the money lent, yet it is found that by a corrupt agreement he took ſo much, and therefore gave judgment againſt him at common law, *viz.* fine and impriſonment.

11 Mod. 174. pl. 17. the Queen v. Dye.

It has been held, that *no indictment will lie* on the ſtatute of uſury; for the method the act preſcribes muſt be followed; therefore the indictment muſt be quaſhed.

[*Vide* Rex v. Upton, 2 Str. 816. 1 Barnard. K. B. 97. S. C. Regina v. Smith, 2 Salk. 680.]

(K) Of the Pleadings in Caſes of Uſury.

Hawk. P. C. c. 82. § 24.

IN pleading a uſurious contract by way of bar to an action, you muſt ſet forth the whole matter eſpecially, becauſe it lay within your own privity; but in an information on the ſtatute for making ſuch a contract, it is ſufficient to ſet forth the corrupt bargain generally, becauſe matters of this kind are ſuppoſed to be privily tranſacted, and ſuch information may be brought by a ſtranger.

3 Salk. 391. pl. 7.

Where the ſtatute is not pleaded, the bond, though uſurious, is good.

2 Str. 1043. Buſh and others, aſſignees of Jones v. Gower.

But it has been held, that uſury cannot be pleaded to a *ſcire facias* on a judgment.

[Ca. temp. Hardw. 233. S. C. In ſuch caſe the court relieve by ſtaying the proceedings on the judgment, and directing an iſſue to try, whether the contract were uſurious or not. Cooke v. Jones, Cowp. 727.]

12 Mod. 385. Crow v. Brown.

A uſurious contract was pleaded in bar of debt upon a bond, but it was not ſaid that the defendant was indebted to the plaintiff at the time of the bond given, or that there was an agreement to lend money upon the uſurious contract; and for that judgment was given for the plaintiff.

2 Str. 816. the King v. Upton.

Likewiſe, after a verdict *pro rege* on an indictment for uſury; it was moved in arreſt of judgment, that they had only laid a corrupt agreement, without any loan or taking exceſſive intereſt in purſuance of it. And judgment was arreſted.

2 Str. 1243. Maſſa v. Dauling.

Upon uſury pleaded to an action againſt the defendant, as indorſer of a note for 200*l.*, the caſe was, that one *Grace* took the note upon advancing 197*l.* when the note had three months to run, and at the three months end took another note for 200*l.* upon advancing 3*l.* for other three months. It was inſiſted, that this was not uſury, being a purchaſe out and out of the notes: and both parties becoming bankrupts, and the commiſſioners refuſing to let theſe notes be proved, a petition was preferred to the Lord Chancellour, who directed an iſſue upon them. And now *Lee*, Chief Juſtice, held, that this was uſury within the meaning of the ſtatute

12 *Ann.*

12 *Ann. c.* 16. which prohibits the taking more than 5 *l. per cent.* upon any contract directly or indirectly: however, he left it to the jury upon the queſtion, Whether this was to be deemed a purchaſe or a loan? who found it to be the latter, and the defendant had a verdict.

In debt on bond defendant pleads *quod corruptè agreatum fuit*, that intereſt ſhould be paid for it *above the rate of* 6 *l. per cent.*: plaintiff demurs: and held good; for that the *plea* ſhews not *what* intereſt, nor that the *bond was for the very money*, but only by intendment (to wit) *ſupra agreamento prædicto* the bond was given; and ſays not expreſsly *pro eadem pecunia*. Judgment *pro quer'*. For that they would not eaſily avoid a bond, and the corrupt agreement ought to be ſpecially and particularly ſet forth, and the *quantum* of intereſt, otherwiſe the plaintiff can never tell what to anſwer. 2 Show. 329. pl. 339. Henton v. Roffee.

In error of a judgment in the Palace-Court, wherein the plaintiff *declared that the defendant became indebted to him by bond in the ſum of* 107 *l.*; the defendant, without claiming oyer, *pleaded that he was indebted truly to the plaintiff in* 92 l. 5 s. 9 d., *and that by way of corrupt agreement for the forbearance* of that ſum for a *year*, *this bond was given*, &c. The plaintiff replied, *that the bond was given* pro vero & juſto debito, and *traverſed the corrupt agreement*. And upon demurrer to this replication, it was inſiſted that it was ill, becauſe the plaintiff did *not ſhew how much the juſt debt was*. *Sed non allocatur*: for there was ſufficient to induce the traverſe; and if it had been alleged, you could not have traverſed the inducement, and the declaration ſufficiently ſhews the debt. 6 Mod. 303. Villars v. Cary.

In debt upon a bond, defendant *pleaded* the ſtatute 12 *Car.* 2. of uſury, and ſaid, *that corruptè agreatum fuit*, *that he ſhould pay more than* 6 l. *per cent.* The plaintiff replied *quod non corruptè agreatum fuit*, and held a good replication; for if by *miſtake of the writer* the money was made payable without any corrupt agreement, it is not uſurious within the ſtatute. Freem. 264. pl. 286. Booth v. Cook.

The plaintiff declares upon a *promiſſory note for* 30 *l.* dated 4th *Feb.* The defendant *pleads that it was corruptly agreed* between him and the plaintiff, *that he ſhould pay* unto the plaintiff 45 *s. for the loan* of the ſaid ſum of 30 *l. for three months*, and then ſets out the laſt ſtatute againſt uſury, *&c.* It was excepted to this plea, that it was *not averred that the note was given ſubſequent to the late act againſt uſury*. To which it was anſwered and reſolved by the court, that by the date of the note it appears to be ſo. Fitzgibb. 130. Baynham v. Matthews.

In an *indebitatus aſſumpſit for* 10 *l. and a computaſſet for* 35 *l.* in the ſame declaration, the *defendant pleads the ſtatute of uſury* to the *indebitatus*, and *avers that both the indebitatus and* the *computaſſet were for the ſame cauſe of action*. It was reſolved, that the averment was naught; for the ground of the *indebitatus* is the debt, and the ground of the *computaſſet* is the account; and ſo it cannot be averred that there is the ſame cauſe of both, eſpecially as it is here, where one is for 10 *l.* and the other for 35 *l.* But *Hale* ſaid, he ſhould have pleaded the ſtatute to the *indebitatus*, and Freem. 367. pl. 475. Tayler v. Herbert.

then that afterwards they came to an account for the ſame wares, &c.

Sid. 285. pl. 21. Dande v. Currer.

On demurrer in debt it appeared that 500 *l.* was lent upon articles dated the 8th of *March*, to be paid at ſuch a time; and in the mean time *to pay* 15 l. *half-yearly from* November *before*. For cauſe of demurrer it was ſhewn, that it appeared by the declaration that the contract was uſurious; but it was anſwered, that the defendant ought to have pleaded that *corruptè agreatum fuit*, &c., and ſo given the plaintiff an opportunity to reply to it. But *upon reading the articles it was, Whereas money was lent*, &c. which might be in *November*, or before; and therefore judgment was given for the plaintiff.

Sir W. Jo. 409. pl. 2. Swailes v. Bateman.

Debt was brought on a bill to pay 7 *l.* the firſt of *May*, and on *default* of payment to pay 3 *s.* 4 *d.* *for every month* that it ſhall be in arrear after *May the firſt*. Defendant made no averment that the agreement was to pay the 3 *s.* 4 *d.* for every month *pro lucro intereſſe & diem dando ſolutionis*, but only with a *ſic* the ſaid ſum exceeded 8 *l.* *per cent.*, whereas he ſhould have averred that the ſame did exceed 8 *l.* upon the 100 *l.*, thoſe being the effectual words in the ſtatute. Judgment *pro quer.*'

Cro. Car. 501. pl. 1. Nevilon v. Whitley.

In debt on a bond for 100 *l.* dated the 12th *July*, &c. conditioned to pay 54 *l.* at *ſix months end*, the defendant pleaded the ſtatute 21 *Jac.* of uſury. The plaintiff replied that he lent the defendant 50 *l.* on the 12th of *July*, &c. for a year, and that the defendant was to pay for it 4 *l.* for the forbearance of one year, and that the plaintiff was not to demand it till the end of the year; *but* that *by miſtake of the ſcrivener it was made but for half a year, which he not knowing accepted it.* The defendant *rejoined that the ending was only for half a year*, and that he was to pay 4 *l.* for it for that time, *abſque hoc, that on the ſaid* 12*th of* July *it was agreed that the loan ſhould be, or that he ſhould forbear it for a whole year.* Upon demurrer it was objected that the plea was ill, becauſe it was *not pleaded, that corruptè agreatum fuit*, &c. And ſo the court, *abſente Bramſton*, held: and they all held the allegation, againſt the words of the condition to be good; for it is only ſhewing the true agreement; but they all held the rejoinder ill, becauſe in the traverſe the defendant had made the day (*viz.* 12th *July*) parcel of the iſſue, when he ſhould only have traverſed the agreement. But no judgment was given, becauſe the parties agreed.

Roll. Rep. 41. pl. 8. Idd v. Ellington.

The defendant borrowed 200 *l.* *of the plaintiff;* and *it was agreed* between them *that he ſhould pay the* 200 *l.* *at ſuch a day, and* 20 *l.* *for the intereſt for one year, and that certain lands ſhould be conveyed to the plaintiff, upon condition that if the money was paid at the day, then the grant ſhould be void.* The defendant *pleaded the ſtatute of uſury, and averred that the land was worth* 12 *l.* *a year, and ſo he had double uſe. The plaintiff replied, that upon the borrowing the* 200 *l.* *it was agreed that the defendant ſhould have the profits of the land until breach of the condition, and traverſed* that there was *an agreement that he ſhould have the profits, and alſo* 20 *l.* *for intereſt.* And upon a demurrer it was objected, that the replica-

tion was ill, becauſe the land being conveyed to the plaintiff, by conſequence, the profits are ſo too; and therefore he cannot aver *a verbal agreement againſt the deed*, that he had not the profits. But the plaintiff had judgment.

Tanfield, Ch. Baron, ſaid, that upon an information betwixt *Paramore* v. *Robinſon*, in *B R.* where *ſeveral contracts upon uſury being alleged, iſſue was joined, whether* it were *corruptè agreatum modo & formâ prout*, it was reſolved by all the Juſtices of *England* to be an ill iſſue; for he ought to have traverſed the agreements, becauſe they were ſeveral. Cro Ja. 544. pl 4. Heath v. Dauntley.

In debt on bond the defendant *pleaded the ſtatute* of uſury *made 6th of* Feb. 13 Eliz. (*whereas the parliament began 2d* Feb. 13 Eliz.) The plaintiff replied, that it was not made for uſury *contra formam ſtatuti modo & formâ prædict.* Though both parties agree that there is ſuch a ſtatute, yet the court knowing that there is not, and that therefore it cannot be *contra formam ſtatuti;* the court held that no judgment could be given for the plaintiff; and it being in the bar of the defendant, the court held it clearly ill, and that there ſhould be a repleader. Cro. El. 245. pl. 4. Love v. Wotton.

In *caſe*, &c. upon a ſpecial promiſe, the plaintiff *ſet forth that he was poſſeſſed of ſeveral pieces of hammered money*, &c. *and that the defendant in conſideration the plaintiff would pay that money, being in number and tale* 300 l. *he promiſed to repay* 300 l. *of new money, together with* 4 l. 10 s. *more for the intereſt of every* 100 l. *for eight months*, &c. *and then declares upon an* indebitatus aſſumpſit *for* 313 *l.* 10 *s.* After verdict, it was moved that the contract was uſurious, it being to pay 4 *l.* 10 *s.* for the intereſt of 100 *l.* for eight months: but *per tot. cur.* judgment was given for the plaintiff. It was agreed, that if it had appeared by the plaintiff's own declaration that the contract was uſurious, and could not be otherwiſe, judgment ought to be given againſt him; but that it *does not appear here that the contract muſt neceſſarily be uſurious; and the jury having found the* aſſumpſit, *the court could not intend uſury*, but the contrary. And *Powell*, J. obſerved, that the conſideration of the promiſe here is, *viz.* that the ſaid plaintiff would *pay* to the ſaid defendant the ſaid 300 *l.*; ſo that here *is no loan*, without which there can be no uſury; and they would not intend a loan, unleſs the jury had found one. Lutw. 271. 273. Yeoman v. Baritow.

The defendant, *in conſideration of* 12 *l.* paid him by the plaintiff, gave *bond to pay* the plaintiff 14 *l. if he lived ſix months after* the date of the bond. There was a plea and demurrer, and it was objected, that it appears by the very condition of this bond, That the contract was uſurious, it being to pay 14 *l.* for 12 *l.* in ſix months after the date of the bond; though this might have made the bond void, in caſe the ſtatute had been pleaded, yet, that not being done, this objection comes too late. 3 Salk. 101 pl. 7. cites Lutw. Grange's caſe.

[If there is an agreement to pay legal intereſt, and a premium is paid down over and above the intereſt, the agreement is uſurious and void. But the penalty under the ſtatute of *Anne* is not incurred, if the premium itſelf does not exceed legal intereſt, nor till more than legal intereſt is actually received; ſo that an action Fiſher v. Beaſley, Doug. 235.

may be brought for the penalty, though more than a year has elapſed ſince the payment of the premium, if it is not a year ſince that which exceeded legal intereſt has been paid.

Lloyd v. Williams, 3 Wilſ. 250. 2 Bl. Rep. 792. S. C.

But, where one lends 100*l.*, and takes 6*l.* 5*s.* for the intereſt thereof for three months by way of advance at the time of lending, the penalty is that inſtant incurred, and the action for it muſt be brought within a year from that time.

Tate v. Wellings, 3 Term Rep. 531.

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[The defendant lent 2000*l.* to the plaintiff on mortgage, with a uſurious clauſe in the deed, that he ſhould have 40*l.* as a pretended ſalary for receiving the rents. The deed was made and executed in *London:* the lands lay in *Middleſex:* the account was ſettled in *London*, and the receipt for the balance ſigned in *London*, but the draft given for it was upon a banker in *Middleſex*. It was adjudged, that the venue was properly laid in *London;* for not only the uſurious taking, but alſo the contract, by which the defendant was appointed receiver, were both in *London.*]

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[But, where in an action on the ſtatute for the penalty, the declaration ſtated a ſpecifick ſum of money to have been lent, (in which the uſury conſiſted), but the evidence was, that the loan was *part in money* and the reſt in goods of a known value, which the borrower *agreed to take as caſh*; it was holden to be good evidence to ſupport the declaration.] Barbe v. Parkere, 1 H. Bl. 283.

In a *qui tam* on the ſtatute of uſury, the Chief Juſtice refuſed to let the party to the contract be a witneſs to prove the repayment of the money, becauſe till that was proved he was no witneſs at all. 1 Str. 633. Shank, *qui tam*, v. Payne.

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may be brought for the penalty, though more than a year has elapſed ſince the payment of the premium, if it is not a year ſince that which exceeded legal intereſt has been paid.

Lloyd v. Williams, 3 Wilſ. 250. 2 Bl. Rep. 792. S. C.

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1 Str. 498. Ld. Barnard v. Saul.

On a motion for leave to plead double, the court declared, that on *non assumpsit* the defendant might give in evidence a usurious contract, because that makes it a void promise; but in the case of a specialty, it must be pleaded. And on the trial the defendant was admitted to that evidence upon the general issue, and the plaintiff was nonsuit.

Wager of Law.

(a) Actions of debt are the most common cases in which defendant may wage his law; but he may likewise wage his law in actions of *detinue*, and other cases, as also in real actions, as will appear in the course of this title. (b) In some cases, however, the *plaintiff* may wage his law. See letter E. (c) According to some, the compurgators should be eleven in number, for which reason every wager of law is said to countervail a jury, as the defendant must wage his law, *de duodecimo manu*, that is by himself and eleven more. Others hold *twelve* to be necessary: but, according to some, less than eleven will suffice. The defendant is sworn absolutely *de fidelitate*, and the compurgators *de credulitate*, that is, that they believe what he swears to be true. 33 H. 6. f. 8. 1 Inst. 295. 2 Shep. Abr. 190. 2 Vent. 171 Anon.

N. B. It has been said, that compurgators are not absolutely necessary unless the plaintiff demands them. 2 Keb. 360. Puckridge v. Brown.

WAGER of law is a particular mode of proceeding, whereby, in an action of debt (*a*) brought upon a simple contract between the parties, without deed or record, the defendant (*b*) may discharge himself by swearing in a court in the presence of compurgators, (*c*) that he oweth the plaintiff nothing in manner and form as he hath declared. And this waging his law, is sometimes called *making* his law.

(d) When a defendant has waged his law it is a perpetual bar to the plaintiff's demand, for the law presumeth that no man will forswear himself: but men's consciences, as Lord Coke observes, are grown so large, especially in this case which passes with impunity, (since no indictment for perjury lies in wager of law,) that it is now become customary, instead of bringing actions of debt, to bring actions upon the case upon the defendant's promise, wherein he cannot wage his law. 1 Inst. 295. 1 Vent. 296.

Actions of *detinue* likewise are now seldom brought, actions of *trover and conversion* having taken place in their stead, where the conversion changes the *detinue to an action on the case*.

For the better understanding of this title, which is now in a great measure obsolete (*d*), it will be necessary to consider the following heads:

(A) The Reason for allowing the Wager of Law.

(B) The Manner of waging Law.

(C) At what Time Law may be waged.

(D) In what Cases Law may be waged, and in what not.

(E) What Persons may wage their Law.

(F) Against

(F) Againſt whom Wager of Law lies.

(G) In what Caſes the Defendant is barred from waging his Law, by having examined the Plaintiff or his Attorney.

(A) The Reaſons for allowing the Wager of Law.

THE reaſon wherefore, in an action of debt upon a ſimple contract, the defendant may wage his law, is, for that the defendant *may ſatisfy the party in ſecret*, or before witneſſes, and all the witneſſes may die, ſo the law doth allow him to wage his law for his diſcharge. And this is peculiar to the law of *England*, and no miſchief iſſueth hereupon; for the plaintiff may take a bill or bond for his money; or, if it be a ſimple contract, he may bring his action upon his caſe upon his agreement or promiſe, which every contract executory implieth, and then the defendant cannot wage his law. 2 Inſt. 45.

It hath been ſaid, however, that the *only true reaſon of* wager of law is the *inconſiderableneſs of the ground of the plaintiff's demand*, and it ſuffices that the nature of the defendant's diſcharge be of equal validity with the ground of the plaintiff's charge. *Per Hatſel*, J. 12 Mod. 670. the City of London v. Wood. It is an argument, ſays Hatſel, J. that the matter is of no great value that the plaintiff did not take care to have better ſecurity for it than the ſlippery memory of man, and the uncertainty of a verbal contract; ſo that ſince the tie was ſo ſlight, it is no wonder if the law will ſlightly diſcharge it.

Originally it was *not only a privilege of the defendant* to diſcharge himſelf, but one which the *plaintiff* had when he had no witneſs of his debt, to put the defendant under a neceſſity of giving him his oath to diſcharge himſelf: ſo it was a kind of equity in law, that the plaintiff might put him to take his oath that he owed nothing to him, or confeſs the debt, rather than the plaintiff ſhould loſe his debt, in caſes where he had no witneſſes of it at all, or had ſome who were then dead. *Per Holt*, Ch. J. 12 Mod. 678. the City of London v. Wood.

The plaintiff's bare affirmance was formerly ſufficient to put the defendant to wage his law; but it is provided by *Magna Charta*, that "No bailiff ſhall put any man to his law, nor to an "oath, upon bare ſaying, without witneſſes brought in." Before this, as has been premiſed, the plaintiff, on his declaration on bare affirmance, might make the defendant ſwear there was nothing due. At this day, if the plaintiff produce witneſſes to prove his demand, the court may put the defendant to wage his law; and in ſuch caſe the defendant is not at liberty to croſs-examine, any more than where the plaintiff in a prohibition produces witneſſes to prove his ſuggeſtion. 2 Salk. 683. Mood v. the Mayor of London.

(B) The Manner of waging Law.

2 Lill. Abr. 824. 2 Vent. 171. Anon. 2 Salk. 682. Anon.

THE manner of *waging of law* is thus: he that is to do it muſt bring ſix compurgators with him into court, and ſtand at the end of the bar towards the right-hand of the Chief Juſtice; and the ſecondary aſks him, Whether he will *wage his law?* If he anſwers that he will, he lays his right hand on the book, then the judges admoniſh him and his compurgators to be adviſed, and tell them the danger of taking a falſe oath; and if they ſtill perſiſt, the ſecondary ſays, and he that *wageth his law* repeats after him: *Hear this, ye juſtices, that I* A. B. *do not owe to* C. D. *the ſum of*, &c., *nor any penny thereof in manner and form as the ſaid* C. D. *hath declared againſt me: ſo help me God.* The compurgators then ſeverally make oath, that they believe he ſwears truly. But, before the defendant takes the oath, the plaintiff is called by the crier thrice; and if he do not appear he becomes nonſuited, and then the defendant goes quit without taking his oath; and if he appear, and the defendant ſwear that he owes the plaintiff nothing, and the compurgators give it upon oath, that they believe he ſwears true, the plaintiff is barred for ever; for when a perſon has *waged his law*, it is as much as if a verdict had paſſed againſt the plaintiff; if the plaintiff do not appear to hear the defendant perform his law, ſo that he is nonſuit, he is not barred, but may bring a new action.

(C) At what Time Law may be waged.

3 Bulſt. 316. And the defendant cannot afterwards waive it without the plaintiff's conſent, and betake himſelf to the country, and upon his non-appearance a *deficit de lege* was entered. Bulſt. 186. Harriſon v. James. —— But there is a caſe where, after the roll was marked with a *deficit de lege, and coſts aſſeſſed*, it was moved and prayed, *ſedente curia*, that the defendant might be demanded again, and it was granted, and then defendant made his law. Noy, 42. Anon.

DAY given for waging law is peremptory. *Per* three juſtices againſt one.

Where the defendant wages his law *inſtantèr*, that is, the ſame term without day given over, the plaintiff need not be called; conſequently, cannot be nonſuited. Thus—

Sid. 366. Buckeridge v. Brown. The reporter ſays, *vide* that when defendant comes *inſtantèr* to wage his law, or at another day in the ſame term, to which the plaintiff has imparled, the plaintiff ſhall not be demanded, nor can he be nonſuited. *Ibid.* cites 14 H. 4. c. 19. b. 3 H. 6. c. 50. 2. S. C. 2 Keb. 360. by the name of Puckeridge v. Brown.

In debt by aſſignees of commiſſioners of bankrupts, defendant came in and *waged his law* inſtantèr, and it was debated if the plaintiff might be nonſuited; and at length it was agreed, inaſmuch as the defendant came *inſtantèr*, that the plaintiff cannot be *nonſuited*; for which reaſon the *plaintiff was not called*, but the defendant waged his law; and ſo the plaintiff was barred.

Br. Ley Gager, pl. 85 cites 3 H. 4. c. 2.

But in *debt* where the *defendant tendered to make his law immediately that he owed nothing*, &c., becauſe the plaintiff appeared in court, it was awarded that the plaintiff ſhould make his law; and this

this was the folly of the plaintiff; for *he might have imparled to the law, and then at the day he might have been nonſuited.* But *Brooke* makes a *quære*, if he may be nonſuited at another day in the ſame term. Brooke, tit. Nonſuit, pl. 10. S.C. ſays, that if he had imparled to the law, ſuch imparlance ought to be to another term.

So in debt, the defendant tendered his law, and the *plaintiff imparled to a day in the ſame term;* there the *plaintiff ſhall not be demanded, nor be nonſuited;* for his appearance was of record the ſame term, and if he refuſes the law he ſhall be barred. Br. Ley Gager, pl. 96. cites 3 H. 6. c. 49.

It is ſaid that the defendant cannot pray to be admitted to wage law *inſtanter*, after imparlance, but before he may, and then the plaintiff cannot be nonſuit, if the defendant perfect his law: but, if he wage his law after imparlance, the plaintiff may be nonſuit. 2 Lill. Abr. 825.

In debt, the defendant waged his law, and when he came to perform it *the plaintiff ſaid, that he who now came is another of the ſame name*, for his action is againſt *J. S. the elder;* and he who now appears is *J. S. the younger*, and prayed his judgment. *Quære*, for the averment was not granted or denied. Br. Ley Gager, pl. 91. cites 5 E. 4. c. 5.

In debt, the defendant had *day given* to wage his law, and *at the day defendant was ſick of a burning fever*, whereupon the court was moved for another day for the defendant to come and wage his law, and offered to make all this good by an affidavit; but the court refuſed, and adviſed him to plead to the country, and ſo he did. 3 Bulſt. 263. Smink v. Barker.

In *debt upon arbitrement* the *defendant imparled*, and *came back the ſame term, and tendered his law;* and *per cur.* he ſhall have his law. Br. Ley Gager, pl. 41. cites 8 H. 6. c. 10.

So in *detinue*, the *defendant pleaded in bar, and after relinquiſhed it and waged his law*, and well; for a man may relinquiſh his plea, and plead the general iſſue, and this ſhall be before the plea entered. Br. Pleadings, pl. 119. cites 2 E. 4. c. 13.

In a *præcipe quod reddat*, the tenant came *at the grand cape* and waged his law of *non-ſummons*, and at the day, *&c.* came to make his law, and the *demandant offered to waive the default, and prayed that the tenant may plead in chief. Per Finch*, you cannot do ſo unleſs the *tenant* will conſent to it; and the *tenant* was thereof demanded, and *would not conſent*, therefore he waged his law, and the demandant took nothing by his writ: but *at the firſt day when the tenant offered his law, the demandant might have releaſed the default*, as it ſeems. Br. Ley Gager, pl. 82. cites 42 E. 3. c. 7.

In a *præcipe quod reddat*, where *eſſoign is caſt for the tenant at the ſummons returned, and* by his default *grand cape iſſued;* there, he cannot wage his law of non-ſummons at the day, unleſs he *ſurmiſes that the eſſoign was not caſt by him.* Br. Ley Gager, pl. 90. cites 36 H. 6. c. 23. And ſee 10 H. 6. c. 9. that if he had ſo ſurmiſed, he might wage his law. *Ibid.*

(D) In what Caſes Law may be waged, and in what not.

12 Mod. 670. the City of London v. Wood.

WAGER of law is *allowable in five caſes*. 1ſt, In *debt* upon *ſimple contract*, which is the common caſe. 2d, In *debt upon an award* upon a *parol ſubmiſſion*. 3d, In *an account againſt a receiver* for receipts by his own hands. 4th, In *detinue*, though the bailment were by the hands of another. 5th, In *an amerciament in a court-baron* or other inferior courts not of record; and in every of theſe inſtances, the action is grounded on a feeble foundation, and of ſmall conſideration in law. *Per Hatſell*, J.

Note; This ſummons muſt be on the tenant's land, and if againſt an heir, muſt be on the lands, which did deſcend; or on default, the tenant at the grand cape, may wage his law of non-ſummons.

It is to be obſerved likewiſe, that there is a wager of law of non-ſummons in actions real, as, where upon ſummons againſt a tenant, he wages his law, ſaying, that he was not ſummoned according to the law of the land. Thus—

Br. Ley Gager, pl. 57. cites 24 E. 3. c. 46.

If ſummons in *præcipe quod reddat* be ſerved fifteen days before the firſt day of the return of the writ, the tenant may wage his law of non-ſummons; for fifteen days before the fourth day of the return will not ſerve.

Br. Ley Gager, pl. 27. cites 50 E. 3. c. 16. *And* per *Belk.* the *vouchee*

So it is ſaid in writ of *deſceit*, that if the ſheriff returns *in præcipe quod reddat, that the tenant is ſummoned by* J. N. *and* J. C., *where he was not ſummoned but by one of them*, the tenant may wage his law, *that he was not ſummoned according to the law of the land. Per Fulthorp.*

in præcipe quod reddat ſhall not wage his law, *that he was ſummoned upon the ſummons*; for he need not ſave his default at the *grand cape ad valentiam: but, if he be returned ſummoned, where he was not ſummoned, and after grand cape ad valentiam* iſſues, he ſhall have *deſceit* of the return, *&c. Ibid.*

12 Mod. 679. the City of London v. Wood.

But in 33 *H.* 6. *c.* 8. in a *præcipe quod reddat*, the *tenant made default*, but appeared on the return of the grand *capias*, and *pleaded non-ſummons*, and would conclude to the country, where the proper trial was by wager of law of non-ſummons; and the queſtion there was, if he could waive his plea of wager of law, and betake himſelf to a plea concluding to the country? And the better opinion there is, that he could not put himſelf upon his country, and decline this wager of law; and that caſe is plainly out of the ſtatute of *Magna Charta*, becauſe it is not debt, nor *ſimplex loquela*, but a proceſs of non-ſummons, from which he was to ſave himſelf. *Per Holt*, Ch. J.

Br. Ley Gager, pl. 103. cites 1 E. 5. c. 2.

It has been ſaid, that a man may wage his law of *non-ſummons in re-ſummons*, as well as he may in the original; *per Brian* and *Choke*, but *per Cateſby contra*. *Quære*; and the writ was returnable 15 *Trin.* and the *ſummoners ſummoned him about the* 15*th of* Corpus Chriſti; and therefore, *per Choke*, he may wage his law of non-ſummons, that he was not ſummoned according to the law of the land; for the law is, that he *ſhall be re-ſummoned by the day in the*

the writ; but *Cateſby* ſaid, that he cannot wage his law here by conſcience, nor can he wage his law in re-ſummons.

Where things are part real and part perſonal, the defendant may wage his law ſometimes for the whole, and ſometimes for part only, thus—

In *detinue of a box with charters* and muniments, if the plaintiff *counts not of any charters in particular*, the defendant may wage his law of the whole, 19 *H.* 6. 9.; becauſe before the ſhewing of it, the box and all in it was but a chattel. 2 Roll. Abr. 108.

If detinue be brought *for a cheſt ſealed, with money and charters of land in it*, the law lies of the whole. *Id. ibid.*

But otherwiſe it is, if he *declares of certain charters in particular*, and if the *writ be not that the cheſt was ſealed.* *Id. ibid.*

In detinue of certain charters and muniments contained in a cheſt, if plaintiff declares of one charter in particular, the defendant may wage his law of the reſidue. *Id. ibid.* In ſuch caſe the defendant waged his law as to all but this particular charter, and did it immediately: and the reaſon ſeems to be, that when it is in a cheſt incloſed, the charters are of the nature of the cheſt, which is only a chattel: *contra* of charter ſpecial; for of this he cannot wage his law, becauſe it *concerns franktenement.* Br. Ley Gager, pl. 61. cites 14 H. 6. c. 1.

But in *no caſe where* a *contempt, treſpaſs, deceit, or injury is ſuppoſed in the defendant*, ſhall he wage his law; becauſe the law will not truſt him with an oath to diſcharge himſelf in thoſe caſes. 1 Inſt. 295. a.

Likewiſe where the *matters charged are facts notoriouſly known*, in ſuch caſe there are no precedents of wagers of law. *Per Hatſell*, J. 12 Mod. 671. *Civit.* London v. Wood. And *per Holt*, Ch. Juſt.—The *ſecrecy of the contract*, which raiſes the debt, is the reaſon of the wager of law. *But*, if the debt *ariſe from a contract* that is *notorious*, there ſhall be no wager of law. In debt upon a *contract for a ſum in groſs*, wager of law will lie; *but*, if debt be brought *for rent* due *upon a parol leaſe*, it will not lie; and the reaſon is, becauſe it is in the realty, and ariſes from the taking of the profits of the land, and occupation of it in the country, and ſo the notoriety of the thing excludes the defendant from waging his law. *Ibid.* 681.

Agreeable hereto it was ſaid by *Holt*, Ch. J. that in account, if the receipt was by the defendant, the defendant may wage his law, but not if by the hands of a third perſon (*a*): it is true, the law is otherwiſe in detinue on a bailment; for though the bailment was by the hands of a third perſon, the defendant may wage his law; but here the bailment is not traverſable, but the detainer, and that is the point of the action, and the delivery might be private. 2 Salk. 683. Mood v. the Mayor of London. (*a*) Becauſe the receipt is traverſable in this action, 2 Roll. Abr. 109., and *becauſe it appears*, from the nature of the action, *that a third perſon can prove the receipt, per Holt*, Ch. J. 12 Mod. 679.; but in account *by the baron of receipt by the defendant, by the hands of the feme of the plaintiff*, the defendant may wage his law; for the baron and feme are one perſon in law; and therefore it is an immediate receipt of the plaintiff himſelf. Br. Ley Gager, pl. 54.

By the 4 & 5 *Annæ* 16. it is enacted, that actions of *account* may be brought *againſt a bailiff or receiver* for receiving more than his juſt ſhare, and an action of *account was brought* upon this ſtatute *againſt defendant, as bailiff ad merchandizandum*, who waged his law; and upon demurrer, it was objected that wager of law would not lie againſt a bailiff *ad merchandizandum; but if* the action had been brought *againſt a receiver*, and *plaintiff did not ſhew by whoſe hands*, there, wager of law would lie; and ſo it was adjudged in this caſe for the plaintiff. 8 Mod. 303. Page v. Barns.

There

10 Rep. 103. a. in a nota of the reporter, in Alfride Denbawd's caſe.

There is no act of parliament in expreſs words which takes away wager of law in action of debt upon arrearages of account; but at the common law the defendant ſhall have his law in action of debt, brought upon arrearages of account, whether the account be before one auditor, or many, as appears in 38 *H.* 6. *f.* 6. *a.* But the *reaſon why the defendant ſhall not wage his law when the account is made before auditors, is upon the ſtatute of Weſt.* 2. *c.* 11. for now this ſtatute *has made the auditors judges of record*, becauſe they are empowered thereby to commit the defendant to priſon, which none can do but judges of record.

12 Mod. 671. *Civit.* London v. Wood.

Alſo, when the matter of the charge is pregnant with matter of law, there ought to be no wager of law, for that were to ſwear to the law; as in debt againſt huſband for clothes taken up by the wife, the huſband ſhall not wage his law; becauſe it is a point of law, whether he be liable or no, *viz.* whether the clothes were for neceſſary apparel of the wife, without which he is not liable.

2 Salk. 683. Mood v. the Mayor of London.

In debt on an arbitrament (it is intended where the ſubmiſſion is by parol) the defendant may wage his law; becauſe, though the arbitrators, who are ſtrangers, are concerned, yet the ſubmiſſion might be ſecret; and that is the foundation from whence the debt ariſes.

Id. ibid.

In debt for an amerciament in a court-baron, the defendant may wage his law. The reaſon is, becauſe the matter is of ſmall value which concerns the lord only, tranſacted *in pais* which might be without his knowledge. But in debt on a judgment in a court-baron, the defendant cannot wage his law; for the judgment could not be but by confeſſion or verdict, and it was in a proper court; all which the defendant cannot by his bare oath falſify; and the authorities to the contrary are not law; and ſo it is in debt on a judgment in a court of ancient demeſne.

Id. 684.

In debt for rent on a leaſe-parol, the defendant cannot wage his law, becauſe his occupation is notorious, which is a better reaſon than becauſe it favours of the realty; and ſo it is in account againſt a bailiff for the ſame reaſon, his management and tranſaction being notorious.

Id. ibid. (*a*) The maſter ſhall not wage his law, becauſe the labourer is compellable to ſerve by the ſtatute; but it is otherwiſe, if he be not retained according to the ſtatute.

In debt brought by a gaoler againſt his priſoner for meat and drink, the defendant, *per Holt*, cannot wage his law, not becauſe the gaoler is obliged to find him victuals; that is not true, as appears by *Plowd.* 68. *a.*; but becauſe the defendant is in durance, and the plaintiff cannot take ſecurity from him for repayment; for a bond will be void, ſo that he muſt be content with a promiſe: and he did not deny the caſe of 9 *Rep.* 87. *b.* 88. *a.* which was debt by a labourer; it is but juſt that the plaintiff ſhould prove he was retained, rather than that the defendant ſhould be put to wage his law (*a*).

1 Inſt. 295. a.

9 Rep. 87. b. Pinchon's caſe.

But, if a victualler or common innkeeper bringeth an action for his gueſt's victuals delivered to him, the gueſt may wage his law; for a victualler or innkeeper is not compellable to deliver

victuals till he be paid for them in hand: and therewith agreeth 10 *H.* 7. *c.* 8. *a.*

In debt on a bye-law made by a company, the defendant in a caſe cited to be in *B. R.* about two years before, waged his law. But *Holt*, Ch. Juſt. ſaid it was, becauſe the counſel for the plaintiff did not challenge it; for he wondered at it then. But this is not ſo ſtrong as debt on a bye-law by a corporation; for this obliges all ſtrangers without notice; but the other only their own members, till notice: And the Chief Juſtice denied the caſe in *Co. Ent.* 118. and the caſe 2 *Ro. Abr.* 106. *pl.* 9. 2 Salk. 684. Mood v. Mayor of London.

Wager of law lies not *in quo minus*, becauſe the *king's revenue* is remotely concerned, upon ſuggeſtion, that the plaintiff is indebted to the king, and leſs able to pay him by the defendant's detainer of his debt. *Per Hatſell*, Juſt. who ſaid this was given as a reaſon, in *Slade's* caſe. 4 Rep. 95. b. in Slade's caſe. 12 Mod. 671. the City of London v. Wood.

In debt upon a penalty given by ſtatute, the defendant ſhall not wage his law. 1 Inſt. 295. a.

The very *cuſtom of London* excludes wager of law in ſome actions, as in *debt for diet*, 1 *E.* 4. *c.* 6. *Bro. Examination*, 18. the ſtatute of 38 *E.* 3. *c.* 5. before which no wager of law could be againſt a *Londoner*. *Per Hatſell*, Juſt. 12 Mod. 671. cites Br. Ley Gager, 94.

So, a *preſcription* prevents wager of law, and no man can deny it upon oath. *Per Holt*, Ch. Juſt. 12 Mod. 683. the City of London v. Wood.

Wager of law was denied in *debt for ſcavage* ariſing by *preſcription*, and that confirmed by act of parliament. 2 Vent. 261. Mayor, &c. of London v. Dupeſter. 2 Lev. 106. S. C. by name of Mayor, &c. of London v. Deputee.

In debt for a *duty* growing by a bye-law, if the *bye-law* be *authorized by letters patent*, no wager of law lies. Vent. 261. the Mayor, &c. of London v. Dupeſter.

So, in caſe for *toll* granted by letters patent. Vent. 261. cites 20 H. 7.

In action of debt for toll by *preſcription*, you cannot wage your law: *per* Hale, Ch. J., who aſked if they could ſhew a precedent where a man can wage his law in an action brought upon a preſcription for a duty. 1 Mod. 121. pl. 26. Draper v. Bridewell.

Where a perſon of quality intending a marriage with a lady, preſented her with a jewel, and the marriage not taking effect, he brought an action of *detinue* againſt her, and ſhe taking it to be a gift, offered to wage her law; the court was of opinion, that the property was not changed by this gift, being to a ſpecial intent, and therefore would not permit her to do it. 2 Mod. 141. Beaumont v. ———.

(E) What Perſons may wage Law, and what not.

AN alien ſhall wage his law in that language he can ſpeak. 1 Inſt. 295. a.

A man outlawed, or attainted in an attaint, or upon an indictment of conſpiracy, or perjury, or otherwiſe, whereby he becomes infamous, ſhall not wage his law. *Id. ibid.*

A man

Id. ibid. The reaſon why an infant cannot wage law, is ſaid to be becauſe he cannot take an oath. 11 H. 6. 40.

A man under the age of twenty-one years ſhall not wage his law; but a feme covert, together with her huſband, ſhall wage her law.

Id. ibid. Wherefover a man is charged as executor or adminiſtrator, he ſhall not wage his law, for no man ſhall wage his law of another man's deed.

11 H. 6. f. 40. b. *So*, where *two* ought to have their law, and *one is under age*, both ſhall be ouſted; becauſe the infant cannot, and both ought to join in plea.

18 E. 3. f. 53. A man who is *dumb and not deaf*, may wage his law *of non-ſummons*, and make it, and ſhew his aſſent by ſigns. Adjudged.

30 E. 3. f. 4. b. In an *account* if the defendant before *auditors pleads payment, or other things given in ſatisfaction*, the *plaintiff may wage his law* of it, though he be plaintiff.

Br. Diſceit, pl. 11. cites 50 E. 3. c. 16. *Tenant who is ſummoned by one ſummoner where there ought to be two, may wage his law* of non-ſummons, according to the law of the land; but *vouchee ſhall not wage his law of non-ſummons* upon the writ of ſummons.

Br. Ley Gager, pl. 32. cites 12 H. 4. c. 24. In *formedon againſt a feme* who made default, and *grand cape* iſſued returnable 15 *Mich.*, before which day *ſhe took baron*, and at the day appeared and waged her law of *non-ſummons*; and the feme made her *law alone without her baron*, and the writ abated.

Br. Ley Gager, pl. 81. cites 33 H. 6. c. 32. *per* Litt. He who is *attainted of any falſity*, or *is perjured*, ſhall not wage his law.

Br. Ley Gager, pl. 40. cites 21 E. 4. c. 49. In *account*, the *defendant* upon his account *alleged tallies of the plaintiff, by which he had received certain of the money*, and the *plaintiff waged his law, that they were not his tallies*; and it was admitted; and ſo ſee that the *plaiutiff* may wage his law, and by it ſhall charge the defendant.

Cro. Fliz. 790. hyfield v. Barnfield. A *bailiff* may not wage his law, but a *receiver* may. *Per* Holt, Ch. J. The reaſon the book gives is, becauſe it is in the realty, which is as much as to ſay, becauſe it is notorious to the country: becauſe the country take notice of his looking after the manor, and have thereby an opportunity of knowing that he received the rents. 12 Mod. 681.

Hob. 244. Eſſington v. Bourcher. *A.* brought *debt upon a joint contract, againſt* B., C., D., *and* E.—E. *was outlawed*, B., C., *and* D. *appeared by a joint ſuperſedeas.* B. *tendered his law*, that he with the reſt did not owe. C. *and* D. *plead nil debent per patriam.* It was inſiſted, that *B.* ſhould not be admitted to his law alone, becauſe they were all charged as one defendant, being for a joint debt, and ſo they muſt all anſwer together. But this was held to be unreaſonable; for if ſo, then by joining others with me, as joint defendants, I muſt be ſubject to their plea, though they would confeſs the action; and though defendants may not ſever in dilatories, yet in bar they may: And after divers motions and precedents produced, *B.* was received to his law, and the plaintiff nonſuited.

(F) Againſt whom Wager of Law lies.

IN an *action brought by the Prince of Wales* the defendant ſhall wage his law. 2 Roll. Abr. 110.

In a debt by *a merchant ſtranger* it lies not. Palm. 14. Godfrey and Dixon's caſe.

Where one is *indebted by ſpecialty to a man attainted*, the king ſhall have it, *&c. contra*, if it be without ſpecialty; for there the debtor may wage his law againſt the perſon attainted: *contra againſt the king*, though it was *upon contract only*: and therefore he ſhall be in a worſe caſe than he was before, and ſo the king ſhall not have the debt. *Per Hamm* and *Holt*, *quod non negatur*. Br. Ley Gager, pl. 25. cites 49 E. 3. c. 5. A man cannot wage his law againſt the king.

Br. Ley Gager, pl. 72. cites 50 E. 3. c. 1. - 4 Rep. 95. b. in a note of the reporter it is ſaid, that in every *quo minus* in the Exchequer, brought by the king's debtor againſt one who is indebted to him upon ſimple contract, the defendant ſhall not have his law, for the benefit of the king, as appears in 8 H. 5. Ley, 66. 10 H. 7. c. 6. and yet there the king is not party; *à fortiori* where ſuch debt or duty is forfeited to the king, and he is the ſole and and immediate party.——For *debt forfeited to the king by common law* no *ley gager* lies. Cro. C. 187. Morgan v. Green.

In a *quo minus in Scaccario* againſt him who *uſurped upon the poſſeſſion of the king which was leaſed to the plaintiff*, ſo that he could not pay his farm to the king, the defendant may wage his law, as appears in a ſhort note there, where it is ſaid, that in 4 *E.* 4. it was adjudged that a man may wage his law in a *quo minus*; but *contra anno* 8 *H.* 5 tit. *Ley*, pl. 66. in *Fitz.* which was agreed for law. 35 *H.* 8. Br. Ley Gager, pl. 102. cites 32 H. 6. c. 24.

In debt by *aſſignee of commiſſioners of bankrupts* the defendant pleaded *nil debet*, and waged his law: and the court held that he might, though the intereſt and power to ſue in his own name be good to the plaintiff by the ſtatute of bankrupts. But otherwiſe, if the duty itſelf had been originally due by the ſtatute. Noy, 112. Oſborne v. Bradſhaw, cites 10 H. 7. c. 18.

If an *infant* be *plaintiff*, the defendant ſhall not wage his law. 1 Inſt. 295. a.

An action doth not lie againſt an *executor* upon a *conceſſit ſolvere* of the teſtator upon a ſpecial cuſtom, *per Rolle*, Ch. Juſt. for this would be to charge an executor in an action of debt, where he may by the law wage his law, and an action of debt lies not againſt the executor upon a ſimple contract made by the teſtator. *Adjournatur.* Sti. 199. Hodges v. Jane.

(G) In what Caſes the Defendant is barred from waging his Law, by having examined the Plaintiff or his Attorney.

THE defendant's right of examining the plaintiff, or his attorney, is founded on the 5 *H.* 4. *c.* 8. by which it is provided, That

To eſchew miſchiefs which be as well within London *as other places, of that diverſe fained ſuits of debt have been taken by the people of the ſaid* If before this ſtatute a man had

entered into an account before two auditors for a thing which lay not in account, and they found him indebted, upon which the other brought writ of debt

ſaid places againſt diverſe people, ſurmiſing that they accounted before their apprentices, and ſometimes other their ſervants, auditors aſſigned, of diverſe receipts, duties, and contracts had betwixt them, and that they were found in arrearages upon the account in diverſe great ſums, where there was never receipt nor duty betwixt ſuch parties, to the intent to make them againſt whom ſuch ſuits were taken, to put them in inqueſt, and to put them from the waging of their law: the judges before whom ſuch actions ſhall be ſued in cities and boroughs ſhall have power to examine the attornies, and others, and thereupon to receive the defendants to their law, or to try the ſame by inqueſt after the diſcretion of judges.

againſt him, it was no plea for the defendant, that the matter lay not in account; for it was his folly to enter into the account; and ſo at the common law the defendant was without remedy. But now by this ſtatute he may tender his law, and pray that the party be examined, whether it lies in account or not, and if it be found that it does not, the defendant ſhall make his law and go his way; but by the common law, the defendant ought to anſwer to the debt, which is the end of the account, and the judgment of the auditors, and the matter of account is only conveyance. *Per* Frowike, Kelw. 82. b. pl. 3. —— It ſeems, by the meaning of this ſtatute of the examination of the attorney of the plaintiff in debt upon arrearages of account before auditors, *the wager of law does not lie, but* that *nihil debet per patriam* ſhall be received in debt upon arrearages of account before auditors. *E contra*, 50 E. 3. againſt *gaoler, for eſcape of one condemned before auditors aſſigned.* Dy. 145. pl. 63. Wiſe's caſe.

Br. Examination, pl. 18. cites 19 H. 6. c. 43.

In debt upon arrears *of account*, the *defendant tendered his law and prayed that the plaintiff be examined*, and *ſo he was, and ſaid* upon oath *that it is as he has counted*, by which the defendant was compelled to anſwer without his law: and ſo ſee that where the defendant prays that the plaintiff be examined or ſworn, this is peremptory to the plaintiff in this point, and ſo is the *ley gager* of the part of the defendant, and ſo is the oath of the plaintiff in *London* by the cuſtom, where if the defendant prays that the plaintiff ſhew his declaration, and he do ſo, there, the defendant by this ſhall be condemned.

Br. Examination, pl. 15. cites 14 H. 4. c. 19. If the attorney refuſes to be examined,

So, *in debt upon arrears of account*, defendant *prayed that the plaintiff's attorney be examined if the matter lies in account*; and ſo he was, notwithſtanding that no iſſue was tendered; and upon examination of the attorney, *it appeared that it was for ſtuff bought by the defendant of the plaintiff*, for which he tendered his law and was admitted.

the defendant ſhall be admitted to his law. Br. Examination, pl. 33. cites 33 H. 6. c. 24.

Br. Examination, pl. 5. cites 3 H. 6. c. 46. S. P. Br. Examination, pl. 6. cites 9 H. 6. c. 8. S. P. *Ibid.* pl. 7. cites 9 H. 6. c. 58.

In *debt by two executors*, who *counted of arrears of account made in the time of their teſtator*; the *defendant tendered his law*, that he owed them, and *prayed that they be examined*; and the opinion of the court was that they ſhall be examined of another's deed: *contra of an attorney*; for he may have information of his maſter, &c. And the cauſe of this examination given by the ſtatute is, that if it be *found upon examination of the party* upon a book *that the matter does not lie in account*, then the law lies; and ſo this caſe is out of the caſe of the ſtatute of examinations, by the opinion of the court.

Where executors bring

action, or where action is brought againſt them, *examination does not lie*; for this is to have the *ley gager* and *executors cannot wage their law*, Br. Examination, pl. 22. cites 20 E. 4. c. 3. *per* Brian and Littleton.—*Debt by an executor upon arrears of account before auditors in the time of the teſtator*, the defendant tendered his law, and prayed that the plaintiff be examined, and *the executor was examined*, though

though it was of another's deed, *but not precisely*, whether he saw or heard of the account, or was present at it; *but whether any matter which proves that it lay in account, came to his hands, and of other points at the discretion of the justices*, but *not of the truth of the deed precisely*; and upon the examination it was awarded, that the defendant answer without his law; *quod nota*. Br. Examination, pl. 19. cites 21 H. 6. c. 54, 55.—*But*, if *such action* was *brought against an executor*, the *plaintiff shall be examined*. Ibid.

Of Warranty.

A Warranty (concerning freeholds and inheritances) (*a*) is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by a former title, else it may be used by way of *rebutter*.

1 Inst. 365. a.

(*a*) There are also warranties of goods and chattels upon contracts; but warranties of lands, &c. only are here spoken of. —☞ For warranties of goods and chattels, see vol. 1. tit. Actions on the Case, letter (E).

For the better consideration of this subject, we shall reduce it under the following heads, under which we shall examine—

Lord Coke says, that the learning of warranties is one of the most curious and cunning learnings of the law, but the subtlety out of this learning is, as will be shewn, greatly abridged by the statute law.

(A) The several Kinds of Warranties.

(B) To what Things a Warranty may be annexed.

(C) What Words and Clauses in a Deed will make a Warranty.

(D) What shall be deemed a good Warranty in Deed.

(E) What shall be deemed a good Warranty in Law.

(F) Of the Nature of a lineal Warranty, and how far it shall bind.

(G) What shall be deemed sufficient Assets to make a lineal Warranty a Bar.

(H) Of the Nature of a collateral Warranty at Common Law, and how far it shall bar.

(I) Of the Alterations introduced by the Statute Law.

(K) What ſhall be deemed Warranties by Diſſeiſin, Abatement, or Intruſion.

(L) Of the Effects of Warranty in Deed.

(M) What Uſe may be made of a Warranty in Deed.

(N) Who may take Advantage of a Warranty, and againſt whom.

(O) When a Warranty ſhall be ſaid to be defeated, determined, ſuſpended, or avoided.

(P) How Warranties ſhall be expounded.

(A) The ſeveral Kinds of Warranties.

WARRANTIES in their more general diviſions are of two kinds,

1 Inſt. 365. Firſt, a warranty in deed, or an expreſs warranty, which is when a fine or feoffment in fee, or a leaſe for life is made by deed, which has an expreſs clauſe of warranty contained in it, as when a conuſor, feoffor, or leſſor, covenants to warrant the land to the conuſee, feoffee, or leſſee.

Secondly, a warranty in law, or an implied warranty, which is when it is not expreſſed by the party, but *tacitè* made and implied by the law.

A warranty in deed is either lineal or collateral.

1 Inſt. 370. A lineal warranty is a covenant real, annexed to the land by him who either was owner of or might have inherited the land, and from whom his heir lineal or collateral might by poſſibility have claimed the land as heir from him that made the warranty.

A collateral warranty is made by him that had no right, or poſſibility of right to the land, and is collateral to the title of the land.

Litt. ſec. 698. Alſo, there is a warranty which commences by diſſeiſin or wrong.

Warranties likewiſe may be ſaid to be either *general*, *viz.* by one and his heirs to another and his heirs; or *particular*, and reſtrained to a certain perſon.

(B) To what Things a Warranty may be annexed.

1 Inſt. 366. A Warranty may not only be annexed to freeholds, or inheritances corporeal, which paſs by livery, as houſes and lands; but alſo to freeholds or inheritances incorporeal, which lie in grant, as advowſons; and to rents, commons, eſtovers, and the like,

like, which iſſue out of lands or tenements: and it may not only be annexed to inheritances *in eſſe*, but alſo to rents, commons, eſtovers, &c. newly created. As a man (ſome ſay) may grant a rent, &c. out of land for life, in tail, or in fee with warranty; for though there can be no title precedent to the rent, yet there may be a title precedent to the land out of which it iſſueth before the grant of the rent, which rent may be avoided by the recovery of the land, in which caſe the grantee may help himſelf by a *warrantia chartæ* upon the eſpecial matter. And ſo a warranty in law may extend to a rent, &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implieth a warranty in law. And ſo a rent newly created may be granted for owelty of partition.

If a man ſeiſed of a rent-ſeck, iſſuing out of the manor of *Dale*, taketh a wife, and the huſband releaſeth to the tertenant, and warranteth *tenementa prædicta*, and dieth, and the wife bringeth a writ of dower of the rent, the tertenant ſhall vouch, for that albeit the releaſe enured by way of extinguiſhment, yet the warranty extendeth to it, and by the warranty of the land, all rents, &c. iſſuing out of the land, that are ſuſpended or diſcharged at the time of the warranty created, are warranted alſo. *Id. ibid.*

But a warranty doth not extend to any leaſe, though it be for many thouſand years, or to eſtates of tenant by ſtatute ſtaple, or merchant or *elegit*, or any other chattel, but only to freeholds or inheritances. And this is the reaſon, that in actions which leſſee for years may have, a warranty cannot be pleaded in bar; as, in an action of treſpaſs, or upon the ſtatute of 5 *R.* 2. and the like. But in ſuch actions, which none but a tenant of the freehold can have, as upon the ſtatute 8 *H.* 6. aſſiſe, or the like, there a warranty may be pleaded in bar. 1 Inſt. 389. a.

A warranty may be made upon any kind of conveyance, as upon fines, feoffments, gifts, &c. Alſo a warranty may be made by and upon releaſes and confirmations made to the tenant of the land, although he who makes the releaſe or confirmation has no right to the land, &c. And yet ſome have holden, that no warranty can be raiſed upon a bare releaſe or confirmation, without paſſing ſome eſtate, or tranſmutation of the poſſeſſion. But the law is otherwiſe; for if *A.* be ſeiſed of lands in fee, and *B.* releaſe to him, or confirm his eſtate in fee with warranty to him, his heirs and aſſigns, this warranty is good, and both the party and his aſſignee ſhall vouch. 1 Inſt. 385. a.

(C) What Words and Clauſes in a Deed will make a Warranty.

THE word *warrantizo*, or warrant, is the only apt and effectual word to make an expreſs warranty, or a warranty in deed, and therefore this word is uſed in fines. 1 Inſt. 384.

Id. ibid. Litt. ſect. 733. 5 Rep. 17, 18. Spencer's caſe.

And the words *defendo*, or *acquitto*, although they are commonly uſed in deeds, yet of themſelves without the other will not make a warranty.

1 Inſt. 384.

The words *dedi & conceſſi*, or *dedi* only, in a feoffment, make a warranty, when an eſtate in fee or inheritance paſſes by the deed.

5 Rep. 18. Spencer's caſe.

But the word *conceſſi* only, or *demiſi & conceſſi*, do not make ſuch a warranty, in the caſe of a freehold or inheritance.

1 Inſt. 384. 4 Rep. 81. Noke's caſe.

And by force of the ſtatutes of *Bigamis*, chap. 6. *dedi* is made an expreſs warranty during the life of the feoffor.

Dyer, 42. 1 Inſt. 383.

If a man by deed warrants land to *J. S.* and his heirs, and the warrantor does not bind his heirs to the warrantee; or does not warrant to *J. S.* and his heirs, but to *J. S.* and his aſſigns, theſe are good warranties.

Dyer, 42.

But, if a man makes a feoffment in fee, and warranty to the feoffee only, without naming his heirs, there, the warranty ſhall endure only for life, becauſe it is taken ſtrictly. And yet if the feoffee recovers in value, he ſhall recover fee-ſimple, becauſe he loſes fee-ſimple.

Id. ibid.

If a man makes a feoffment to one and his heirs, and binds himſelf and his heirs to warranty againſt all people, and does not ſay with certainty to whom, nor for how long he will warrant, yet the feoffee will have a fee-ſimple in the warranty, as he had in the land: but, if the intent of the warranty appears plainly by expreſs words, the warranty ſhall extend no farther.

(D) What ſhall be deemed a good Warranty in Deed.

A Warranty in deed, or an expreſs warranty, as has been ſaid, is created only by the word *warrant*. And

It is to be premiſed that to every good warranty in deed, in order that it may bar and bind, theſe following circumſtances are requiſite.

1 Inſt. 367. b.

Firſt, That the perſon that warrants, be a perſon able; for if an infant makes a feoffment in fee of land, and thereby binds him and his heirs to warrant the land, in this caſe, although the feoffment be only voidable, yet the warranty is void.

Id. ibid.

But, if a man of full age and an infant make a feoffment in fee with warranty, this warranty is not void in part, and good in part; but it is good for the whole againſt the man of full age, and void as to the infant.

Secondly, That the warranty be made by deed in writing; for if a man makes a feoffment by word, and by word binds him and his heirs to warrant the land, this is not a good warranty.

1 Inſt. 386.

So, if a man gives land to another by his laſt will, and thereby binds him and his heirs to warrant it; this warranty, although the will be in writing, is void, becauſe a will in writing is no deed.

Thirdly,

Thirdly, That there be ſome eſtate to which the warranty is annexed that may ſupport it; for if one covenant to warrant land to another, and make him no eſtate, or make him an eſtate that is not good, and covenant to warrant the thing granted; in theſe caſes the warranty is void. 10 Rep. 96.

Likewiſe, if the eſtate to which the warranty is annexed is determined, the warranty dependent on it is determined likewiſe. Thus, if a man maketh a gift in tail, and warranteth the land to him and his heirs, and afterwards tenant in tail maketh a feoffment and dieth without iſſue, he ſhall not rebut the donor in a formedon in reverter, becauſe that the eſtate to which the warranty is annexed is determined. *Id. ibid.*

Fourthly, That the eſtate to which the warranty is annexed, be ſuch an eſtate as is able to ſupport it, and therefore that it be a leaſe for life at the leaſt; for if one makes a leaſe for years of land, and binds himſelf and his heirs to warrant the land; this is no good warranty, neither will it have the effect of a warranty; but this may amount to a covenant, on which an action of covenant may be brought. 1 Inſt. 378. 5 Rep. 17. Spencer's caſe.

Fifthly, That the warranty deſcends upon him, that is heir of the whole blood by the common law to him that made the warranty, and not upon another; for if tenant in tail in *borough Engliſh* diſcontinues the tail, and has iſſue two ſons, and the uncle releaſes to the diſcontinuee with warranty, and dies; this is no good warranty to bind the younger ſon. 1 Inſt. 12. Litt. ſect. 735. Becauſe a warranty cannot go according to the nature of tenements by the cuſtom, &c., but only according to the form of the common law. Lit. *ibid.*

So, if in this caſe tenant in tail diſcontinues the tail with warranty, *&c.* having two ſons, and dies ſeiſed of other lands in the ſame borough in fee-ſimple, to the value of the land in tail; the younger ſon is not barred by this warranty. 1 Inſt. 12. Litt. 735. and it is there added, that the younger ſon ſhall not be barred, though aſſets in fee-ſimple deſcend to him from his father.

So, if one gives his land to the eldeſt ſon and the heirs male of his body, the remainder to the ſecond ſon, *&c.* and the eldeſt aliens with warranty, having iſſue a daughter and dies; this is not a good warranty to bar the ſecond ſon. Litt. ſect. 718. The reaſon is, becauſe the warranty deſcended to the daughter of the elder ſon, and not to the ſecond ſon. Lit. *ibid.*

So, if tenant in tail has iſſue two daughters by divers venters, and dies, and they enter, and a ſtranger diſſeiſes them, and one of them releaſes all her right, and binds her and her heirs to warrant it; in this caſe the warranty is not good to bar the ſiſter, becauſe they are of half blood only, and the one cannot be heir to the other according to the courſe of the common law. Litt. 737.

So, if two brothers be by demi-venters, and the eldeſt releaſe with warranty to the diſſeiſor of the uncle, and dies without iſſue; this is no good warranty to bar the younger brother; for a warranty, as has been ſaid, muſt deſcend upon him that is heir at the common law to him that made it. 1 Inſt. 387.

Litt. ſec. 745. Sixthly, It is neceſſary that he that is heir do continue to be ſo, and that neither the deſcent of the title nor the warranty be interrupted; for if one binds him and his heirs to warranty, and after is attainted of treaſon or felony, and dies; this warranty does not bind his heir.

Id. 746. The reaſon is, for that nothing in this caſe maketh a So, if tenant in tail be diſſeiſed, and after releaſe to the diſſeiſor with warranty, and after the tenant in tail be attainted of felony, and have iſſue and die; this warranty will not bind the iſſue.

continuance but the warranty, which cannot deſcend to the iſſue in tail, becauſe the blood between the iſſue and him that made the warranty is corrupt. *Id. ibid.*

10 Rep. 96. Seymor's caſe. Seventhly, That the eſtate of freehold that is to be barred be put to a right before or at the time of the warranty made, and that he to whom the warranty deſcends have then but a right of the land; for a warranty will not bar an eſtate of freehold or inheritance *in eſſe*, in poſſeſſion, in reverſion, or remainder, that is not diſplaced and put to a right before or at the time of the warranty made, though after at the time of the deſcent of the warranty, the eſtate of freehold or inheritance be diſplaced and deveſted.

Id. ibid. The reaſon is, for that the ſon was actually ſeiſed of the And therefore if there be a father and ſon, and the ſon have a rent-ſervice, ſuit to a mill, rent-charge, rent-ſeck, common of paſture, or other profit apprender out of the land of the father, and the father make a feoffment in fee with warranty, and die; this ſhall not bar the ſon of the rent, common, *&c.*

rent or common at the time of the warranty, and he who is in poſſeſſion needeth not put in his claim, either to avoid the fine or collateral warranty.

Id. ibid. Becauſe the warranty at the time of the creation of it did not And although the ſon, after the feoffment with warranty, and before the death of the father, had been diſſeiſed, and ſo being out of poſſeſſion the warranty had deſcended upon him, yet this warranty ſhall not bind him.

extend to any eſtate of freehold or inheritance *in eſſe*.

Id. ibid. So, if my collateral anceſtor releaſes to my tenant for life with warranty, and dies, and this warranty deſcends upon me; this ſhall not bind my reverſion or remainder.

Id. ibid. But, if in the caſe before, the ſon be diſſeiſed of the rent, *&c.* and affirm himſelf to be diſſeiſed by the bringing of an aſſize, (for otherwiſe he ſhall not be ſaid to be out of poſſeſſion of a rent, or the like,) and after the father releaſe with warranty, and die; in this caſe, the collateral warranty ſhall bar and bind the ſon of his rent, *&c.*

Id. ibid. Becauſe my reverſion, as well as the And if in the laſt caſe my tenant for life be diſſeiſed, and my anceſtor releaſe to the diſſeiſor with warranty, and die; this is a good warranty to bind and bar me.

eſtate of the tenant for life, was deveſted at the time of the warranty made.

Litt. 734. Eighthly, That the warranty take effect in the lifetime of the anceſtor, and that he be bound by it; for the heir ſhall never be bound by an expreſs warranty, but where the anceſtor was

bound by the ſame warranty, and therefore a warranty made by will is void.

Ninthly, That the heir claim in the ſame right that the anceſtor does; for if one be a ſucceſſor only in caſe of a corporation, he ſhall not be bound by the warranty of a natural anceſtor. 1 Inſt. 370.

Tenthly, That the heir that is to be barred by the warranty be of full age at the time of the fall of the warranty; for if the anceſtor make a feoffment, or a releaſe with warranty, and the heir at this time be within age, and after he die, and the warranty deſcend upon him within age; this warranty ſhall not bind him: but, if he become of age after the warranty of the anceſtor, and before his death; in this caſe the warranty may bar him; therefore he muſt take care not to ſuffer a deſcent after his full age, before his entry. 1 Rep. 140. b. Chudleigh's caſe.

(E) What ſhall be deemed a good Warranty in Law.

WARRANTIES in law are ſo called, becauſe, in judgment of law, they amount to a warranty without the uſe of the word *warrant*. Thus 1 Inſt. 384.

The words *dedi & conceſſi*, or *dedi* only, in a feoffment, make a good warranty in law to the feoffee and his heirs during the life of the *feoffor*. But not againſt the heir of the feoffor, for the heir ſhall not be bounden unto a warranty made by his father, unleſs he bind him and his heirs to warranty by expreſs words in the deed. F. N. B. 134. [*Vide* Gilb. Ten. by Watkins, note lvi.]

But the word *conceſſi* only in a fine or feoffment does not make a warranty in law.

A warranty in law may be good in its creation, although it be without deed; for if a man by his laſt will and teſtament deviſes lands to another man for life, or in tail, rendering rent; to this eſtate there is a warranty in law annexed. 1 Inſt. 386.

And although there be an expreſs warranty in the deed, yet this does not take away the implied warranty of the law. 1 Inſt. 384.

Every partition and exchange implies in it, and has annexed to it, a ſpecial warranty in law. 1 Inſt. 102. 384.

If one makes a gift in tail, or leaſe for life of land by deed or without deed, reſerving a rent, or of a rent-ſervice of deed; in theſe caſes there is annexed an implied warranty againſt the donor or leſſor, his heirs and aſſigns. 1 Inſt. 334. The aſſignee likewiſe of leſſee for life ſhall take the benefit of this warranty in law.

So, when dower is aſſigned to a woman, there is a warranty in law included, which is that the tenant in dower being empleaded, ſhall vouch and recover in value a third part of the two parts whereof ſhe is dowable. 1 Inſt. 384.

And this warranty in law is of the nature of a lineal warranty, and ſhall bind as a lineal warranty only, for it never bars any collateral title. *Id. ibid.*

And hence it is, that this warranty and aſſets in ſome caſes is a good bar; as, if a tenant in tail exchanges for other lands which *Id. ibid.*

are deſcended to the iſſue, and he has accepted of them, or if not, that other lands are deſcended to him.

Id. ibid. But, if tenant in tail of lands makes a gift in tail, or leaſe for life, rendering rent, and dies; this is no bar.

And yet if other aſſets in fee-ſimple deſcend, this warranty in law and aſſets is a good bar.

(F) Of the Nature of lineal Warranty, and how far it ſhall bind.

Litt. ſec. 703. A Warranty is called lineal, when if no deed with warranty had been made by the father, then the right of the tenements ſhould deſcend to the heir, and the heir ſhould convey the deſcent from his father, *&c.*

1 Inſt. 370. And it is added by Lord *Coke*, that it is called a lineal warranty, not becauſe it muſt deſcend upon the lineal heir; for be the heir lineal or collateral if by poſſibility he might claim the land from him that made the warranty, it is lineal, having regard to the warranty and title of the land.

Litt. ſec. 703. As, where a man ſeiſed of lands in fee, maketh a feoffment by his deed to another, and binds himſelf and his heirs to warranty, and hath iſſue and dies, and the warranty deſcends to his iſſue, this is a lineal warranty.

Litt. ſec. 506. 1 Inſt. 371. So, if there be a grandfather, father and ſon, and the grandfather be diſſeiſed, and the father releaſe to the diſſeiſor being in poſſeſſion with warranty, *&c.* and die, and after the grandfather die; this is a lineal warranty to the ſon: and although in this caſe the warranty deſcends before the right, yet it is a good bar

Litt. ſec. 707. Likewiſe, if there be two brothers, and the father be diſſeiſed, and the eldeſt brother releaſe with warranty, and die without iſſue, and after the father die, and the warranty deſcend to the younger ſon; this is a lineal warranty to him; for though the eldeſt ſon died in the lifetime of the father, yet he might poſſibly have conveyed the title to his younger brother, if no ſuch warranty had been.

Termes de la Ley, tit. Garranty. And in every caſe where one demands an eſtate-tail, if any anceſtor of the iſſue in tail, whether he had poſſeſſion of the land or not, has made a warranty, and if the iſſue, that was to bring a writ in *formedon*, may or might by poſſibility have conveyed to himſelf a title by force of the gift by him that made the warranty; this is a lineal warranty, whereby the iſſue in tail ſhall not be barred, except he have aſſets to him deſcended in fee-ſimple.

As, if a man be ſeiſed of land of an eſtate-tail to him and his heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and have iſſue, and die; this warranty deſcending upon the iſſue is a lineal warranty.

Litt. ſec. 709. And if lands be given to one and the heirs male of his body, and for want of ſuch iſſue to the heirs female of his body, and the donee make a feoffment with warranty, and have iſſue a ſon and a daughter, and die; this warranty is lineal to the ſon, and if

if the ſon dies without iſſue male, it is a lineal warranty from the father to the daughter.

But, if the brother in his lifetime releaſe to the diſcontinuee, *&c.* with warranty, *&c.* and after die without iſſue; this is a collateral warranty to the daughter. *Id. ibid.* The reaſon is, becauſe ſhe cannot convey to her the right which ſhe hath by force of the remainder by any means of deſcent by her brother, for that the brother is collateral to the title of his ſiſter, and therefore his warranty is collateral. *Id. ibid.*

If lands be given to the huſband and wife and the heirs of their two bodies engendered, and they have iſſue a ſon, and the huſband diſcontinue, and die, and after the wife releaſe with warranty, and die; this is a lineal warranty to the ſon. Litt. 714. The ſon ſhall not be barred in this caſe unleſs he hath aſſets by deſcent in fee-ſimple by the mother, becauſe their iſſue ought to convey their right as heirs to father and mother of their two bodies begotten, *per formam doni*, and therefore the warranty of the father and the warranty of the mother are but lineal warranties to the heir. *Id. ibid.*

And if lands be given to a man and woman unmarried, and the heirs of their two bodies, and they intermarry, and be diſſeiſed, and the huſband releaſe with warranty and die, and after the wife die; this is a lineal warranty to the iſſue for the whole. 1 Inſt. 375. Becauſe the iſſue muſt convey his right as heir to his father and mother of their two bodies engendered, and therefore it is collateral for no part. *Id. ibid.*

And if a father give land to his eldeſt ſon and the heirs male of his body, *&c.* the remainder to the ſecond ſon, *&c.* if the eldeſt ſon alien in fee with warranty, *&c.* and have iſſue female, and die without iſſue male; this is a lineal warranty to the ſecond. Litt. 718.

It is a rule as to the lineal warranties, that they bar the right to a fee ſimple without aſſets, for he that demandeth fee-ſimple by any of his anceſtors, ſhall be barred by warranty lineal which deſcendeth upon him, unleſs he be reſtrained by ſome ſtatute. Litt. c. 711.

But it doth not bar the right of an eſtate-tail, unleſs the heir have aſſets by deſcent in fee-ſimple by the ſame anceſtor that made the warranty. Litt. c. 712.

Yet if the iſſue in tail alien the aſſets deſcended, and die, the iſſue of that iſſue is not barred by this warranty and aſſets: But, if the iſſue to whom the warranty and aſſets deſcended, had brought a formedon, and by judgment had been barred by reaſon of the warranty and aſſets: in that caſe, though he aliens the aſſets, yet the eſtate-tail is barred for ever. 1 Inſt. 393.

But for the more clear underſtanding what aſſets are requiſite to bar the right of an entail, it will be proper to conſider,

(G) What ſhall be deemed ſufficient Aſſets to make a lineal Warranty a Bar.

THE aſſets requiſite to make a lineal warranty a bar, muſt have ſix qualities. Firſt, they muſt be aſſets (that is) of equal value, or more, at the time of the deſcent. Secondly, they muſt be of deſcent, if not by purchaſe or gift. Thirdly, they muſt be aſſets 1 Inſt. 374. b. A ſeignory in frankalmoigne is no aſſets, be-

cauſe it is not valuable, and therefore not to be extended; and ſo it ſeemeth of a ſeignory of homage and fealty. But an advowſon is aſſets. *Id. ibid.*

aſſets in fee-ſimple, and not in tail, or for another man's life. Fourthly, they muſt deſcend to him as heir to the ſame anceſtor that made the warranty. Fifthly, they muſt be of lands or tenements, or rents or ſervices valuable, or other profits iſſuing out of lands or tenements, and not perſonal inheritances, or annuities, and the like. Sixthly, it muſt be in eſtate or intereſt, and not in uſe or right of actions, or right of entry; for they are no aſſets until they be brought into poſſeſſion. But, if a rent in fee-ſimple iſſuing out of land of the heir deſcend unto him, whereby it is extinct, yet this is aſſets; and to this purpoſe hath, in judgment of law, a continuance.

(H) Of the Nature of a collateral Warranty at Common Law, and how far it is barred.

Termes de la Ley, tit. Garranty.

WHEREVER the heir cannot by any poſſibility convey to himſelf a title by force of his gift that made the warranty, then that is a collateral warranty, and thereby the right of the heir ſhall be barred without any aſſets.

Litt. ſec. 709. The reaſon that the warranty of the uncle having no right to the

As, if tenant in tail diſcontinue the tail, and have iſſue and die, and the uncle of the iſſue releaſe to the diſcontinuee with warranty, *&c.* and die without iſſue, this is a collateral warranty to the iſſue in tail, becauſe the warranty deſcendeth upon the iſſue who cannot convey himſelf to the entail by means of his uncle.

land entailed, ſhall bar the iſſue in tail is, for that the law preſumeth that the uncle would not unnaturally diſinherit his lawful heir, being of his own blood, of that right which the uncle never had, but came to the heir by another mean, unleſs he left him greater advancement. 1 Inſt. 373. a. [Lord Chancellour Cowper ſaid, that "a collateral warranty was certainly one of the harſheſt and moſt cruel points "of the common law; becauſe there was not ſo much as an intended recompence; yet he could not "find, that Chancery had ever given relief in it. 10 Mod. 3, 4.]

Litt. ſec. 707.

If there be father and two ſons, and the father be diſſeiſed, and the younger ſon releaſe with warranty to the diſſeiſor, and die without iſſue, this is a collateral warranty to the eldeſt ſon, becauſe that of ſuch land as was the father's, the elder can by no poſſibility convey to him the title by means of the younger ſon.

Litt. ſec. 704. The reaſon is, for that if no ſuch deed with warranty had been

Likewiſe, if there be father and ſon, and the ſon purchaſe lands in fee, and the father of this diſſeiſe the ſon, and alien to another in fee by deed, and by the ſame deed bind him and his heirs to warranty, *&c.* and the father die, the ſon is barred by this warranty, which is a collateral warranty, though it deſcendeth lineally from the father to the ſon.

made, the ſon could in no manner convey his title from his father to him, inaſmuch as the father had no eſtate in right to the land, but was collateral to the title of the land. Litt. ſec. 705.

Litt. ſec. 708. But if the eldeſt ſon die without iſſue, the youngeſt

Alſo, if tenant in tail have iſſue three ſons, and diſcontinue the tail in fee, and the middle ſon releaſe by his deed to the diſcontinuee, and bind him and his heirs to warranty, and after the tenant in tail die, and the middle ſon die without iſſue, this is a collateral warranty to the eldeſt ſon, inaſmuch as he can by no means convey

convey to him, by force of the tail, any deſcent by the middle brother. brother may recover, because the warranty of the middle one is lineal to the youngeſt. *Id. ibid.*

Many other examples might be produced where theſe collateral warranties at common law did bind the right of eſtates in fee-ſimple, and alſo of eſtates in fee-tail. But the law in this reſpect has been greatly altered by the following ſtatutes: and firſt by the ſtatute of *Glouceſter*.

(I) Of the Alterations introduced by the Statute Law.

BEFORE the ſtatute of *Glouc'* all warranties which deſcended to them which were heirs to thoſe who made the warranties, were bars to the ſame heirs to demand any lands or tenements againſt the warranties, except the warranties which commenced by diſſeiſin. For ſuch warranty was no bar to the heir, for that the warranty commenced by wrong, *viz.* by diſſeiſin. Litt, ſec. 697.

By this ſtatute of *Glouceſter* four things are enacted. 1 Inſt. 365.

1ſt, That if a tenant by the curteſy alien with warranty, and die, this ſhall be no bar to the heir in a writ of *mortd'anceſtor* without aſſets in fee-ſimple. And if lands or tenements deſcend to the heir from the father, he ſhall be barred, having regard to the value thereof.

2dly, That if the heir, for want of aſſets at that time deſcended, recover the lands of his mother by force of this act, and afterwards aſſets deſcend to the heir from the father, then the tenant ſhall recover againſt the heir the inheritance of the mother by a writ of falſe judgment, which ſhall iſſue out of the record, to reſummon him that ought to warrant, as hath been done in other caſes, where the heir being vouched cometh into court, and pleadeth that he hath nothing by deſcent. *Id. ibid.*

3d, That the iſſue of the ſon ſhall recover by a writ of *coſinage*, *aiel*, and *beſaiel*. *Id. ibid.*

And laſtly, That the heir of the wife after the death of the father and mother, ſhall be barred of his action to demand the heritage of the mother by writ of entry, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

Likewiſe, by the 11th *Hen.* 7. *c.* 20. Where a wife after her huſband's death ſhall alone, or with her ſucceeding huſband, alien, leaſe, confirm or diſcontinue with warranty the land ſhe holdeth in dower, or in tail, of the gift of her former huſband, or any of his anceſtors, ſuch warranty, *&c.* is made void.

And laſtly, by the 4 & 5 *Ann. c.* 16. "All warranties which ſhall be made after the firſt day of *Trinity* term 1705, by any tenant for life, of any lands, tenements, or hereditaments, the ſame deſcending or coming to any perſon in reverſion or remainder, ſhall be void and of no effect; and likewiſe all collateral warranties which ſhall be made after the ſaid *Trinity* term, of any lands,

lands, tenements, or hereditaments, by any anceſtor who has no eſtate of inheritance in poſſeſſion in the ſame, ſhall be void againſt his heir.

(K) What ſhall be deemed Warranties by Diſſeiſin, Abatement, or Intruſion.

WARRANTIES are ſaid to commence by diſſeiſin in the following caſes: As,

Litt. ſec. 698. Where there is father and ſon, and the ſon purchaſeth land, &c. and letteth it to the father, or any other anceſtor, for term of years, or at will, and the father, &c. thereof by deed enfeoffeth another in fee, and binds him and his heirs to warranty, and the father dieth, whereby the warranty deſcendeth upon the ſon, this warranty commences by diſſeiſin.

Litt. ſec. 698, 699. 1 Inſt. 367. In the ſame manner, if tenant by *elegit*, tenant by ſtatute merchant, ſtatute ſtaple, guardian in chivalry, or ſocage, or becauſe of nature, make a feoffment in fee with warranty; this ſhall not bind the heir, becauſe ſuch warranties commence by diſſeiſin.

Litt. ſec. 700. Alſo, if father and ſon purchaſe lands to have and to hold to them jointly, &c., and after the father alien the whole to another, and bind him and his heirs to warranty, &c., and after the father die, this warranty, as to the moiety which belongs to the ſon, commences by diſſeiſin.

1 Inſt. 367. b. But, if the purchaſe were to the father and the ſon, and the heirs of the ſon, and the father make a feoffment in fee with warranty, if the ſon enter in the life of the father, and the feoffee reenter, and the father die, the ſon ſhall have an aſſize of the whole. If the ſon, however, had not entered in the life of the father, then, for the father's moiety, it had been a bar to the ſon, for that therein he had an eſtate for life, and therefore the warranty, as to that moiety, had been collateral to the ſon; and as to the ſon's moiety, it would be a warranty by diſſeiſin, and ſo the warranty would be defeated in part and ſtand good in part.

Id. ibid. If, on the other hand, the purchaſe had been to the father and ſon, and the heirs of the father, then the entry of the ſon in the life of the father, in avoidance of the warranty, had not availed him, becauſe his father lawfully conveyed away his moiety.

1 Inſt. 366. b. If the father be tenant for life, remainder to the ſon in fee, and the father by covin and conſent make a leaſe for years, to the end that the leſſee ſhall make a feoffment in fee to whom the father ſhall releaſe with warranty, and all this be executed accordingly, and the father die, this warranty begins by diſſeiſin.

Id. ibid. So, if one brother makes a gift in tail to another, and the uncle diſſeiſes the donee, and enfeoffeth another with warranty, and the uncle dieth, and the warranty deſcendeth upon the donor, and then the donee dieth without iſſue, this warranty alſo begins by diſſeiſin.

1 Inſt. 367. a. And the If the father, the ſon, and a third perſon are joint-tenants in fee, and the father makes a feeoffment in fee of the whole with

with warranty, and dieth, and the ſon dieth, the warranty as to the part of the ſon, and the part of the third perſon, begins by diſſeiſin. third perſon ſhall not only avoid the feoffment for his own part, but for the part of the ſon.

Alſo, if a man who hath no right, enters into lands and makes feoffment of them with warranty, this commences by diſſeiſin. 1 Inſt. 369. b.

Lord *Coke* enumerates ſeveral qualities belonging to warranties commencing by diſſeiſin. 1 Inſt. 366, 367.

Firſt, That the diſſeiſin is generally done immediately to the heir who is bound by the warranty.

Secondly, That the warranty and diſſeiſin are *ſimul* and *ſemel*.

And yet if a man commit a diſſeiſin with intent to make a feoffment in fee with warranty, although he make the feoffment many years after the diſſeiſin, yet being done with that intent, it ſhall be a warranty commencing by diſſeiſin. 5 Rep. 80. Fitzherbert's caſe.

The law is the ſame with reſpect to warranties commencing by abatement or intruſion, if the abatement or intruſion be made with intent to make a feoffment in fee with warranty, for theſe alſo commence by wrong. 1 Inſt. 367. a.

So, if a tenant die without heir, and an anceſtor of the lord enter before the entry of the lord, and make a feoffment in fee with warranty, and die, this warranty ſhall not bind the lord, becauſe it commenceth by wrong, being in the nature of an abatement. *Id. ibid.*

(L) Of the Effects of a Warranty in Deed.

THE effect of a warranty in deed has been partly explained in conſidering the nature of the ſeveral kinds of warranty. It may be neceſſary however to obſerve, that a warranty in deed always bars the warrantor himſelf of the land ſo warranted for ever; ſo that all the preſent and future rights which he hath or may have therein are thereby extinct. Therefore,

If the father be diſſeiſed, and the ſon in his lifetime releaſe all his right in the land to the diſſeiſor, and make a warranty of the land in the deed, and then the father die, and the right of the land deſcend to the ſon; in this caſe, although the releaſe does not bar the ſon, yet the warranty bars him. 1 Inſt. 265, a. and b.

For the moſt part likewiſe, it bars the heirs of him who made the warranty, to whom the ſaid warranty deſcends, to demand the land againſt the ſaid warranty; for if the warranty be lineal, it is, as has been ſhewn, a bar of an eſtate in fee-ſimple without any aſſets, that is, without any other land deſcended to him in fee-ſimple from the ſame anceſtor that made the warranty: and with aſſets it is a bar of an eſtate in tail. 1 Inſt. 374. b. 384.

If the warranty be collateral, it is, with or without aſſets, a bar of an eſtate in fee-ſimple or fee-tail, and all poſſibility of right thereunto. But a collateral warranty doth not give a right, but only bindeth the right, ſo long as the warranty continueth; 1 Inſt. 372. 374. b.

nueth; for if it be determined, removed, or defeated, the right is revived.

10 Rep. 97. Edward Seymor's caſe. But neither the lineal nor collateral warranty can enlarge an eſtate; and therefore if the leſſor by deed releaſes to his leſſee for life, and warrants the land to him and his heir; this does not make his eſtate greater. Neither will it bar titles of entry or action in caſes of mortmain, conſent to a raviſher, mortgage, or dower: and therefore if an anceſtor of the lord has title to enter upon an alienation in mortmain, and he releaſes and makes a feoffment with warranty, this warranty will neither bar him nor his heir.

1 Inſt. 385. b. 389. a.

As to the warranty which commences by diſſeiſin, it does not, as has been ſhewn, bar any eſtate with or without aſſets.

1 Inſt. 388. b. No fine or warranty ſhall bar any eſtate in poſſeſſion, reverſion, or remainder, which is not deveſted and put to a right; for he who has the eſtate or intereſt in him, cannot be put to his action, entry, or claim; for he has that already which entry, action, or claim can give him.

(M) What Uſe may be made of a Warranty in Deed.

Termes de la Ley, tit. Garranty. WHERE a lineal or collateral warranty is a bar, there, if the party be empleaded by him who made the warranty, or his heirs, the party empleaded, who is tenant of the land, may plead and ſhew forth his warranty againſt him, and demand judgment, whether, contrary to his own warranty, he ſhall be received to demand the thing warranted; and this in pleading is called a *rebutter*.

1 Inſt. 101. 393. But, if the party be empleaded or ſued by *another* for the land in an action wherein he may vouch, then he to whom the wartanty is made or his heirs may vouch, that is, call in the warrantor or his heirs to warrant the land. And this is an interpleader in the nature of an action brought by the warrantor againſt the warrantee, wherein he that vouches, who is called the voucher, is demandant, and he that is vouched, who is called the vouchee, is made tenant or defendant to the action, and the voucher is as it were out of the ſuit: and this ſecond tenant, the vouchee, is called the tenant by the warranty: and hereupon a writ iſſues to the ſheriff to ſummon the vouchee to appear, which writ is called a *ſummoneas ad warrantizandum*.

Id. ibid. If the vouchee appears, he muſt plead to the voucher: and if he ſhews cauſe why he ſhould not warrant, that muſt be tried; and this ſhewing of cauſe is called a counterplea to the voucher.

Id. ibid. But, if he pleads in avoidance of the warranty, it is called a counterplea to the warranty: and if he cannot defend himſelf againſt the warranty, the ſtranger ſhall recover the land demanded againſt the voucher, and he ſhall recover as much other land againſt

againſt the vouchee of the lands he has or had at the time of the voucher: and this recovery of other lands is called a recovery in value.

If the vouchee at the time of the voucher and recovery has no lands deſcended to him to anſwer the warrantee, but has afterwards lands falling to him by deſcent from that anceſtor, then the voucher may have a reſummons, and recover the land which afterwards falls. *Id. ibid.*

But, if the ſheriff returns upon the ſummons that the vouchee is ſummoned, and he nevertheleſs maketh default, then he ſhall have a *magnum cape ad valentiam*, when if he makes default again, the judgment ſhall be given againſt the voucher, and he ſhall recover over the value againſt the vouchee: and if the vouchee appears and then makes default, the voucher ſhall have a *parvum cape ad valentiam*, and then if he makes default, judgment ſhall be given as before. *Id. ibid.*

But, if the ſheriff upon the ſummons returns that *he has nothing whereby he may be ſummoned*, then, after writs of *alias* and *pluries*, a writ called *ſequatur ſub ſuo periculo* (*a*), ſhall be awarded; and if the like return be made, the demandant ſhall have judgment againſt the firſt tenant, but he cannot recover in value againſt the vouchee, becauſe he was never warned, and it appeareth that he hath nothing.

(*a*) It is called *ſequatur ſub ſuo periculo*, becauſe the tenant ſhall loſe his land without any recompence in value, unleſs he upon that writ can bring in the vouchee to warrant the land unto him: and if at the *ſequatur ſub ſuo periculo*, the tenant and the vouchee make default, and the demandant have judgment againſt the tenant, and after bring a *ſcire facias* to have execution, the tenant may have a *warrantia chartæ*, and if he were empleaded by a ſtranger, he may vouch again. But, if he had judgment to recover in value, he ſhall never have a *warrantia chartæ*, nor vouch again, for by this judgment to recover in value, he hath had the benefit of the warranty.

If the vouchee had a warranty from ſome other for the land, he may *deraign*, that is, maintain the warranty over, and ſhall recover in value alſo againſt his vouchee in the ſame manner as before.

But, if the warrantee to whom the warranty is made, or his heirs, be empleaded in an aſſiſe, or in a writ of entry in the nature of an aſſiſe, in which actions they cannot vouch, then they ſhall have a wit *de warrantia chartæ* againſt the warrantor who made the warranty, or his heirs. F.N.B. 34. If he be empleaded in any action in which he may vouch, then he ought to vouch to warranty; and if he will not, he ſhall not afterwards have a writ of *warrantia chartæ*.

Likewiſe, the warrantee or his heirs may, at any time before they be empleaded for the land, bring a *warrantia chartæ* upon the warranty in the deed againſt the warrantor or his heirs, and thereby all the land the heir of the warrantor has by deſcent from the anceſtor, who made the warranty, at the time of the writ brought, ſhall be bound and charged with the warranty into whoſe hands ſoever it goes afterwards. So, if the land warranted be after recovered from the warrantee, he ſhall have ſo much land over again of the other land of the heir of the warrantor, or of *Id. ibid.*

the

the warrantor himſelf, if he be living: and although the warrantee or his heirs recover in this writ, yet upon occaſion he may afterwards vouch the warrantor or his heirs notwithſtanding.

Id. ibid. But, if a man be vouched, he ſhall not render in value, but of the lands he had at the time of the voucher.

It is to be obſerved, moreover, that it is good policy, if a man ſuſpect any thing, to bring this writ of *warrantia chartæ* betimes, becauſe it binds all the lands of the warrantor from the time of the writ brought, and not any of his other land he had before that time, which are now aliened.

Id. ibid. But, if a man recover his warranty by writ of *warrantia chartæ*, and have bounden the land which the vouchee had at that time; yet, if he be afterwards empleaded for that land, for which he recovered his warranty, he ought to vouch him againſt whom he recovered his warranty, to defend the land, if he be ſued in any action wherein he may vouch; otherwiſe, he ſhall not have advantage by recovery of his warranty in the *warrantia chartæ*.

Id. ibid. And if a man recover his warranty in a *warrantia chartæ*, and afterwards be empleaded in an action in which he cannot vouch, as by aſſiſe or by a *ſcire facias* ſued forth upon a fine, *&c.*; it ſeemeth he ought to give notice to him againſt whom he hath recovered his warranty of the action, and to pray him to ſhew him what he ſhall plead to defend the land.

(N) Who may take Advantage of a Warranty, and againſt whom.

1 Inſt. 384. b. 385. a. 5 Rep. 71. Spencer's caſe. (*a*) As in diſſeiſin, abatement, intruſion, uſurpation, or otherwiſe, they ſhall rebut, by force of the warranty, as a thing annexed to the land.

ALL ſuch as are parties to the warranty, that is, ſuch as are named in the deed, ſhall take advantage of the warranty; as if one warrant lands to another, his heirs and aſſigns; in this caſe both the heirs and aſſigns may take advantage of it, and they may both vouch or rebut, or have a *warrantia chartæ*, ſo as they come in in privity of eſtate; for otherwiſe the heirs or aſſigns cannot vouch, or have a *warrantia chartæ*, but yet they may in many caſes rebut (*a*).

Id. ibid. But herein a difference is to be obſerved, when in the caſes aforeſaid, he that rebutteth claimeth under the warranty, and when he that would rebut claimeth above the warranty, for there he ſhall no trebut.

Therefore, if lands be given to two brethren in fee-ſimple, with a warranty to the eldeſt and his heirs, and the eldeſt die without iſſue, the ſurvivor, though he be heir to him, ſhall neither vouch nor rebut, nor have a *warrantia chartæ*, becauſe his title to the land is by relation above the fall of the warranty, and he cometh not under the eſtate of him to whom warranty is made, as the diſſeiſor, *&c.* doth.

If

If a man warrant lands to two men and their heirs, and the one make a feoffment in fee, yet the other ſhall vouch for his moiety. *Id. ibid.*

If a man be enfeoffed with warranty to him, his heirs and aſſigns, and he make a gift in tail, the remainder in fee, and the donee make a feoffment in fee, that feoffee ſhall not vouch as aſſignee, becauſe no man ſhall vouch as aſſignee, but he that cometh in in privity of eſtate, but he muſt vouch his feoffor, and he vouch as aſſignee; but ſuch an aſſignee may rebut. *Id. ibid.*

So, if the warranty be made to a man and his heirs without this word (*aſſigns*) yet the aſſignee, or any tenant of the land, may rebut.

If a man enfeoff *A.* and *B.* to have and to hold to them and their heirs with a clauſe of warranty *prædictis* A. & B. *& eorum hæredibus & aſſignatis;* in this caſe if *A.* die, and *B.* ſurvive and die, and the heir of *B.* enfeoff *C.* he ſhall vouch as aſſignee; and yet he is but the aſſignee of the heir of one of them; for in judgment of law, the aſſignee of the heir is the aſſignee of the anceſtor; and ſo the aſſignee of the aſſignee ſhall vouch *in infinitum*, within theſe words (his aſſigns). 1 Inſt. 384 b.

If a man enfeoffeth *A.* to have and to hold to him, his heirs and aſſigns, and *A.* enfeoffeth *B.* and his heirs, and *B.* dieth, the heir of *B.* ſhall vouch as aſſignee of *A.* So that heirs of aſſignees, and aſſignees of aſſignees, and aſſignees of heirs, are within this word (aſſigns). *Id. ibid.*

But thoſe who are not named for the moſt part ſhall not take advantage of the warranty; and therefore if land be warranted to *J. S.* without the word (heirs) his heirs ſhall not vouch; and regularly, if he warrant land to a man and his heirs without naming aſſigns, his aſſignee ſhall not vouch. Yet, if the father be enfeoffed with warranty to him and to his heirs, and the father enfeoff his eldeſt ſon with warranty, and die, the law giveth the ſon advantage of the warranty made to his father, becauſe by act of law the warranty between the father and the ſon is extinct. *Id. ibid.*

The warranty wrought by the word *dedi*, and the warranty annexed to an exchange, partition, *&c.* does not extend to aſſignees. But yet in caſes of exchange, and of warranties by the word *dedi*, the aſſignee ſhall rebut. 1 Inſt. 384 a. and b.

If a man make a feoffment in fee with warranty to him, his heirs and aſſigns, by deed, and the feoffee enfeoff another by parol, the ſecond feoffee ſhould vouch, or have a *warrantia chartæ*, as aſſignee, although he hath no deed of the aſſignment, becauſe the deed comprehending the warranty doth extend to the aſſignees of the land, and he is a ſufficient aſſignee, although he hath no deed. 1 Inſt. 385 b.

If a man make a feoffment in fee to *A.*, his heirs and aſſigns, and *A.* enfeoff *B.* in fee, who re-enfeoffeth *A.*; he or his aſſigns ſhall never vouch, for *A.* cannot be his own aſſignee. But, if *B.* had enfeoffed the heir of *A.* he might vouch as aſſignee; for the heir of *A.* may be aſſignee to *A.* inaſmuch as he claimeth not as heir. *Id. ibid.*

Id. ibid. If one makes a feoffment to two, their heirs and aſſigns, and one of them makes a feoffment in fee, this feoffee in this caſe ſhall not take advantage as aſſignee.

1 Inſt. 385. a. But an aſſignee of part of the land ſhall take advantage of a warranty; as,

If a man makes a feoffment of two acres with warranty to him, his heirs and aſſigns, and the feoffee makes a feoffment of one acre of it to another, in this caſe the ſecond feoffee ſhall take advantage of the warranty as aſſignee.

Id. ibid. Therefore, there is a difference between the whole eſtate in part, and part of the eſtate in the whole, or in any part; for if a man has a warranty to him, his heirs and aſſigns, and he makes a leaſe for life or gift in tail; in theſe caſes the leſſee or donee ſhall not take advantage of the warranty as aſſignee, becauſe they have not the eſtate in fee-ſimple, whereunto the warranty was annexed, but they may vouch the leſſor or donor, and by this means take advantage of the warranty.

Id. ibid. But, if a leaſe for life be made, the remainder in fee, ſuch a leſſee may vouch as aſſignee, becauſe the whole eſtate is out of the leſſor, and the particular eſtate and the remainder do in judgment of law, to this purpoſe, make but one eſtate.

1 Inſt. 390. If a man enfeoffs a woman with warranty, and they intermarry and are empleaded, and upon default of the huſband, the wife is received, in this caſe ſhe may vouch her huſband, *& ſic è converſo*, if a woman enfeoffs a man with warranty, and they intermarry and are empleaded, the huſband in this caſe ſhall vouch himſelf and the wife.

3 Rep. 61 and 63. Lincoln College caſe. He who comes into land merely by act of law in the *poſt*, as the lord by eſcheat or the like, ſhall never take advantage of a warranty; and therefore if tenant in dower enfeoffs a villein with warranty, and the lord of the villein enters; or a feoffment be to a baſtard with warranty, and he dies without iſſue, and the lord enters by eſcheat, the lord ſhall never take advantage of theſe warranties.

Id. ibid. But it is otherwiſe, where a man comes to the land by limitation of uſe, or by common recovery, which is the act of the party; for if tenant in tail being in of another eſtate, that is, by diſſeiſin, or feoffment of a diſſeiſor, ſuffers a common recovery, and a collateral anceſtor of the tenant in tail releaſes with warranty to the recoveror, and after the recoveror makes a feoffment to uſes, which are executed by the ſtatute of 27 *H.* 8. and after the collateral anceſtor dies; in this caſe the terretenants may take advantage of the warranty by way of rebutter, although the eſtate be transferred in the *poſt*.

Id. ibid. So, if he to whom the warranty is made ſuffers a common recovery, and after the anceſtor dies; the recoveror may take advantage of the warranty by way of rebutter; for any man that has the poſſeſſion of land, although he has no deed to ſhew how he got poſſeſſion of it, or how he is aſſignee, may rebut the demandant, and ſo bar him, and defend his own poſſeſſion.

There-

Therefore, tenant by the curteſy, donee in tail who is in of another eſtate, an aſſignee by force of a warranty made to a man and his heirs, feoffee of a donee in tail, may rebut and bar the demandant by the warranty. *Id. ibid.*

If one enfeoffs another of an acre of ground with warranty, and his iſſue two ſons, and dies ſeiſed of another acre of land of the nature of *borough Engliſh*; in this caſe, although the warranty deſcends upon the eldeſt ſon only, yet both the ſons may be vouched; one as heir to the warranty, the other as heir to the land. 1 Inſt. 376. If he ſhould vouch the eldeſt ſon only, he could not have the fruit of his warranty, that is, a recovery in value, and he cannot vouch the youngeſt ſon only, becauſe he is not heir at common law, upon whom the warranty deſcends.

So it is alſo of heirs in gavelkind, the eldeſt ſhall be vouched as heir to the warranty, and the reſt in reſpect to the inheritance. *Id. ibid.*

In like manner, the heir at the common law, the heir of the part of the mother ſhall be vouched, or the heir at common law may be vouched alone at the election of the tenant. *Id. ibid.*

The heir likewiſe at common law ſhall be vouched with the heir in *borough Engliſh*. *Id. ibid.*

The baſtard alſo ſhall be vouched with a mulier.

If a man dies ſeiſed of certain lands in fee, having iſſue a ſon and a daughter by one venter, and a ſon by another, and the eldeſt ſon enters, and dies, and the land deſcends to the ſiſter; in this caſe, the warranty deſcends on the ſon, and he may be vouched as heir, and the ſiſter alſo may be vouched as heir to the land. *Ibid.*

If two make a feoffment with warranty, and one of them dies, the ſurvivor ſhall not be charged alone with the warranty, but the heir of him that is dead ſhall be charged alſo. 1 Inſt. 386. b. But, if they are jointly bound in an obligation, the ſurvivor only ſhall be charged.

Likewiſe, if two are bound to warrant land, and both of them die, the heirs of both of them ought to be vouched, and ſhall be equally charged. 3 Rep. 14. Sir Wm. Herbert's caſe.

If the heir be vouched in the award of three ſeveral perſons, the one of them only ſhall not be charged, but they ſhall be charged equally. *Id. ibid.*

If a woman an heireſs of the diſſeiſor enfeoffs me with warranty, and after ſhe is married to the diſſeiſee; in this caſe I may take advantage of this warranty againſt the diſſeiſee, and rebut him upon it, if he ſues me for the land. 1 Inſt. 365. b.

So, if the huſband and wife ſue me for the land of the wife, and I have a warranty of a collateral anceſtor of the huſband's, which deſcended to the huſband; I may make uſe of this to bar the huſband and wife. *Id. ibid.*

(O) When a Warranty ſhall be ſaid to be defeated, determined, ſuſpended, or avoided.

WHEN a warranty is made to a man upon an eſtate which he then had, if the eſtate be defeated, the warranty is defeated: Litt. ſec. 741. 1 Inſt. 393. a. and b.

and a warranty lineal or collateral may be defeated, determined, or avoided in all or in part, and this is ſometimes by matter in law and ſometimes by matter in deed.

Id. ibid. If an eſtate-tail, to which a warranty is annexed, be ſpent, the warranty is determined: or, if a man make a gift in tail with warranty, and the donee afterwards make a feoffment, and die without iſſue, the warranty is gone.

Id. ibid. So, if tenant in tail diſcontinue the tail, and the diſcontinuee be diſſeiſed, or make a feoffment on condition, and a collateral anceſtor of the iſſue releaſe to the diſſeiſor or feoffor on condition, with warranty, and after the diſcontinuee enter upon the diſſeiſor, or on the feoffee, for the condition broken, in this caſe the warranty made by the collateral anceſtor is gone.

1 Inſt. 392. b. Likewiſe, if a ſeignory be granted with warranty, and the tenancy eſcheat, ſo that the ſeignory is extinct, conſequently, the warranty, which was annexed to it, is defeated.

1 Inſt. 384. b. But, if the father had been enfeoffed with warranty to him and his heirs, the ſon, as has been ſhewn, might take advantage of the warranty made to his father. If the father makes a feoffment to his eldeſt ſon, and dieth, and the warranty deſcends upon the ſon, the warranty is extinct.

Litt. ſec. 743. Becauſe the uncle took back to him as great an eſtate from his firſt feoffee to whom the warranty was made, as the ſame feoffee had from him; and if the warranty ſhould ſtand, then the uncle would warrant to himſelf, which cannot be. If tenant in tail makes a feoffment to his uncle, and the uncle afterwards makes a feoffment in fee with warranty to another, and after the feoffee of the uncle doth re-enfeoff the uncle again in fee, and after the uncle enfeoffeth a ſtranger in fee without warranty, and dieth without iſſue, and the tenant in tail dieth, the warranty made to the firſt feoffee is hereby defeated.

2 Inſt. 390. So, if the uncle makes the warranty to the feoffee, his heirs and aſſigns, and takes back an eſtate in fee, and after enfeoffs another, yet the warranty is defeated, becauſe he cannot be aſſignee to himſelf.

Id. ibid. But, if one makes a feoffment with warranty to the feoffee, his heirs and aſſigns, and the feoffee re-enfeoffs the feoffor and his wife, or the feoffor and a ſtranger; in theſe caſes the warranty is not defeated, but continues ſtill.

Id. ibid. So, if two make a feoffment with warranty to one, his heirs and aſſigns, and the feoffee re-enfeoff one of the feoffors; in this caſe the warranty is not gone.

Lit. ſec. 744. 2 Inſt. 390. But it is otherwiſe, where the uncle hath as great eſtate in the land of the feoffee to whom the warranty was made, as the feoffee hath himſelf. And if in the firſt caſe before put by *Littleton*, ſec. 743. the feoffee makes an eſtate to his uncle in tail or for life, ſaving the reverſion, or a releaſe for life, the remainder over, *&c.* in this caſe the warranty is only ſuſpended.

Litt. ſec. 745. 2 Inſt. 391. Alſo, if the uncle after ſuch feoffment with warranty, or releaſe with warranty, be attainted or outlawed of felony; hereby the warranty is gone; and although he afterwards obtain his pardon, yet the warranty is not revived.

Alſo,

Alſo, if tenant in tail be diſſeiſed, and after make a releaſe to the diſſeiſor with warranty in fee, and after the tenant in tail be attaint or outlawed of felony, and have iſſue and die, in this caſe the iſſue in tail may enter upon the diſſeiſor; for nothing makes a diſcontinuance in this caſe but the warranty, and the warranty cannot deſcend to the iſſue in tail, becauſe the blood is corrupt between him that made the warranty and the iſſue: and if tenant in tail ſhould obtain his pardon, the warranty, as has been ſaid, would not revive. Litt. ſec. 746, 747. 1 Inſt. 391.

But, if tenant in tail at the time of his attainder had no iſſue, and after the obtaining of his pardon had iſſue, that iſſue would be bound by the warranty. 1 Inſt. 392. a.

If a partition be made by judgment upon a writ of *partitione faciendâ*, by force of the ſtatute of 31 *H.* 8. this does not defeat the warranty, becauſe by writ they are compellable by the ſtatute to make partition. 6 Rep. 12. Morrice's caſe.

But, if a feoffment with warranty be made to two or more, and they being joint tenants, afterwards, by deed make partition; by this the warranty is determined; for though they were compellable by writ to make partition, yet ſince they have not purſued the ſtatute by making partition by writ, the warranty is gone. *Id. ibid.*

So, if there be two joint tenants, and one of them diſſeiſes the other, and he that diſſeiſes recover in an aſſize, and have judgment to hold in ſeveralty; hereby the warranty is determined. *Id. ibid.*

As warranties may be defeated and extinguiſhed by matter in law, ſo likewiſe they may be diſcharged or defeated by matter in deed: and this in three ſeveral ways. For— 1 Inſt. 392. b.

If the party that has the warranty, or the eſtate to which the warranty is annexed, releaſes to him that is bound to warrant all warranties, or all covenants real, or all demands; by either of theſe releaſes the warranty is gone. Litt. ſec. 748.

If one enfeoffs three with warranty to them and their heirs, and one of them releaſes to one of the other two; hereby the warranty is gone for that part. But, if one of them releaſes to the other two; in this caſe the warranty is not gone, but continues, and they may vouch upon it. 1 Inſt. 385.

If tenant in tail enfeoffs his uncle, who enfeoffs another in fee with warranty, and the feoffee releaſes the warranty to his uncle; thereby the warranty is extinct. 1 Inſt. 390.

But, if a gift in tail be made with warranty, in this caſe a releaſe made by the tenant in tail of the warranty will not extinguiſh it. *Id. ibid.*

If two make a feoffment in fee, and warrant the land to the feoffee and his heirs, and the feoffee releaſes the warranty to one of the feoffors; this does not determine the warranty of the other as to the moiety. 1 Inſt. 393.

So if one enfeoffs two with warranty, and one of them releaſes the warranty; this does not extinguiſh the warranty for the other moiety, but it continues ſtill. *Id. ibid.*

1 Inſt. 385. If one warrants land to two men and their heirs, and one of them makes a feoffment in fee; hereby the warranty is not determined, but the other may vouch for his moiety.

As warranties may be defeated in the whole, ſo they may be defeated as to part of the benefit that may be taken of the ſame; as,

1 Inſt. 393. a. He who has a warranty may make a defeaſance not to take any benefit by way of voucher: in the like manner that he ſhall take no advantage by way of *warrantia chartæ*, or by way of rebutter.

1 Inſt. 390. If the parties, between whom the warranty is, intermarry, hereby the warranty is ſuſpended during the coverture in ſome caſes.

Id. ibid. If tenant in tail makes a feoffment in fee with warranty, and diſſeiſes the diſcontinuee, and dies ſeiſed; this ſuſpends the warranty.

In ſome ſpecial caſes there ſhall be no recoveries in value upon one warranty; as,

1 Inſt. 393. a. If a diſſeiſor gives lands to the huſband and wife, and to the heirs of the huſband, the huſband aliens in fee with warranty, and dies, the wife brings a *cui in vita*, the tenant vouches and recovers in value, if after the death of the wife the diſſeiſee brings a *præcipe* againſt the alience, he ſhall vouch and recover in value again.

Id. ibid. So it is, where the wife brings a writ of dower againſt the alienee, he ſhall recover in value again upon the ſame warranty.

Id. ibid. And it is in the ſame manner if a man be ſeiſed of a rent by a defeaſible title, and releaſe to the tenant of the land all his right in the land, and warrant the land to him and his heirs; if he be empleaded for the rent, he ſhall vouch and recover in value for the rent; and if he be empleaded for the land, he ſhall vouch and recover in value again for the land.

Id. ibid. But in theſe and the like caſes, the reaſon is in reſpect of the ſeveral eſtates recovered, but for one and the ſame eſtate he ſhall never recover but once in value; and though the land recovered in value be evicted, yet he ſhall never take benefit of the warranty after.

Id. ibid. A warranty alſo may loſe its force by taking benefit or making uſe thereof; for after a man has once taken advantage thereof in ſome caſes, he can make no further uſe of it.

Id. ibid. If in a *præcipe* the tenant vouches, and at the *ſequatur ſub ſua periculo*, the tenant and the vouchee make default, whereupon the demandant has judgment againſt the tenant; and afterwards the demandant brings a *ſcire facias* againſt the tenant to have execution; in this caſe the tenant may have a *warrantia chartæ*.

Id. ibid. And if in that caſe a ſtranger had brought a *præcipe* againſt the tenant, the warranty loſt not its force; but, if the tenant had judgment to recover in value againſt the vouchee, he ſhould not vouch again by reaſon of that warranty, becauſe he had taken advantage of the warranty.

(P) How Warranties ſhall be expounded.

IT is a principle of law that all warranties in general are to be favourably conſtrued, becauſe they are part of men's aſſurances.

It is to be obſerved likewiſe, that in ſome caſes warranties in law are not taken away by expreſs warranties; as, if a man leaſeth for life, and farther bindeth himſelf and his heirs to warranty, here the expreſs warranty doth not take away the warranty in law; for if he in reverſion granteth over his reverſion, and the leſſee attorneth, and afterwards is empleaded, he may vouch the grantee by the warranty in law, or he may vouch the leſſor by the expreſs warranty. 4 Rep. 81. Noke's caſe.

So likewiſe, if a man make a feoffment in fee by the word *dedi*, with an expreſs warranty in the deed, he may uſe the one or the other at his election: and the warranty wrought by this word *dedi* is a ſpecial warranty, and extendeth to the heirs of the feoffee during the life of the donor only. But upon an exchange, the warranty extendeth reciprocally to the heirs, and againſt the heirs of both parties; though the aſſignee ſhall not vouch by force of ſuch warranties. *Id. ibid.* 1 Inſt. 384. a.

A partition implies a warranty in law. *Id. ibid.*

So, if a man make a gift in tail or a leaſe for life of land by deed or without deed, reſerving a rent, or of a rent-ſervice by deed, this is a warranty in law; and the donee or leſſee being empleaded ſhall vouch and recover in value: and this warranty in law extendeth not only againſt the donor or leſſor and his heirs, but alſo againſt his aſſignees of the reverſion; and ſo likewiſe the aſſignee of leſſee for life ſhall take the benefit of this warranty in law. 1 Inſt. 384. b.

When dower is aſſigned, there is a warranty in law included, that the tenant in dower being empleaded, ſhall vouch and recover in value a third part of the two parts whereof ſhe is dowable. *Id. ibid.*

If a man of a full age and an infant make a feoffment in fee with warranty, this warranty is not void in part and good in part; but it is good for the whole againſt the man of full age, and void againſt the infant; for although the feoffment of an infant paſſing by livery of feiſin be voidable, yet his warranty, which taketh effect only by deed, is merely void. 1 Inſt. 367. b.

If a man make a feoffment in fee, and bind his heirs to warranty, this is void, becauſe the anceſtor himſelf was not bound: alſo, if a man bind himſelf to warranty, and not his heirs, the heirs are not bound. 1 Inſt. 386. a.

But a warranty in law may bind the heir, although it never bound the anceſtor. *Id. ibid.*

If a man for him and his heirs warrant lands unto another and his heirs, this is a general warranty, becauſe it is not reſtrained to any perſon certain. 1 Rep. 1. Lord Buckhurſt's caſe.

A warranty regularly doth extend to all things iſſuing out of the land; that is to ſay, to warrant the land in ſuch plight and manner, 1 Inſt. 388. b.

manner, as it was at in the hand of the feoffor, at the time of the feoffment with warranty, and the feoffee ſhall vouch, as of lands diſcharged of the rent, &c. at the time of the feoffment made.

Id. ibid. and 389. a. If a woman that hath a rent-charge in fee, intermarrieth with the tenant of the land, and a ſtranger releaſeth to the tenant of the land with warranty, he ſhall not take advantage of this warranty, either by voucher or *warrantia chartæ*; for the wife, if the huſband die, or the heir of the wife, living the huſband, cannot have an action for the rent upon a title before the warranty made; for if the heir of the wife bring an aſſize of *mortd'anceſtor*, this action is grounded after the warranty, whereunto, as has been ſaid, the warranty ſhall not extend.

1 Inſt. 389. a. So it is, if the grantee of the rent grant it to the tenant of the land upon condition, which maketh a feoffment of the land with warranty, this warranty cannot extend to the rent; albeit the feoffment was made of the land diſcharged of the rent, for if the condition be broken, and the grantor be entitled to an action, this muſt of neceſſity be grounded after the warranty made.

Id. ibid. But in the caſe aforeſaid, when the woman, grantee of the rent, marrieth with the tenant, and the tenant maketh a feoffment in fee with warranty, and dieth; in a *cui in vita* brought by the wife, (as in law ſhe may,) the feoffee ſhall vouch as of lands diſcharged at the time of the warranty made, for that her title is paramount. So, if a tenant in tail of a rent-charge purchaſe the land, and make a feoffment with warranty, if the iſſue bring a *formedon* of the rent, the tenant ſhall vouch.

Of Waſte.

WASTE is the committing of any ſpoil or deſtruction in houſes, lands, &c. by tenants, to the damage of the heir, or of him in reverſion or remainder: whereupon the writ or action of waſte is brought for the recovery of the thing waſted, and damages for the waſte done.

In order to ſtate the law relative to this head, we will conſider it under the following diviſions:

(A) In what Subjects Waſte may be committed.

(B) Of the ſeveral Kinds of Waſte.

(C) What

(C) What Acts ſhall be deemed Waſte: And herein,

1. What ſhall be deemed Waſte in Lands.
2. What ſhall be deemed Waſte in Trees and Woods.
3. What ſhall be deemed Waſte in digging for Gravel, Mines, &c.
4. What ſhall be deemed Waſte, in Gardens, Orchards, Fiſh-Ponds, Dove-Houſes, Parks, &c.
5. What ſhall be deemed Waſte with reſpect to Houſes, &c. —And herein,

Of what Things annexed to the Freehold, Waſte may be committed.

(D) What ſhall be deemed Waſte with reſpect to eccleſiaſtical Perſons.

(E) What Waſte ſhall be deemed excuſable.

(F) What Waſte ſhall be juſtifiable, by Reaſon of the Intereſt of the Party.

(G) Who may bring an Action of Waſte.

(H) Againſt whom the Action of Waſte may be brought: Herein,

1. Againſt whom it may be brought for Waſte done by a Stranger.
2. How far it lies againſt Executors, &c.

(I) At what Time an Action of Waſte ſhall be brought.

(K) Of the Proceſs and Proceedings in Actions of Waſte: And herein,

1. In what Caſes the Action ſhall be brought in the *Tenet*.
2. In what Caſes it ſhall be brought in the *Tenuit*.

(L) Of the Pleadings in Actions of Waſte.

(M) Of the Judgment in Actions of Waſte, and what ſhall be recovered thereby.

(N) In what Caſes in general Waſte may be reſtrained by Injunction in Equity: And herein,

How

How far it may be reſtrained in Equity, notwithſtanding the Words without *Impeachment of Waſte* be contained in the Leaſe, &c.

(O) What Relief may be given in Equity in Caſes of Waſte.

(A) In what Subjects in general Waſte may be committed.

This act provideth remedy for waſte done

THE ſtatute 52 *H.* 3. *c.* 23. § 2. *enacts, that farmers* (*a*), *during their terms, ſhall not make* (*b*) *waſte, ſale* (*c*), *nor exile of houſe, woods, and men.*

by leſſee for life, or leſſee for years, and it is the firſt ſtatute that gave remedy in thoſe caſes: for the rule of the regiſter is, that there are five manner of writs for waſte, *viz.* two at the common law, as for waſte done by tenant in dower, or by the guardian; and three by ſtatute or ſpecial law, as againſt tenant for life, tenant for years, and tenant by the curteſy. 2 Inſt. 145. [299. But this opinion of Lord Coke, that there was no remedy at common law for waſte, except againſt tenant by the curteſy, in dower, and a guardian, it ſhould ſeem is not well founded. *Vide* Bract. lib. 4. c. 18. 2 Reeves's Hiſt. Law, 73, 74. 148. note.]

This ſtatute is a penal law, and yet becauſe it is a remedial law it has been interpreted by equity. Arg. 10 Mod. 281. in caſe of Hammond v. Webb.

(*a*) Here farmers do comprehend all ſuch as hold by leaſe for life or lives, or for years, by deed or without deed. 2 Inſt. 145 ——It has been reſolved likewiſe that it ſhould extend to ſtrangers. Arg. 10 Mod. 281. in caſe of Hammond v. Webb.

Although the regiſter ſays *ſciend.* that *per ſtatutum de* Marlebridge, *cap.* 23. *data fuit quædam prohibitio waſti verſus tenentem annorum*, which is true; yet the ſtatute extends to farmers for life alſo, but this act extended not to tenant by the curteſy, for he is not a farmer; but if a leaſe be made for life or years, he is a farmer, though no rent be reſerved. 2 Inſt. 145.

(*b*) By theſe words they are prohibited to *ſuffer* waſte, for it has been reſolved that this act extends to waſte *omittendo*, though the word is *faciant*, which literally imports *active* waſte. Arg. 10 Mod. 281. in caſe of Hammond v. Webb [(*c*) Note, the word *ſale* is not in the original act. Bracton, ſpeaking of the terms *waſte, deſtruction, and exile*, ſays, that the two firſt ſignified the ſame thing; but *exilium* meant ſomething of a more enormous nature; as ſpoiling or ſelling houſes; proſtrating and extirpating trees in an orchard or avenue, or about any houſe; all theſe were conſidered, ſays he, *ad maximam deformitatem curiæ & capitalis meſſuagii*, and as they either drove the inhabitants away, or had a tendency ſo to do, they were called *exilium*. Bract. lib. 4. c. 18. § 13. 1 Reeves's Hiſt. Law. 386.]

(*d*) Houſes, woods, and men were

Nor of any thing (*d*) *belonging to the tenements that they have to farm.*

before particularly named, and theſe words do comprehend lands and meadows belonging to the farm. 2 Inſt. 146.

Alſo, theſe general words have a further ſignification, and therefore, if there had been a farmer for life or years, of a manor, and a tenancy had eſcheated, this tenancy ſo eſcheated did belong to the tenements that he held in farm, and therefore this extended to it; and the leſſor ſhall have a writ generally, and ſuppoſe a leaſe made of the lands eſcheated by the leſſor, and maintain it by the ſpecial matter. 2 Inſt. 146.

(*e*) This grant ought to be by

Unleſs they have ſpecial licence (*e*) *by writing of covenant, mentioning that they may do it.*

deed, for all waſte tends to the diſinheritance of the leſſor, and therefore no man can claim to be diſpuniſhable of waſte without deed. 2 Inſt. 146.

Likewiſe, this ſpecial grant is intended to be *abſque impetitione waſti*, without impeachment of waſte. 2 Inſt. 146.

And this muſt be underſtood in

Which thing if they do, and thereof be convict, they ſhall yield full damage, and ſhall be puniſhed by amerciament grievouſly.

ſuch a prohibition of waſte upon this ſtatute as lay againſt a tenant in dower at the common law, and ſingle damages were given by this ſtatute againſt leſſee for life, and leſſee for years. 2 Inſt. 146.

But

But waſte may be committed not only in houſes and lands, but in gardens, orchards, timber-trees, dove-houſes, warrens, parks, fiſh-ponds, and other ſubjects of property, as will be ſhewn. 1 Inſt. 53. a.

(B) Of the ſeveral Kinds of Waſte.

THERE are two kinds of waſte, *viz. voluntary* or *actual*, and *negligent* or *permiſſive*. *Voluntary* waſte may be done by pulling down or proſtrating houſes, or cutting down timber-trees: *Negligent* waſte may be by ſuffering houſes to be uncovered, whereby the ſpars or rafters, planches or other timber of the houſe are rotten. 1 Inſt. 53. a.

A. leaſed a houſe which was ruinous at the time of the demiſe: the leſſee obliged himſelf not to do or ſuffer any voluntary waſte, *&c.*: the houſe fell, and *A.* brought debt: it was adjudged, that it lies: for it is waſte, though the leſſee may excuſe himſelf upon the ſpecial matter. Dy. 38. pl. 35. Ow. 92. Glover v. Pipe, and a difference was taken between an action of waſte, and debt on an obligation.

So, where *A.* leaſed a houſe and land for years by indenture, in which was a *clauſe, that if the leſſee* happens to *do any waſte*, the *leſſor may re-enter*. The *leſſee ſuffered the houſe to fall for want of covering* and repairing. Though the words were (to do any waſte) yet *Dyer* and *Walſh* inclined that leſſor might re-enter, becauſe ſuch waſte is puniſhable by the ſtatute of *Glouceſter*, and the words (any waſte) is general and indifferent to either of the two kinds of *waſte*, viz. *voluntary or negligent*, &c. Dy. 281. pl. 21. Of this opinion likewiſe is Lord Coke in his comment on the ſtatute of Marlebridge, where he ſays—That to do or make waſte, in legal underſtanding, includes negligent as well as voluntary waſte. 2 Inſt. 145.

(C) What Acts ſhall be deemed Waſte.

IT has been laid down as a general principle, that the law will not allow that to be waſte, which is not any way prejudicial to the inheritance: nevertheleſs, Het. 35. Barret v. Barret.

It has been held, that a leſſee or tenant cannot change the nature of the thing demiſed; though, in ſome caſes, the alteration may be for the greater profit of the leſſor. Thus—

If a leſſee converts a corn-mill into a fulling-mill, it is waſte; although the converſion be for the leſſor's advantage. Cro. Ja. 182. *Civit.* London v. Greyme.

Alſo, converting a brewhouſe of 120*l. per annum* into other houſes let for 200*l.* a year, is waſte; becauſe of the alteration of the nature of the thing, and of the evidence. 1 Lev. 309. Cole v. Green.

We will now conſider what ſhall be deemed *waſte* with reſpect to particular ſubjects of property.—And,

1. What Acts ſhall be deemed Waſte in Lands.

If the tenant converts arable into wood, or *è converſo*, it is waſte; for it not only changes the courſe of huſbandry, but alſo the proof of evidence. Hobart's Rep. Caſe, 296. p. 234.

But,

2 Roll. Abr. 814. But, if a leſſee ſuffers arable land to lie freſh, and not manured, ſo that the land grows full of thorns, &c. this is not waſte, but ill huſbandry.

1 Inſt. 53. b. Likewiſe, the converſion of meadow into arable is waſte; for it not only changes the courſe of huſbandry, but the proof of his evidence.

2 Roll. Abr. 815. Some ſay, that But, if meadow be ſometimes arable, and ſometimes meadow, and ſometimes paſture, there, the ploughing of it is not waſte.

ploughing muſt be prohibited by covenant to pay ſo much an acre, for that an abſolute reſtraint from ploughing is void.

2 Le. 174. pl. 210. Neither is the diviſion of a great meadow into many parcels by the making of ditches waſte; for the *meadows* may be better for it, and it is for the profit and eaſe of the occupiers.

Id. ibid. Likewiſe, converting a meadow into a hop garden, is not waſte; for it is employed to a greater profit, and it may be meadow again. *Per Windham* and *Rhodes*, J., but *Periam*, J. ſaid, though it be a greater profit, yet it is alſo with greater labour and charges.

Id. ibid. But converting a meadow into an orchard, is waſte, though it be to the greater profit of the occupier. *Per Periam.*

2 Roll. Abr. 815. If a leſſee plough the land ſtored with conies, this is not waſte; unleſs it be a warren by charter or preſcription.

Id. ibid. Ow. 66. Moyle v. Moyle. So, if a leſſee of land deſtroys the coney-boroughs in the land, it not being a free warren by charter or preſcription, it ſeems, it is not waſte; for a man can have no property in them, but only a poſſeſſion.

1 Inſt. 53. b. It is waſte to ſuffer a wall of the ſea to be in decay, ſo as by the flowing and reflowing of the ſea the meadow or marſh is ſurrounded, whereby the ſame becomes unprofitable. But, if it be ſurrounded ſuddenly by the rage and violence of the ſea, occaſioned by wind, tempeſt, or the like, without any default in the tenant, this is not waſte. Yet, if the tenant repair not the banks or walls againſt rivers or other waters, whereby the meadows or marſhes be ſurrounded and become ruſhy and unprofitable, this is waſte.

2 Roll. Abr. 816. So, *à fortiori*, if arable land be ſurrounded by ſuch default; for the ſurrounding waſhes the marle and other manurance from the land.

2. What Acts ſhall be deemed Waſte in Trees and Woods.

5 Rep. 12. Saunders's caſe. Trees are parcel of the inheritance, and therefore if leſſee aſſigneth his term, and excepts the timber-trees, it is void; for he cannot except that which doth not belong to him by law.

11 Rep. 48. Liford's caſe. The leſſor, after he has made a leaſe for life or years, may by deed grant the trees, or reaſonable eſtovers out of them, to another and his heirs; and the ſame ſhall take effect after the death of the leſſee. But ſuch a gift to a ſtranger is void during the eſtate for life, becauſe of the particular prejudice which might be done to the leſſee.

The

The leſſee hath but a particular intereſt in the trees, but the general intereſt of the trees doth remain in the leſſor: for the leſſee ſhall have the waſte and fruit of the trees, and the ſhadow for his cattle, &c. but the intereſt of the body of the tree is in the leſſor, as parcel of his inheritance. Therefore, 11 Rep. 48. Liford's caſe.

If trees are overthrown, by the leſſee or any other, or by wind or tempeſt, or by any other means disjointed from the inheritance, the leſſor ſhall have them in reſpect of his general ownerſhip. 11 Rep. 81. Bowles's caſe.

With reſpect to timber trees, ſuch as oak, aſh, and elm, (which are timber trees in all places,) waſte may be committed in them, either by cutting them down, or topping them, or doing any act whereby the timber may decay. Alſo, in countries where timber is ſcant, and beeches or the like are converted to building for the habitation of man, they are alſo accounted timber. Thus, 1 Inſt. 53. a. 54. b.

Waſte may be committed in the cutting of beeches in *Buckinghamſhire*, becauſe there, by the cuſtom of the country, they are the beſt timber. 2 Roll. Abr. 814.

So, waſte may be committed in the cutting of birches in *Berkſhire*, becauſe they are the principal trees there for the moſt part. *Id. ibid.*

If the tenant cut down timber-trees, or ſuch as are accounted timber, as is aforeſaid, this is waſte; and if he ſuffer the young germins to be deſtroyed, this is deſtruction. So it is, if the tenant cut down underwood, (as he may by law,) yet, if he ſuffer the young germins to be deſtroyed, or, if he ſtub up the ſame, this is deſtruction. 1 Inſt. 53. a.

If a leſſee or his ſervants ſuffer a wood to be open, by which beaſts enter and eat the germins, though they grow again, yet it is waſte; for after ſuch eating they never will be great trees, but ſhrubs. 2 Roll. Abr. 815.

If a termor cuts down underwood of hazel, willows, maple, or oak, which is ſeaſonable, it is not waſte. 2 Roll. Abr. 817. If uſually cut and ſold every ten years, it is no waſte: but if he dig them up by the roots, or ſuffer the germins to be bitten with cattle after they are felled, ſo as they will not grow again, the ſame is a deſtruction of the inheritance, and waſte lies for it. And mowing the ſtocks with a wood ſcythe is a malicious waſte; and continual mowing and biting is deſtruction. Godb. 210. pl. 298. Sir John Gage v. Smith.

If aſhes are ſeaſonable wood to cut from ten years to ten years, it is not waſte to cut them down for houſe-bote. *Id. ibid.*

But, if the aſhes are groſs of the age of nine years, and able for great timber, it is waſte to cut them down. *Id. ibid.*

If oaks are ſeaſonable, and have been uſed to be cut always at the age of twenty years, it is not waſte to cut them down at ſuch age, or under; for in ſome countries, where there is great plenty, oaks of ſuch age are but ſeaſonable wood. *Id. ibid.*

But after the age of twenty years, oaks cannot be ſaid to be wood ſeaſonable, and therefore it ſhall be waſte to cut them down. *Id. ibid.*

Cutting down willows, beech, birch, aſp, maple, or the like, ſtanding in the defence and ſafeguard of the houſe, is deſtruction. 1 Inſt. 53. a.

If

If there be a quickſet fence of white thorn, if the tenant ſtub it up, or ſuffer it to be deſtroyed, this is alſo deſtruction. And for all theſe and the like deſtructions, an action of waſte lieth.

Godb. 4. pl. 6. The cutting of horn-beams, hazels, willows, ſallows, though of forty years growth, is no waſte, becauſe theſe trees would never be timber. *Per Meade*, J.

7 Rep. 15. Engleſield's caſe. 5 Rep. 21. Mayne's caſe. If the leſſee covenant, that he will leave the wood at the end of the term as he found it; if the leſſee cut down the trees, the leſſor ſhall preſently have an action of covenant: for it is not poſſible for him to leave the trees at the end of the term. So that the impoſſibility of performing the covenant ſhall give a preſent action on a future covenant. But it is otherwiſe in the caſe of a houſe; for there, though the leſſee commit waſte, yet he may repair the waſte done, before the term expires.

1 Inſt. 53. b. Hubart's Rep. C. 296. The *cutting of trees* is juſtifiable *for houſe-bote, hay-bote, plough-bote, and fire-bote.*

Br. Waſte, 130. By the common law the leſſee ſhall have them, though the deed does not expreſs it; but if he *takes more than is neceſſary*, he ſhall be puniſhed in waſte. Br. Waſte, pl. 130.——A termor may take wood for them, becauſe they belong to him of common right. F. N. B. 59. (N) And *ibid.* in the new notes there (*i*) ſays, he may take oaks, elms, aſh, &c. for repairs of the houſe, and underwood, &c. for incloſures and firing.——Covenant by leſſor that leſſee ſhall have houſe-bote, hay-bote, and fire-bote, without committing any waſte, on pain of forfeiting the leaſe, is no more than what the law appoints, and therefore the *covenant* is vain. Cro. E. 604. pl. 18. Archdeacon *v.* Jennor.

If leſſee *juſtifies*, in waſte for *cutting oaks for fire-bote, he muſt ſurmiſe that there was no underwood upon the land:* ſo, it ſeems, where he takes aſh, or other trees which are timber. Br. Waſte, pl. 89.—And by the beſt opinion, *oak and alſo under the age of ſixteen years*, may be cut for fire-bote. *Ibid.*

Leſſee for life or years, by the common law, cannot take fuel but of *buſhes and ſmall wood*, and not of timber-trees: *but, if leſſor in the leaſe grants fire-bote expreſsly*, then, if leſſee cannot have ſufficient fuel as above, *&c.* he may take great trees. 3 Le. 16. Anon.

1 Inſt. 53. b. In an action of waſte for cutting The tenant may take *ſufficient wood to repair the walls, pales, fences, hedges, and ditches as he found them;* but he cannot make new.

trees, the defendant juſtifies, *&c.* that they were *to make a fence with pale:* And by Hubard, it was good, *without ſhewing that the fence was made of pale*, &c. *and now in decay.* Noy, 23. Jenkins v. Jenkins.

1 Inſt. 53. Cutting dead wood is no waſte.

Id. ibid. But converting trees into coals for fuel, where there is ſufficient dead wood, is waſte.

3. What ſhall be deemed Waſte, in digging for Gravel, Mines, &c.

1 Inſt. 53. b. But not where it is for repara-tion. If the tenant digs for gravel, lime, clay, brick-earth, or ſtone hid in the ground, or for mines of metal or coal, or the like, not being open at the time of the leaſe, it is waſte.

See *poſt*, 5. *What ſhall be deemed waſte with reſpect to houſes.*

1 Inſt. 54. b. If a man hath land in which there is a mine of coals, or the like, and maketh a leaſe of the land (without mentioning any mines) for life or for years, the leſſee for ſuch mines as were open at the time of the leaſe made, may dig and take the profits thereof. But he cannot dig for any new mine that was not open at the time of the leaſe made, for that would be adjudged waſte.

Likewiſe,

Likewiſe, if there be open mines in the land, and the owner leaſe it to another, *with the mines in it*, he may dig in the open mines, but not in the cloſe mines: but otherwiſe it would be, if there was not any open mine there; for then the leſſee might dig for mines, otherwiſe the grant would take no effect. *Id. ibid.*

If a leſſee digs ſlate-ſtone out of the land, it is waſte. And, 2 Roll. Abr. 816.

Digging for ſtones, unleſs in an ancient quarry, is waſte, though the leſſee fill it up again. Ow. 66. Moyle v. Moyle.

Likewiſe, if he have a leaſe of land, in which there was a coal-mine, but not open at the time of the leaſe; if the leſſee open it, and aſſign his intereſt, it is ſtill waſte in the aſſignee. But, where the leaſe is of lands, and all mines in it, there, the leſſee may dig in it. 5 Rep. 12. a. b. Sander's caſe.

But, if leſſee of land, with mines of coals, iron, and ſtone, digs of the coals, iron, and ſtones, ſo much as is neceſſary for him to uſe without ſelling, it is not waſte. 2 Roll. Abr. 816.

If a leſſee digs the earth, and carries it out of the land, action of waſte lies. *Id. ibid.*

If a leſſee digs for gravel or clay, for reparation of the houſe, not being open at the time of the leaſe, it is not waſte; any more than the cutting of trees for reparation. 1 Inſt. 53. b.

4. What ſhall be deemed Waſte in Gardens, Orchards, Fiſh-Ponds, Dove-Houſes, Parks, &c.

If the tenant cut down or deſtroy any fruit-trees, growing in the garden or orchard, it is waſte: but, if ſuch trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waſte. 1 Inſt. 53. a.

Breaking a hedge alſo is not waſte. *Id. ibid.*

Likewiſe, deſtruction of *ſaffron heads in a garden*, is not waſte. Br. Waſte, pl. 143. cites 10 H. 7. c. 2.

If the tenant of a dove-houſe, warren, park, vivary, eſtangues, or ſuch like, takes ſo many, that ſo much ſtore is not left as he found at the time of the demiſe, it is waſte. 1 Inſt. 53. a. Hob. Rep. C. 296.

Likewiſe, if the leſſee of a pigeon-houſe ſtops the holes, that the pigeons cannot build, it is waſte. 1 Inſt. 53. a.

So likewiſe, ſuffering the pales of a park to decay, whereby the deer are diſperſed, is waſte. *Id. ibid.*

Alſo, if the leſſee of a hop-ground plough it up and ſow grain there, it is waſte. Ow. 66. Moyle v. Moyle.

The *breaking of a weare* is waſte, and ſo of the *banks of a fiſh-pond*, ſo that the water and fiſh run out. *Id. ibid.*

5. What ſhall be deemed Waſte with reſpect to Houſes.

Waſte may be done in houſes, by pulling them down or proſtrating them, or by ſuffering the ſame to be uncovered, whereby the ſpars or rafters, planches or other timber of the houſe are rotten. 1 Inſt. 53. a.

2 Roll. Abr. 815. Default of coverture of an houſe is waſte, though the timber be ſtanding.

1 Inſt. 53. a. But, if the houſe be uncovered, when the tenant cometh in, it is no waſte in the tenant to ſuffer the ſame to fall down.

1 Inſt. 53. a. Though there be no timber growing upon the ground, yet the tenant at his peril muſt keep the houſes from waſting.

2 Roll. Abr. 815. But, if the old houſe falls by being ruinous, and the leſſee builds a new one, it needs not be ſo long and wide as the old one. Br. Waſte, pl. 93. If a leſſee raſes the houſe, and builds a new houſe, if it be not ſo long and wide as the other, it is waſte.

1 Inſt. 53. a. So, if he rebuilds it more large that it was before, it is waſte; for it will be more charge for the leſſor to repair it.

2 Roll. Abr. 815. But, if a leſſee of land makes a new houſe upon the land where there was not any before, this is not waſte; for it is for the benefit of the leſſor. But, according to Lord *Coke*,

1 Inſt. 53. a. Lord Coke perhaps is here to be underſtood of building a new houſe in the room of one of which was before on the premiſes; and thus Rolle and he may be reconciled. If the tenant build a new houſe, it is waſte; and if he ſuffer it to be waſted, it is a new waſte.—Yet, if the houſe be proſtrated by enemies or the like without a default of the tenant, or were ruinous at his coming in, and fall down, the tenant may build the ſame again with ſuch materials as remain and with the other timber, which he may take growing on the ground for his habitation; but he muſt not make the houſe larger than it was.

1 Inſt. 53. a. If the houſe be uncovered by tempeſt, the tenant muſt in convenient time repair it.

2 Roll. Abr. 815. If a leſſee fling down a wall between a parlour and a chamber, by which he makes a parlour more large, it is waſte; becauſe it cannot be intended for the benefit of the leſſor, nor is it in the power of the leſſee to tranſpoſe the houſe.

Br. Waſte, 143. So, if he pull down a partition between chamber and chamber, it is waſte.—Or,

2 Roll. Abr. 815. If a leſſee pull down a hall or parlour, and make a ſtable of it, it is waſte.

Id. ibid. If a leſſee pull down a garret over head, and make it all one and the ſame thing, it is waſte.

Id. ibid. If a leſſee permit a chamber *fore in decaſu pro defectu plauſtrationis, per quod groſſum maheremium devenit putridum, & camera illa turpiſſima & fœdiſſima devenit*, action of waſte lies for it.

Id. ibid. So, if a leſſee permit the walls to be in decay for default of daubing, *per quod maheremium devenit putridum*, action of waſte lies.

Br. Waſte, pl. 94. *The breaking of a pale* or of a wall uncovered, is not waſte.

Id. ibid. But the *breaking of a wall covered with thatch, and of a pale of timber covered*, is waſte.

1 Inſt. 53. b. But by the 6 Anne, c. 31. no action is to be proſecuted againſt any perſon in whoſe houſe or chamber any fire accidentally begins. Burning the houſe by negligence or miſchance is waſte.

If the tenant do or ſuffer waſte to be done in houſes, yet, if he repair them before any action brought, there lieth no action of waſte againſt him: but he cannot plead, *quod non fecit vaſtum*, but the ſpecial matter. 1 Inſt. 53. a.

6. Of what Things annexed to the Freehold Waſte may be committed.

The removing of a poſt in a houſe, is waſte. 42 E. 3. 6. Of poſts, &c. fixed in the land, and not to the walls by termor, and taken off within his term, waſte does not lie, for the houſe is not impaired by it. *Per* Kingſmill, J. and Grevill, Serjt. *Quod non negatur.* Br. Waſte, pl. 104.

So, the removing of a door. *Id. ibid.* 1 Inſt. 53. In waſte of taking away doors, the leſſee pleaded, that he erected them, and the court took a difference between outer doors and inner doors. *Per* 3 J. Leſſee may take away the inner doors within the term, but not the outer doors. Mo. 177. pl. 315. Cooke's caſe, *alias* Cook v. Humphrey.

So, the removing of a window. 42 E. 3. 6. It is Waſte, though the glaſs window be glazed by the tenant himſelf. 1 Inſt. 53. a.

The digging up a furnace annexed to the franktenement, and ſelling it, is waſte. Br. Waſte, pl 143. So, though annexed by the tenant himſelf. 1 Inſt. 53. a. The difference is between a furnace fixed to the middle or to the wall of the houſe; in the firſt caſe the leſſee make take it away, but not in the laſt. *Per* Dyer and Owen, J. Ow. 71. in caſe of Day v. Auſtin.

A furnace fixed *in medio domûs* is but a chattel, and removeable; but otherwiſe, if fixed to the walls. *Per* Walmſley. Said to have been agreed in Dyer's time. Cro. E. 374. in caſe of Day v. Biſbich. So of dyer's fat fixed to the walls, adjudged not removeable on an attachment. Cro. E. 374. pl. 24. Day v. Biſbich.

The removing of a bench is waſte, though annexed by the tenant himſelf. Br. Waſte, pl. 143. 1 Inſt. 53. a.

If wainſcot annexed to the houſe be taken away, it is waſte. *Id. ibid.* Though annexed by the tenant himſelf. *Id. ibid.* If fixed to a wall, it is waſte. *Per* Anderſon, Cro. E. 374. in caſe of Day v. Biſbich. Wainſcot annexed by the leſſor or leſſee, is parcel of the houſe, and whether by great or little nails, ſcrews, or irons, put through the poſt or walls of the houſe, is all one: but, if by any way whatever it be fixed to the poſt or walls of the houſe, it is waſte for leſſee to remove them; and ſhall paſs by grant of the houſe in the ſame manner as the cieling and plaſtering, 4 Rep. 64. cites it as reſolved, Mich. 41 & 42. Eliz. C. B. by the whole court, in caſe of Warner v. Fleetwood. But *per* Dodderidge, J. Wainſcot may as well be removed by a leſſee as arras hangings. Roll. 216. in Bridgman's caſe.

Of tables dormant and fixed in the land, and not to the walls by termor, and taken off within his term, waſte does not lie; for the houſe is not impaired by it. *Per Kingſmill*, J. and *Grevil*, Serjt. Br. Waſte, pl. 104. Tables dormant fixed cannot be removed, and if they are, it is waſte. Per Anderſon, C. J. Cro. 374. pl. 24. E. in caſe of Day v. Biſbich.

Beating down a wooden wall, or ſuffering a brick wall to fall, is no waſte, unleſs it be expreſsly alleged, that the walls were coped or covered. Dy. 108. b. pl. 31. Earl of Bedford v. Smith. So of a mud wall, is waſte. Br. Waſte, pl. 143.

If waſte be aſſigned in pulling up a plank floor and mangers of a ſtable, plaintiff muſt ſhew that the ſame were fixed. *Id. ibid.*

Mo. 178. Cooke's caſe. If leſſee erects a partition, he cannot break it down without being liable to an action of waſte, for he has joined it to the freehold.

Cro. Eliz. 329. Pyot v. Lady St. John. 2 Bulſtr. 113. Shelves are parcel of the houſe, and not to be taken away; and though it is not ſhewed that the ſhelves were fixed, it ought to be intended that they were fixed. *Per Coke*, Ch. J.

Id. ibid. Pavement is a ſtructure, for they uſe lime to finiſh it.

And held, that it is within the intention of the covenant for repairing edifices, buildings, and it is *quaſi* building.

Ow. 43, Stickleborne v. Hatchman. If by not ſcouring a ditch or moat the groundſels of the houſe are putrified, waſte ſhall be aſſigned *in domibus pro non ſcourando*. Id. ibid. If the tenant ſuffers the groundſels to waſte in his default of defence or removing the water from off them, or of dirt or dung or other nuiſance which lies or hangs upon them, the tenant ſhall be charged, for he is bound to keep them in as good caſe as he took them.

[The rule which ſeems pretty clearly eſtabliſhed by the above caſes, that whatever is annexed to the freehold, becomes part of it, and cannot be removed without doing waſte, has been relaxed in later times, upon motives of publick policy, as between two deſcriptions of perſons, that is, landlord and tenant, and tenant for life or in tail, and the remainder-man or reverſioner. As between landlord and tenant, it is now admitted, that the latter may, *during the term*, take away all ſuch chimney-pieces, wainſcot, *&c.*, and all ſuch things neceſſary for trade, as brewing veſſels, coppers, fire-engines, cyder-mills, *&c.* as he has himſelf put up or erected. We have ſaid *during the term*, for if he remove them *after the term*, he will be a treſpaſſer. And as between tenant for life or in tail, and the remainder-man or reverſioner, it is alſo admitted, that the former may remove fire engines, cyder-mills, coppers, *&c.* which he has erected, and thereby not only enjoys the profits of the eſtate, but likewiſe carries on a ſpecies of trade. And if he does not remove them in his lifetime, they go to his perſonal repreſentatives. But as between *heir* and *executor* the old rule of law ſeems ſtill to hold; for though in an action of trover by an executor againſt an heir for a cyder-mill tried at *Worceſter* before Lord *C. B. Comyns*, his Lordſhip was of opinion, that it was perſonal eſtate, and directed the jury to find for the executor; yet Lord *Mansfield* has obſerved, that that caſe in all probability turned upon a cuſtom: and that where no circumſtance of that kind ariſes, the rule ſhall ſtill hold in favour of the heir, ſeems fully eſtabliſhed by the deciſion of the Court of King's Bench in *Lawton* v. *Lawton*, *Eaſter* 22 *G.* 3.]

Ex parte Quincy, 1 Atk. 477. Ld. Dudley v. Ld. Ward, Ambl. 113. Bull. N. P. 34. S. P. Poole's caſe, 1 Salk. 368. Lawton v. Lawton, 3 Atk. 13.

Vide 3 Atk. 16. by Sanders, note.

(D) What ſhall be deemed Waſte, with reſpect to eccleſiaſtical Perſons.

3 Lev. 268. Jones v. Hill. WITH reſpect to eccleſiaſtical perſons, it has been held, that an action on the caſe will lie for dilapidations. And,

It

It has been ſaid that dilapidation of eccleſiaſtical places, houſes, and buildings, is a good cauſe of deprivation. 3 Inſt. 204.

If a biſhop cut and ſell the trees of the biſhoprick, *for this waſte, a prohibition ſhall be granted, commanding him to ceaſe doing ſuch waſte.* Reſolved in parliament. 11 Rep. 49. cites as the Biſhop of Durham's caſe.

So, if a parſon or vicar waſte the trees of his parſonage or vicarage, a prohibition ſhall be granted; for it is the dowry of the church. 11 Rep. 49. Liford's caſe. The patron may have the prohibition.

So, if a prebendary waſte the trees of his prebend, the patron may have a prohibition. Between *Ackland and Atwell*, prohibition granted by the Lord *Coventry*, Lord Keeper, for the prebend of *Catton* in *Devon*.

It has been holden, that if a biſhop, parſon, or other *eccleſiaſtical perſon, cut down trees* upon the lands, *unleſs* it be *for reparation* of their eccleſiaſtical houſes, and do or ſuffer to be done any dilapidations, they may be puniſhed for the ſame in the eccleſiaſtical court, and a prohibition will not lie in the caſe; and that the ſame *is a good cauſe of deprivation* of them of their eccleſiaſtical livings and dignities. But yet for ſuch waſte done, *they may be alſo puniſhed by the common law*, if the party will ſue there. Godb. 259. pl. 357. Saliſbury Biſhop's caſe.

On a motion for prohibition, the ſuggeſtion appeared to be, that the parſon had *digged and found lead mines in his glebe, and had felled timber;* and it was inſiſted that this was waſte, and prohibitable by 35 *E.* 1. *De non proſternend' arbores*, &c. But *per cur.*—It lies not for mines; for then mines in glebe-land can never be opened. Lev. 107. C unteis of Rutland's caſe.

(E) What Waſte ſhall be deemed excuſable.

IT may be obſerved in general, that waſte which enſues from the act of God is excuſable. Thus, 1 Inſt. 53. a.

If a houſe falls by tempeſt, the tenant ſhall be excuſed in action of waſte. *But, if* it be *uncovered by tempeſt, and ſtand* there, if the *tenant has ſufficient time to repair it*, and does not, the leſſor, if the leaſe be made on condition of re-entry for waſte, may re-enter, but not immediately upon the tempeſt; for it is no waſte till the tenant ſuffers it to be ſo long unrepaired, that the timber be rotted; *per* Hull; and then it is waſte. Br. Conditions, pl. 40. —— If he *ſuffer it to continue unrepaired, ſo that at laſt the houſe is caſt down by a tempeſt*, it is waſte. Mo. 62. pl. 173.

Likewiſe, if a houſe be abated by lightning, or thrown down by a great wind, it is not waſte. Inſt. 53. a.

So, if apple-trees be torn up by a great wind, if leſſee afterwards cut them, it is not waſte. Br. Waſte, pl. 39.

If the banks be well repaired by the leſſee, and the water notwithſtanding ſubvert them, and ſurround his meadow, by which it is become ruſhy, it is not waſte. 2 Roll. Abr. 820. *contra* 20 H. 6. c. 1. b. Leſſee for years *covenanted*, upon a penalty of 10*l. to repair the banks of a river.* They were afterwards broken down by a *ſudden outrageous flood.* Fitzherbert and Shelly held, that he is excuſed the penalty, becauſe it is the act of God; but he is bound by his covenant to repair it, which he muſt do in convenient time. Dy. 33. a. pl. 10, 11.

If banks *on the River Trent* are *unrepaired*, it is waſte; *per* all the juſtices; becauſe the Trent is not ſo violent, but that the leſſee by his policy and induſtry may well enough preſerve the banks, and make the water to run within its bounds; but the violence of the ſea is ſuch, that it cannot be reſtrained by any

any policy, and therefore it is no waſte if that by tempeſtuouſneſs breaks the walls and ſurrounds the land. Mo. 69. pl. 187. Griffith's caſe.

Br. Done, &c. pl. 13. The leſſor cannot give trees during the tenant's leaſe. But, if he grants them to a ſtranger, and commands the tenant to cut and deliver them, who does it, this ſhall excuſe him in an action of waſte. And yet the tenant was not bound by law to obey and execute this command.

(F) What Waſte ſhall be deemed juſtifiable, by reaſon of the Intereſt of the Party.

Caſ. temp. Talb. 16. Glenorchy v. Boſville. And his lordſhip ſaid, an injunction was refuſed, in Mr. Saville's caſe of Yorkſhire, who being an infant, and tenant in tail in poſſeſſion, and in a very bad ſtate of health, and not likely to live to full age, cut down by his guardian a great quantity of timber, juſt before his death, to a very great value; the remainder-man applied here for an injunction to reſtrain him, but could not prevail. *Ibid.*

TENANT in tail may commit waſte in houſes as well as in all other parts of the eſtate, notwithſtanding any reſtraint to the contrary, and no inſtance can be ſhewn where a tenant in tail has been reſtrained from committing waſte by injunction of the court of Chancery.

3 Le. 121. pl. 173. Anon. If *tenant in tail* grants all his eſtate, *his grantee* is diſpuniſhable of waſte: ſo, ſuch *grantee's grantee* is alſo diſpuniſhable. *Per Clerk*, J.

Lands were given to *A.* and *B.* and the heirs of *their two bodies*. A. *died without iſſue*, and the remainder of the half *reverted* to the donor. He brought waſte againſt *B.* of houſes and lands to him demiſed, and agreed that the writ was good: but it was queſtioned, if the count ſhall be general, or of a half only, notwithſtanding that both were tenants in common of the reverſion. 2 Brownl. 133. Mallet v. Mallet.

If a man *deviſes land to two in tail*, and after the *one* deviſee *dies without iſſue*, by which the reverſion in fee of one moiety reverts to the heir of the donor, but the *other* deviſee is tenant for life of the whole, and after he *commits waſte*; action of waſte lies againſt him by the heir of the donor for the one *moiety*.

11 Rep. 80. a. Lewis v. Rowles. But ſuch tenant ſhall not have the trees, &c. which he cuts. 4 Rep. 63. Herlakenden's caſe. —— And ſuch tenant may be reſtrained in equity. See *poſt*.

But action of waſte does not lie againſt *tenant in tail after poſſibility*, for the greatneſs of the eſtate of inheritance which was once in him; and alſo, as ſome ſay, becauſe the eſtate was *not within the ſtatute at the creation*.

1 Inſt. 28. b. If lands are given to the huſband and wife, and to the heirs of the body of the huſband, the remainder to the huſband and wife, and to the heirs of their two bodies begotten; and the huſband dies without iſſue; the wife ſhall not be tenant in tail after poſſibility; for the remainder in ſpecial tail was utterly void, for that it could never take effect. For ſo long as the huſband ſhould have iſſue, it ſhould inherit by force of the general tail; and if the huſband die without iſſue, then the ſpecial tail cannot take effect, inaſmuch as the iſſue which ſhould inherit in ſpecial tail, muſt be begotten by the huſband; and ſo the general, which is larger and greater,

greater, hath fruſtrated the ſpecial, which is leſs; and the wife, in that caſe, ſhall be puniſhed for waſte.

It has been agreed, that *tenant for years may cut wood;* but it has been doubted, if *tenant at will may:* but it ſeems, that as long as tenant at will is not countermanded he may cut ſeaſonable wood, *&c.* Br. Waſte, pl. 114. Tenant at will cannot juſtify cutting underwood, without licence. *Per* Littleton. Br. Waſte, pl. 131.

Where a man *leaſes a wood, which conſiſts only of great trees,* the leſſee cannot cut them. Br. Waſte, pl. 126.

But a leſſee may juſtify the *cutting of trees for reparation of houſes.* Hobart's Rep. Caſe, 296.

1 Inſt. 54. b. But in ſuch caſe the termor ſhall *pay the wages and ſalary of the workmen out of his own money,* and not cut wood to ſell to pay the wages. Br. Waſte, pl. 112.—And if he cuts trees for reparations, and *ſuffers the trees to lie and putrify,* it is waſte. Br. Waſte, pl. 112.

Nevertheleſs, *if leſſee cuts trees for reparation, and ſells them, and after buys them again, and employs them for reparation,* it is waſte by the ſale. 1 Inſt. 53. b.

So, if leſſee *cuts trees, and ſells them* for money, *though with the money he repairs the houſe,* yet it is waſte. *Id. ibid.*

As to the cutting of timber trees for repairs by leſſee, there is no *difference* whether the *leſſor or leſſee covenants to repair* the houſes; for in either caſe it is not waſte, if leſſee cuts them. Mo. 23. pl. 80. Anon. If *leſſor covenants to repair* the houſes, and does not, leſſee may cut down trees for the repairing of the houſes. Brownl. 240. Anon.

If a *houſe be proſtrated by enemies of the king,* or ſuch like, *without default of the leſſee,* the leſſee may rebuild it with the ſame materials that remain, and may *cut other timber* upon the land to rebuild it, but he muſt not make the houſe larger than it was. 1 Inſt. 53. a. —If *ſtrangers, enemies of the king,* deſtroy a houſe, waſte does not lie; but *contra,* if it be *by trairerous ſubjects* of the king. Br. Waſte, pl. 15.

So, if the houſe *was ruinous at the time of the leaſe, and fell within the term,* this is not waſte in the tenant. 1 Inſt. 53. a. Br. Waſte, pl. 130.

But the leſſee ſhall *not* cut trees to make *a new houſe, where there was not any at the time of the leaſe.* Hobart's Rep. Caſe, 296.

So, if a leſſee *ſuffers a houſe to fall for default of covering,* which is waſte, he *cannot cut trees to repair the houſe.* Br. Waſte, pl. 39.

And in general, if the *tenant ſuffer the houſe to be waſted,* he cannot juſtify the felling of timber to repair it. 1 Inſt. 53. b. —And in ſuch caſe the felling of timber to repair the ſame, is double waſte. *Ibid.*

If a *houſe be ruinous at the time of the leaſe, though the leſſee is not bound to repair it,* yet he *may cut trees to repair it.* 1 Inſt. 54. b. If the tenant *covenants to repair ſuch ruinous houſe,* he may take trees for it. Br. Waſte, pl. 130. cites 12 H. 8. 1.

The tenant likewiſe may *dig for gravel or clay for reparation of the houſe,* though the ſoil was not open when the tenant came in; and it is juſtifiable as well as the cutting of trees. 1 Inſt. 53 b.

Br. Waſte, pl. 67. So with regard to *a ſtable, if it fall without default of the leſſee in the time of the leſſor*, the leſſee *may take trees in the time of the heir to make a new ſtable, if it be of neceſſity.*

Br. Waſte, pl. 67. Iſſue was taken whether it was well repaired in the time of the plaintiff (the heir) and fell in the time of the plaintiff, in default of the defendant. *But*, if the ſtable falls *in default of the leſſee*, in time of the leſſor, he cannot, in time of the heir, cut trees to make a new ſtable.

F. N. B. 59. (M). Cutting *wood to burn, where the tenant has ſufficient hedgewood*, is waſte.

Dy. 19. pl. 115. Anon. Where leſſee for years has power to take hedge-bote *by aſſignment*, yet he may take it without aſſignment; for the affirmative does not take away the power which the law gives him.

4 Le. 162. pl. 269. Sir Richard Lewkner's caſe. If *leſſor except his trees* in his leaſe, the leſſee ſhall not have fire-bote, hay-bote, *&c.* which he ſhould have otherwiſe; and the property of the trees is in the leſſor himſelf. Upon ſuch reſervation, waſte will not lie againſt the tenant for cutting trees, becauſe they are not parcel of the thing leaſed, but treſpaſs lies in ſuch caſe. Dy. 19. pl. 110.

Noy, 29. Rich v. Makepeace. Yet it has been ſaid, that *leſſee for years, the trees being excepted*, has liberty to take the *ſhrowds and loppings* for fire-bote; but if *he cuts any tree*, it ſhall be *waſte, as well for the lopping as for the body* of the tree.

Clayt. 40. pl. 99. *coram* Barkley, Anon. If a tenant that has fire-bote to his houſe *in another man's land*, cuts wood for that intent to take his bote-wood, and *the owner* of the land *takes it away*, an action of trover and converſion lies againſt him by the tenant of the land who hath ſuch fire-bote.

Dy. 36. b. pl. 38. Maleverer v. Spinke. If the *leſſor is bound in a bond of* 100 *l.*, and the *leſſee cuts twenty oaks, and ſells them, and pays the obligee* for his leſſor, yet waſte lies againſt him for cutting them down, though the money was applied to the uſe and profit of the leſſor.

Clayt. 47. pl. 81. *coram* Barkley, Earl of Pembroke's caſe. If *A.* hath common of eſtovers in the wood of *B.* for houſe-bote, and he cuts down four trees for that purpoſe, and *in the working they prove unfit* for the uſe, as for poſts of a houſe, *&c.*, *A. cannot convert* this timber to *any other uſe*, &c. neither can he ſell and buy other fit wood with the money; and he cannot enlarge the houſe with this timber, nor board the ſides of the barn there which had mud-walls or the like before.

1 Lev. 171. Jemmet v. Cooley. *Where a rent is granted in fee*, with a *proviſo to enter and retain till ſatisfied of the profits;* the grantee, upon entry, cannot cut trees or do waſte. *Per* three juſtices.

F. N. B. 59. (M). Cutting *dead wood*, is no waſte.

Hobart's Rep. C. 296. Ld Darcy v. Aſhwith. And ſee Hutt 19. Where the caſe is more clearly reported. If a man leaſes land with general words of *all mines of coals, where there is not any mine of coals open at the time of the demiſe, and after the leſſee opens a mine*, he cannot juſtify *the cutting of timber trees for the making of puncheons, corſes, rolls, roll-ſcoops, and other utenſils* in and about the ſaid mine, though without them he could not dig and get the coals out of the mine: and this is like to a *new houſe built after the demiſe*, for the reparation of which he cannot take timber upon the land; and it had been waſte to open it, if it had not

not been granted by expreſs words: And it was ſaid by *Hobart*, that the law had been the ſame if the mine was open at the time of the demiſe.

(G) Who may bring an Action of Waſte.

BY 13 *Edw.* 1. *c.* 22. *the action of waſte is given to one tenant in common againſt* another (*a*).

(*a*) Theſe words include as well joint-tenants as tenants in common, for both of them hold *in communi*; and ſo do old books and records term them both. But, though the generality of theſe words do extend to coparceners, yet in good conſtruction they are not within the purview of this act, becauſe they were compellable to make partition; for this act extends not to them that had remedy by the common law.

Where there are tenants in common for life, the one ſhall not have treſpaſs of trees cut againſt the other, but ſhall have waſte *pro indiviſo*, though they are only tenants for term of life, *&c.*; but the one may have treſpaſs of corn cut againſt the other. Br. Waſte, pl. 79.

If one coparcener before partition makes feoffment to another, and one of them does waſte in the trees, waſte lies. 11 Rep. 49. a. Liford's caſe.

Likewiſe, if two joint-tenants do waſte, and after the *one enters into religion*, waſte lies againſt the other alone. 2 Roll. Abr. 828.

By the 20 *Ed.* 1. *ſt.* 2. *an action of waſte is maintainable by the heir for waſte done in the time of his anceſtors, as well as for the waſte done in his own time.* It is queſtioned if this is not an ordinance only. See Maynard's Ed. 2. 231. 273, 274.

This action muſt be brought by him that hath the immediate eſtate and inheritance in fee-ſimple or fee-tail, but ſometimes another may join with him. 1 Inſt 53. b. 285. a.

It is ſaid, that the reverſion muſt continue in the ſame ſtate that it was at the time of the waſte done, and not granted over; for though the reverſioner taketh the eſtate back again, the action is gone, becauſe the eſtate did not continue. But in ſome ſpecial caſes an action of waſte ſhall lie, though the leſſor had nothing in the reverſion at the time of the waſte done; for if a biſhop makes a leaſe for life or years, and dies, and the leſſee, the ſee being void, doth waſte, the ſucceſſor ſhall have an action of waſte. This is allowed upon a particular reaſon. A purchaſer ſhall have an action of waſte, though the ſtatute of 20 *Ed.* 1. ſpeaks of thoſe that are inheritors. 1 Inſt. 53. b. 356. 2 Roll. Abr. 825.

A tenant for life cannot have this action, but a parſon, *&c.* may have an action of waſte, and the writ ſhall ſay, *ad exhæredationem eccleſiæ*, for it is the dowry of the church. If a tenant doth waſte, and he in reverſion dieth, the heir ſhall not have an action of waſte, for waſte done in the life of his anceſtor: for he cannot ſay that the waſte was done to his diſinheriſon; neither ſhall a biſhop, maſter of an hoſpital, parſon, *&c.* have an action of waſte done in the time of their predeceſſors. 1 Inſt. 341. a. 1 Inſt. 53. b. 356. a.

If a leaſe is made to *A.* for life, the remainder to *B.* for life, remainder to *C.* in fee; no action of waſte lieth againſt the firſt leſſee during the eſtate in the meſne remainder (*b*), for then his eſtate would be deſtroyed. Otherwiſe, if *B.* had a meſne remainder 5 Rep. 67. 77. 1 Inſt. 54. a. [(*b*) But in ſuch caſe court of

equity would interpoſe by injunction

mainder for years, for that would be no impediment, the recovery not deſtroying the term of years.

to preſent waſte. Perrot v. Perrot, 3 Atk. 94. Robinſon v. Litton, *Id.* 210. Farrant v. Lovell, *Id.* 723.]

1 Inſt. 285. a. 283. a. 2 Inſt. 306. 5 Rep. 119. 2 Cro. 658.

If leſſee for years committeth waſte, and the years expire, yet the leſſor ſhall have an action of waſte for the treble damages, though he cannot recover the place waſted: but, if the leſſor accepteth of a ſurrender of a leaſe after the waſte done, he ſhall not have his action of waſte. It is ſaid, that if a tenant repairs before action brought, he in reverſion cannot have an action of waſte; but he cannot plead that he did no waſte, therefore he muſt plead the ſpecial matter.

And ſo it is of meſne aſſignees; the action lies againſt him that

Likewiſe, by 11 *H.* 6. *c.* 5. where tenants for life, or for another's life, or for years, grant over their eſtates, and take the profits to their own uſe, and commit waſte, they in reverſion may have an action of waſte againſt them.

takes the profits; but this is by the ſtatute of 11 H. 6. c. 5. For in that caſe the pernor of the profits did not hold the land. 2 Inſt. 302.

If *tenant for life or years does waſte, and grants over* his eſtate, the writ lies againſt him who did the waſte, and not againſt the grantee, F. N. B. 56. (A).—But, if the waſte be done after the alienation made, then it lies againſt the tenant. F. N. B. 60. (L); but ſays, *tamen quære.*

5 Rep. 77. Paget's caſe. 2 Inſt. 302.

He in the remainder as well as the reverſioner may bring this action, and every aſſignee of the firſt leſſee, mediate or immediate, is within this act.

(H) Againſt whom the Action of Waſte may be brought.

1 Inſt. 54. a. 2 Inſt. 145. 299. 301. 305.

IT has been ſaid, that there are five writs of waſte, two at the common law, as for waſte done by tenant in dower or by guardian; three by ſtatute, as againſt tenant for life, tenant for years, and tenant by the curteſy. It has been ſaid, however, that tenant by the curteſy was puniſhable for waſte by the common law, for that the law created his eſtate as well as that of the tenant in dower, and therefore the law gives like remedy againſt them. But on this ſubject the authorities in the books are very contradictory, as the reader will perceive by attending to the note ſubjoined to the following clauſe of—

No action of waſte *lay before the ſtatute of*

The *ſtatute of* Glouceſter, 6 *E.* 1. *cap.* 5. which enacts, that *a man from henceforth ſhall have a* (*a*) *writ of waſte in the Chancery againſt* (*b*) *him that* (*c*) *holds by law of* England.

Glouceſter, *but againſt tenant in dower and guardian*, and *by the ſtatute, action* of waſte is *given againſt tenant by the curteſy, for term of life*, and tenant for term of *years*. Br. Waſte, pl. 68.——Lord *Coke* ſays, a reaſon is required, (that ſeeing as well the eſtate of the *tenant by the curteſy*, as the *tenant in dower* are created by act in law,) wherefore the prohibition of waſte did not lie as well againſt the tenant by curteſy as the tenant in dower, at the common law; and the reaſon he aſſigns is this, for that *by having iſſue the ſtate of the tenant by the curteſy is originally created*, and yet after that *he ſhall do homage alone* in the life of his wife, which proves a larger eſtate; and ſeeing that at the creation of his eſtate he might do waſte, the prohibition of waſte lay not againſt him after his wife's deceaſe; but in the caſe of tenant in dower, ſhe is puniſhable of waſte at the firſt creation of her eſtate, 2 Inſt. 145.——But 2 Inſt. 299. ſays, that at the common law, waſte was puniſhable in three perſons, (*viz.*) tenant in dower, tenant by the curteſy, and the guardian, but not againſt tenant for life, or tenant for years: and the reaſon of the diverſity

verſity was, for that the law created their eſtates and intereſt; and therefore the law gave remedy againſt them, but tenant for life and for years came in by demiſe and leaſe of the owner of the land, &c., and therefore he might in his demiſe provide againſt the doing of waſte by his leſſee; and if he did not, it was his negligence and default.

(*a*) Neither this act, nor the ſtatute of *Marlebridge*, doth create *new kind of waſtes*, but gives new remedies for old waſtes; and what is waſte and what not, muſt be determined by the common law. 2 Inſt. 300, 301.

(*b*) If two are *joint tenamts* for years or for life, and one of them does waſte, this is the waſte of them both as to the place waſted, notwithſtanding the words of the act are (him tha holds). 2 Inſt. 302.

(*c*) Here tenant by the curteſy is named for two cauſes. *1ſt*, For that albeit the common opinion was that an action of waſte did lie againſt him, yet ſome doubted of the ſame in reſpect to this word (*tenet*) in the writ, for that the tenant by the curteſy did not hold of the heir, but of the lord paramount; and after this act, the writ of waſte grounded thereupon doth recite this ſtatute. *2dly*, For that greater penalties were inflicted by this act than were at the common law. 2 Inſt. 301.

'Or (*d*) *otherwiſe for term of life, or for term of years, or a woman* (*e*) *in dower.*

(*d*) A leſſee *for his own life, or* for *another man's life*, is within the words and meaning of this law, and in this point this act introduces that which was not at the common law. 2 Inſt. 301. [In this point, with deference to the high authority of Lord *Coke*, the act does not introduce that which was not at the common law; for tenant for life was puniſhable for waſte at common law, as may be ſeen in Bracton, lib. 4. c. 18.]

If *feme leſſee for life takes huſband*, the *huſband does waſte*, the *wife dies*, the *huſband ſhall not be puniſhed* by this law; for the words of this act be (a man that holds, &c. for life) and the huſband held not for life; for he was ſeiſed but in right of his wife, and the eſtate was in his wife. 2 Inſt. 301.

He that hath an *eſtate for life by conveyance at common law*, *or* by *limitation of uſe*, is a tenant within the ſtatute. 2 Inſt. 302.

Tenants *for years of a moiety*, 3d or 4th part, *pro indiviſo*, are within this act; and ſo it is of a tenant by the *curteſy*, *or* other tenant *for life of a moiety*, &c. 2 Inſt. 302.

(*e*) This is to be underſtood of all the five kinds of dowers whereof Littleton ſpeaks, *viz.* dower *at common law*, dower *by the cuſtom*, dower *ad oſtium eccleſiæ*, dower *ex aſſenſu patris*, and dower *de la pluis beale*; and againſt all theſe the action of waſte did lie at the common law. 2 Inſt. 303.

If tenant *in dower* be *of* a *manor*, and a *copyholder* thereof *commits waſte*, an action of waſte lies againſt tenant in dower. 2 Inſt. 303.

Action of waſte lies againſt an *occupant for life*, becauſe he has the eſtate of the leſſee for life, and holds for life, as the *ſtatute* mentions. 6 Rep. 37. b. Dean and Chapter of Worceſter.

If *leſſee for life* be *attainted of treaſon*, by which the leaſe is forfeited to the *king*, who *grants it over to* J. S., *and he afterwards do waſte*, though he come in *en le poſt*, yet action of waſte lies againſt him. 2 Roll. Abr. 826.

So if a man *diſſeiſe the tenant for life, and do waſte*, yet action of *waſte lies againſt the tenant for term of life*; for *he may have his remedy over againſt the diſſeiſor*. Br. Waſte, pl. 138.

Likewiſe, if an eſtate be made *to* A. *and his heirs, during the life of* B., *A.* die, *the heir of* A. *ſhall be puniſhed* in an action of waſte. 1 Inſt. 54. a. (5).

But an action of waſte does not lie againſt *tenant by ſtatute merchant, elegit, or ſtaple*, becauſe it is not an eſtate for life or years, and the ſtatute mentions thoſe who hold in any manner for life or years. *Contra Fitzh. Na.* 58. *H.* and there ſaid, that in the regiſter is a writ againſt him. 6 Rep. 37. Dean and Chapter of Worceſter. F.N.B. 58. (H), and in the new notes there (*a*) cites 21 E. 3. 26. that a *ſcire facias* was brought againſt a tenant *by elegit*, who had cut trees, *to pay the reſidue of the money to anſwer for the trees cut*, and for the plaintiff *to have his land again*; *per curiam*. By the ſtatute againſt cutting trees this is in the nature of a treſpaſs, and lies not in account, nor is he puniſhable in waſte, but in an *action on the caſe*.——Waſte lies not againſt tenant by *elegit*, but *writ of account*. Br. Waſte, pl. 78.

Some

Fitzh. Na. 58. b. (H). If ſuch tenant cuts timber *it ſinks the debt*, and the conuſor may have *ſcire facias ad computandum*, 3 Mod. 93 Arg. in the caſe of the mayor and commonalty of Norwich v. Johnſon.

Some books give *the reaſon of it to be*, becauſe the conuſor, if he commits waſte, may have a *venire facias ad computandum*, and the waſte ſhall be recovered in the debt.

2 Inſt. 303. If a man makes a *leaſe for years*, and *puts out the leſſee*, and *makes a leaſe for life*, and the *leſſee for years enters upon the leſſee for life, and does waſte*, the leſſee for life ſhall not be puniſhed for it.

Brownl. 238. Anon. If *leſſee for years* makes a *leaſe of one moiety to* A., and of the *other moiety to* B., and *A.* does waſte; the action ſhall be againſt both; for the waſte of the one is the waſte of the other.

Br. Waſte, pl. 132. An action of waſte lies againſt *a deviſee*, and the writ may ſuppoſe it *ex legatione*, for it is within the equity of the *ſtatute*.

1 Inſt. 54. S. P. *contra* F. N. B. 59. (E) and 2 Inſt. 135. ſays, the heir within age ſhall have an action of waſte againſt the guardian in ſocage.——But F. N. B. 59. (E), in the new notes there (*d*), it is ſaid, that *the heir* in this caſe ſhall have account or treſpaſs, but not waſte.——And *ibid.* (A), in the new notes there (*d*); Note, waſte does not lie againſt the guardian in ſocage, but only account or treſpaſs, according to the nature of the waſte, and ſays it was adjudged 16 E. 3.

No action of waſte lies againſt *guardian in ſocage*, but an account or treſpaſs.

If *guardian in ſocage in right of his wife* does waſte, the writ ſhall be againſt the huſband only. Brownl. 239.

Litt. ſect. 381. If an eſtate of lands be made to baron and feme, to hold to them during the coverture, *&c.*, if they waſte, the feoffor ſhall have writ of waſte againſt them.

2 Roll. Abr. 827. If *feme leſſee for life marries, and the huſband does waſte*, action lies againſt both.

Id. ibid. *And*, if in the above caſe, the huſband *dies*, action of waſte lies againſt the feme for the waſte he committed.

Id. ibid. But, if *tenant in dower marries, and the huſband does waſte, and dies*, the feme ſhall not be puniſhed for this.

Id. ibid. 1 Inſt. 54. Kelw. 113. pl. 42. —— Likewiſe, if *baron and feme are leſſees for life*, and *baron does waſte, and dies*, the feme ſhall be puniſhed in waſte, *if ſhe agrees to the eſtate*.

Though there have been variety of opinions in our books. She ſhall be puniſhed for the waſte done by her huſband in like manner as if a ſtranger had done it; and after the death of her huſband ſhe is in from the leſſor. 2 Inſt. 303.

The feme ſhall not be puniſhed for this waſte; *per Hanke*. Br. Waſte, pl. 58. Br. Waſte, pl. 138. ſays, that waſte does not lie againſt the feme. But ſays, *quare*, If this be not the waſte of both; and ſays, ſo ſee where there is folly in the feme, and where not. [*Quære*, If this does not mean by her agreeing to the eſtate after the baron's death.]

2 Roll. Abr. 827. *But, if ſhe waives the eſtate*, ſhe ſhall not be charged.

Id. ibid. *So upon leaſe for years* made to the baron and feme, waſte lies againſt both. And,

Id. ibid. If *baron and feme are joint leſſees for years*, and *baron does waſte, and dies*, action of waſte lies for this againſt the feme.

Id. ibid. Upon leaſe *for life* to baron and feme, waſte lies againſt both.

Id. ibid. And the writ may be *quod fecerunt vaſtum*, or *quod uxor, dum ſola fuit, fecit vaſtum*. Br. Waſte, pl. 55. Likewiſe, if *feme commits waſte and then marries*, the action ſhall be brought againſt both.

If

If *baron, ſeiſed for life of his wife in right of his wife, does waſte,* and after the *feme dies,* no action of waſte lies againſt the baron *in the tenuit,* becauſe he was ſeiſed only in right of his wife, and the franktenement was in the feme. 1 Inſt. 54. 5 Rep. 75. b. reſolved *per tot. cur.* Clifton's caſe, that the writ does not lie; and the reporter ſays, *Nota* reader, This judgment given upon conſideration of the ſtatute of Glouceſter, and of opinions *obiter in* 10 H. 6. 11 & 12. by Strange and Cotteſmore.——S. C. cited by Treby, Ch. J. Lutw. 674. Baron v. Barkley; and ſaid the reaſon is, becauſe it cannot be ſaid that the baron *tenuit ex dimiſſione,* according to the words of the ſtatute.

But, if baron, *poſſeſſed for years* in right of the feme, does waſte, and after the feme dies, action of waſte lies againſt the baron, becauſe the law gives the term to him. 1 Inſt. 54.

A. made a *feoffment* in fee *to the uſe of himſelf and his wife,* and to *his heirs:* there were *underwoods* on the lands, which were *uſually cut at* 21 *years* growth: *A. ſuffered them to grow* 25 *years, and then died.* Per tot. cur.—This ſhall bind the wife; for where the law limits a time for tenant for life to fell underwood, if it be not felled in that time, it ſhall not be felled by a tenant for life afterwards, but it ſhall be waſte. Godb. 4, 5. pl. 6. Anon.

Leſſee for years of lands *bought trees with liberty to cut them down within* 80 *years:* afterwards the *leſſee bought the inheritance, and deviſed to his wife for life,* remainder *to the plaintiff in fee,* and *made his wife executrix,* and died: ſhe cut down the trees: adjudged, that an action was maintainable; for though the trees were once chattels in the leſſee, yet by purchaſing the inheritance they are again united to the land. Ow. 49. Anon.

If the king *commits the wardſhip* of the heir in ward unto another, and the *committee does waſte,* then, upon a ſurmiſe made thereof in Chancery, the king ſhall ſend a writ unto the eſcheator to go to the land and ſee if waſte be done, and to certify the king thereof in the Chancery. F. N. B. 59. (B).

If *eſcheators* commit waſte in lands which they have in their hands in cuſtody, the heir within age, or of full age, ſhall have an action of waſte, and ſhall recover treble damages againſt them, and they ſhall ſuffer impriſonment two years at the leaſt, at the king's pleaſure. And ſo if eſcheators *commit waſte in* other *lands, ſeiſed into the king's hands by inqueſt of office.* *Id. ibid.*

And eſcheators, or other guardians of lands, *in the vacation of the temporalties of biſhopricks,* ſhall do no waſte, *&c.* *Id. ibid.*

Pending a *quare impedit,* if the incumbent cuts trees upon the glebe, and upon the lands of copyholders of a manor, parcel of the rectory, a prohibition lies. Hob. 36. pl. 51. Drury v. Kent.

A prohibition is awardable *againſt any one who waſtes the houſes of the parſon incumbent, or cuts the trees, or does any waſte.* Agreed by all the juſtices. Mo. 917. pl. 1303. Saccar's caſe. The *prohibition of waſte* was *abrogated, and the action of waſte framed* upon the act of Weſtm. 2. (c. 14.) as in the regiſter appears. 2 Inſt. 146.

If tenant by the curteſy, or other *tenant for life, make a leaſe for years,* and he in the *reverſion confirm it,* and tenant by the curteſy die, an action of waſte lies againſt the leſſee. 2 Inſt. 302.

But, if tenant by the curteſy grant over his eſtate, and the grantee commit waſte, the action of waſte ought to be brought againſt 1 Inſt. 54. Le. 291. pl. 397. S.P.

2 Inſt. 301. againſt the tenant by the curteſy by the heir, and thereby he ſhall recover the land againſt the aſſignee, for the *privity*, which is between the heir and the tenant by the curteſy.

2 Roll. Abr. 828. 2 Inſt. 301.— S.P. 3 Rep. 23. b. in Walker's caſe. So, if *tenant in dower grant over* her eſtate, and after the grantee commit waſte, yet an action of waſte lies againſt the tenant in dower, for the *privity* between them.

The reaſon wherefore, at the common law, the action of waſte did lie againſt the tenant in dower, or tenant by the curteſy, albeit they had aſſigned over their eſtates, was, *becauſe no action of waſte, by the common law, lay againſt the aſſignee for waſte done after the aſſignment*; therefore the action of neceſſity did, for ſuch waſte, (after the aſſignment,) lie againſt the tenant by the curteſy, or tenant in dower. 2 Inſt. 300.

And it lies againſt her, and not againſt the grantee, for the grantee cannot be tenant in dower; and *confirmation by the heir to the tenant in dower is no bar in this action*; becauſe it ſhall not change her eſtate. Br. Waſte, pl. 76.

Where the *huſband levied a fine, and took back an eſtate for life, remainder to his ſon in tail, and died; and the ſon endowed the mother, who aſſigned over* the eſtate; it was nevertheleſs adjudged, that waſte lay againſt her as tenant in dower. F. N. B. 55. (E), in the new notes there (*a*).

1 Inſt. 54— S.P. 3 Rep. 23. b. in Walker's caſe.— F. N. B. 56. (E). S. P. *But*, if tenant by the curteſy, or tenant in dower, grant over their eſtate, and grantee do waſte, and the heir, either before or after the aſſignment, grant the reverſion over, the ſtranger *ſhall have* action of *waſte againſt the aſſignee*, becauſe the privity is deſtroyed.

For one cannot hold by the curteſy, but of the heir, *&c.*—He can hold of none but the heir, and his heirs by deſcent. 1 Inſt. 316. a.—*But, if feoffee of the baron endow the feme* and ſhe aſſign over the eſtate, waſte lies for him againſt the wife; for the plaintiff ſhall not ſuppoſe in his writ, that ſhe held in dower of him *ex aſſignatione*; but only that ſhe held in dower of his heritage. F. N. B. 56. (E), in the new notes there (*a*).

1 Inſt. 54. The action ſhall be brought againſt the grantee. If *leſſee for life grant over* his eſtate *upon condition*, and after the *grantee commit waſte*, and *grantor enter for the condition broken*, he cannot be charged for the waſte committed by the grantee.

And ſo it is in caſe of tenant for years. 2 Inſt. 302.—And the place waſted ſhall be recovered. 1 Inſt. 54. a.

2 Roll. Abr. 828. *contra* 39 Aſſ. 15. by Tank. *So*, if leſſee for life, *make feoffment upon condition*, and the feoffee commit waſte, and after the leſſee re-enter for the condition broken, an action of waſte does not lie againſt him for the waſte committed by the feoffee.

Sir W. Jo. 51. pl. 2. Bray v. Tracy. If *tenant for life without impeachment of waſte leaſe for years*, or otherwiſe, and leſſee for years commit waſte, he in remainder in fee ſhall not have an action of waſte; for this leaſe was derived out of the privileged eſtate for life, and if waſte lay, it ſhould be brought againſt the tenant for life, who made the leaſe, and he was diſpuniſhable.—But,

2 Roll. Abr. 828. If there be *leſſee for life*, remainder *in tail*, remainder *in fee to the leſſee*, and he do waſte, he in remainder in tail ſhall have an action of waſte.

Id. ibid. contra 46 E. 3. 31. b. admitted. Br. Waſte, pl. 48. If leſſee for life and for years commit waſte, and die, his executor ſhall not be charged for it.

Clayt. Rep. 126, 127. pl. 125. Ward v. Waddington. But a *condition in a leaſe not to do waſte, extends to the aſſignee*, without naming him, and that as inherent to the land.

If leſſee for 100 years *grant part of his term to another*, and he commit waſte, the action ſhall be brought againſt the firſt leſſee. Brownl. 238. Anon.

Leſſee for years made a *leaſe of one moiety to A.* and of the *other moiety* to *B.*—*A.* does waſte—the action ſhall be againſt both; for the waſte of the one is the waſte of the other. *Id. ibid.*

B. leſſee for years, the reverſion to *A.* in fee: *B.* aſſigned all his term and intereſt to *J. S.*, reſerving all trees growing and being on the lands, and afterwards he committed waſte in cutting down the trees: *A.* brought an action againſt *J. S.*, and it was diſputed whether the action would lie. It ſeemed agreed, that if the reſervation was good, then the action would lie againſt the aſſignee; but to prove it void, it was inſiſted, that what a man cannot grant he cannot reſerve; ſo that becauſe the leſſee cannot grant the trees, he cannot reſerve them. As to the point of law the court was divided. Goldſb. 63. pl. 23. Foſter's caſe. If tenant for years or for life aſſigns over his leaſe for years, or eſtate for life, excepting the timber-trees, and after waſte is done in felling down the trees, the action of waſte is maintainable againſt the aſſignee, for as to the leſſor they are not ſevered from the land. 2 Inſt. 302.

But action of waſte does not lie againſt *tenant at will*. Br. Waſte, pl. 52. who ſays, that caſe lies, but not waſte.——If *tenant at will* to him and his heirs, *according to the cuſtom, or another tenant at will cuts trees*, action of *waſte does not lie, but treſpaſs*. *Per* Aſcough, Juſt. which was not denied by the other juſtices, but it is not expreſſed whether he ſhall have treſpaſs *vi et armis*. Br. Treſpaſs, pl. 147.——Tenant at will cut down trees, leſſor brought treſpaſs *vi et armis* againſt him, and held good, and judgment accordingly. 4 Le. 167. pl. 271. Walgrave v. Somerſet.—Becauſe otherwiſe he ſhall have no action, for waſte is not maintainable. 1 Inſt. 57. a.

It lies not againſt tenant at will *for permiſſive waſte*, either *by common law or by ſtatute*. Arg. Show. 315. Cunlip v. Rundle.

Nor, according to ſome, againſt *leſſee for a* * *year*, though the ſtatute mentions years. 2 Roll. Abr. 828. *contra* 48 E. 3. 25.

It lies againſt leſſee for a year, and ſo from year to year. Br. Waſte, pl. 52. * S. P. Or for half a year. 2 Inſt. 302. And ſo though he holds only for twenty weeks. Plow. C. 467.

1. Againſt whom it may be brought for Waſte done by a Stranger.

If a ſtranger commits waſte, yet an action of waſte lies againſt the leſſee, for in a treſpaſs he ſhall recover his damages againſt the ſtranger. 49 E. 3. 26. b. The ſtatute of Marlebridge prohibits farmers doing waſte, and yet if they ſuffer a ſtranger to do waſte, they ſhall be charged with it; for it is preſumed in law, that the farmer may withſtand it, *& qui non obſtat quod obſtare poteſt, facere videtur*. 2dly, The law does give to every man his proper action, ſo as none be without due remedy; and therefore, in this caſe, the leſſor ſhall have his action of waſte againſt the leſſee, and the leſſee his action of treſpaſs againſt him that did the waſte; and ſo the loſs, as reaſon requires, in the end ſhall be upon the wrong-doer; and if the leſſor ſhould not have his action of waſte, he ſhould be without remedy. 2 Inſt. 145, 146.

So, if a ſtranger diſſeiſes leſſee and commits waſte, waſte lies againſt leſſee for this, for he ſhall have his remedy againſt the ſtranger. 44 E. 3. 27. b. And the leſſor cannot in ſuch caſe, have treſpaſs againſt the diſſeiſor. Br. Waſte, pl. 37. cites S. C.

If a man, who has common of eſtovers of land in leaſe, does waſte in cutting ſuch wood as he ought not, action of waſte lies againſt leſſee for it; for it ſeems he may have treſpaſs againſt commoner, for he is as a mere ſtranger for this. 46 E. 3. 17. b.

A guardian

F.N.B. 60. A guardian ſhall not be puniſhed in waſte for waſte done by a ſtranger.

49 E. 3. 26. b. If leſſee for life leaſes for years, and leſſee for years does waſte, waſte lies againſt leſſee for life.

1 Inſt. 54. a. For he in the reverſion cannot have any remedy but againſt the tenant, and the tenant ſhall have his remedy againſt the wrong-doer, and recover all in damages againſt him; for voluntary waſte and permiſſive waſte is all one to him that hath the inheritance. But, if the waſte be done by the enemies of the king, the tenant ſhall not anſwer for the waſte done by them, for the tenant has no remedy over againſt them. 2 Inſt. 303. Tenant by the curteſy and tenant in dower ſhall be puniſhed for waſte done by a ſtranger.

1 Inſt. 54. a. 2 Inſt. 305. cites 3 E. 3. 28. So of waſte done by one, both ſhall be attainted for it. See 2 Inſt. 303. If two are joint-tenants of a ward, and the one does waſte, both ſhall be puniſhed in an action of waſte.

1 Inſt. 54. a. An infant ſhall be puniſhed in an action of waſte for waſte done by a ſtranger.

1 Inſt. 54. a. If an infant is tenant by the curteſy or leſſee for life or years, he ſhall anſwer for the waſte done by a ſtranger, and have his remedy over; though ſome have holden the contrary. And ſo it is in caſe of a feme covert; for the privilege of coverture and infancy, in this caſe, ſhall not prevail againſt the wrong and diſheriſon done to him that has the inheritance, eſpecially when they have their remedy over, and the eſtate is of their own purchaſe or taking. 2 Inſt. 303. Baron and feme ſhall likewiſe be puniſhed in waſte for waſte done by a ſtranger.

1 Inſt. 54. a. If baron, poſſeſſed of a leaſe for years in right of his feme, commits waſte, and after the feme dies, action of waſte lies againſt the baron, becauſe the law gives the term to the baron.

2 Inſt. 303. cites as adjudged in 9 E. 3. If thieves burn the houſe of tenant for life without any default of leſſee for life in keeping his fire, the leſſee ſhall not be puniſhed for it in an action of waſte.

F. N. B. 60. (G). A termor ſhall be puniſhed for waſte done by a ſtranger.

2. How far it lies againſt Executors, &c.

2 Inſt. 302. Waſte lies againſt *one executor* alone, without naming his companion, if the waſte was done by him alone.

Br. Waſte, pl. 138. S. P. 2 Inſt. 302. It is the ſame in caſe of adminiſtrators. Went. Off. of Exec. 127. But Brownl. 239. ſays, that an action of waſte lies againſt executors for waſte done by teſtator. If termor does waſte, and makes executors, and dies, the action of waſte is loſt, for it does not lie againſt the executors, but for waſte done by themſelves, and not for the waſte of the teſtator; for it is as a treſpaſs, which is an action perſonal, which dies with the perſon.

3 Lev. 35. Mayor, &c. of Norwich v. Johnſon. S. C. 3 Mod. 90. it was objected in error, that if the plaintiff is entitled to this action it muſt be by the ſtatute of Glouceſter: but that it will not lie againſt the defendant even by that ſtatute, becauſe the action is thereby given againſt the tenant by the curteſy, in dower, for life or years, and treble damages, &c., and that the defendant is neither of theſe: and that it being ſo penal a law, ſhall be taken ſtrictly. But *per cur.*—This is a remedial as well as a penal law, and therefore ſhall have a favourable conſtruction. And the judgment was affirmed. Executor *de ſon tort* of a term is chargeable in waſte.

(I) At what Time an Action of Waſte may be brought.

WHEN the reverſion is deveſted, the leſſor cannot have an action of waſte, becauſe the writ is, that the leſſee did waſte *ad exhæredationem* of the leſſor, and that inheritance muſt continue at the time of the action brought. 1 Inſt. 356. a.

If a man brings an action of waſte, and dies before any recovery, his heir ſhall not have an action for the ſame waſte, becauſe the damages do not belong to him. *Contra* 20 *E.* 1. (*a*), *Liber Parliamentarum*, 33. *b.* adjudged in parliament upon debate, and there commanded to the juſtices henceforth to do accordingly in ſuch caſe.

[(*a*) That is, the ſtatute of 20 E. 1. c. 4.;—which ſtatute is an authoritative deciſion in parliament of a point ariſing in a cauſe then pending in the bench, upon which occaſion the parliament not only declared how the law ſhould be held in future, but likewiſe directed the juſtices to proceed in that manner in the caſe then before them. Note. This act is not to be found either upon the parliament rolls, or among the ſtatute rolls.] Lord Coke ſays upon the ſtatute of Glouceſter, cap. 5. it has been received for a certain rule, that if waſte be committed, and he in the reverſion die, the action of waſte fails, for that the heir cannot recover damages for the waſte in the life of the anceſtor, and the waſte was not done to the diſinheritance of the heir; and yet the law extends the action of waſte favourably, as much as with convenience may be, leſt waſte which is hurtful to the commonwealth ſhould remain unpuniſhed. 2 Inſt. 305.

If leſſee for years does waſte, and after leſſor enters upon him by *tort*, he ſhall not have an action of waſte againſt him during his own ſeiſin, before re-entry by the leſſee; becauſe the action ought to be in the *tenet*. Br. Waſte, pl 84. F. N. B. 60. (L). in the new notes there (*b*), ſays, the action is ſuſpended, and cites S. C.

If leſſee for life does waſte, and after aliens in fee, and leſſor enters for forfeiture, yet he ſhall have an action of waſte againſt leſſee; for peradventure if he had not entered he ſhould be diſinherited. 45 *E.* 3. 9. *b.*—14 *H.* 8. 14.—8 *H.* 6. 10. (It ſeems in thoſe caſes he may have his action in the *tenet*; then it is clear that it lies.) Br. Waſte, pl. 42. cites S. C. *per* Finchden, that the reverſioner ſhall not have action of waſte after his entry for waſte done before the alienation. (In that caſe the action was brought in the *tenuit*.)

If tenant in dower leaſes for her life to him in reverſion within age, who never took the profits, but at full age diſagrees to the leaſe; he may have an action of waſte for waſte in the mean time. 30 E. 3. 16. So, if ſhe leaſes to the heir within age, and a ſtranger, rendering rent on condition of re-entry for non-payment of rent. F. N. B. 55. (E), in the new notes (*a*).

But, if at the time of, or during the waſte done, the heir takes any of the profits, the waſte is diſpuniſhable. F. N. B. 55. (E), in the new notes (*a*).

If after waſte done, the leſſor grants over the reverſion in fee, and retakes it, yet he ſhall not have an action for the ſaid waſte. 1 Inſt. 53. b.

So, if after the waſte done, the leſſor grants over the reverſion, and retakes it to him and his feme, and to his heirs; yet he ſhall not have an action for the ſaid waſte, becauſe the eſtate, which was privy to the waſte committed, is altered. *Id. ibid.*

2 Roll. Abr. 829. 1 Inſt. 54. S. P. For

If *leaſe* be made *for life*, the *remainder for years*, an action of waſte lies againſt leſſee for life, notwithſtanding the remainder for years; for *de minimis non curat lex*.

the recovery therein ſhall deſtroy the term for years. 2 Inſt. 301.—F. N. B. 59. (H).

2 Roll. Abr. 829. *But* in ſuch caſe

But, if there be leſſee *for life*, *remainder for life*, action of waſte does not lie during the continuance of the meſne remainder.

an *injunction* has been granted out of Chancery. Mo. 534. pl. 748. Anon. [and 3 Atk. 94. 210. 723.]

Br. Waſte, pl. 56. cites S. C. where Perſay held it did not lie; but Belknap *contra*. But Broke ſays, that the law at this day ſeems to be with Perſay.——For if he ſhould have an action againſt the firſt leſſee, then the eſtate of him in remainder ſhall be deſtroyed; and ſuch conſtruction muſt be made to preſerve the eſtate of a ſtranger, who is in no fault: but, if remainder-man for life dies, then the waſte is puniſhable as well before as after his death. 2 Inſt. 301.

1 Inſt 54.—F. N. B. 58. (C), ſays that it lies notwithſtanding;

So, if there be leſſee for *life*, the *remainder for life*, the *remainder in fee to another*, he in remainder ſhall not have an action of waſte againſt the firſt leſſee, during the continuance of the remainder for life.

and at 59. (H) ſays it appears by the regiſter, that the writ is maintainable, though the meſne remainder life be between the tenant for life and him in reverſion.——*So*, if *remainder-man for life ſurrenders* his eſtate to him in the remainder or reverſion in fee. 5 Rep. 76. b. Paget's caſe.——And F. N. B. 58. (C), in the new notes (*b*), ſays, That waſte does not lie till after the death, or ſurrender of the particular eſtate. And 1 Inſt. 54. a. (*t*) ſays, that where it is ſaid in the regiſter, and in F. N. B. that waſte does lie, it is to be underſtood after the death or ſurrender of the meſne remainder.

But though he that has the inheritance cannot have action of waſte, during the life of the remainder-man for life; yet it was reſolved, that he may ſeize timber-trees cut down by the tenant for life; and alſo that a trover and converſion would lie for all of them, though he never ſeized parcel of them; for by the cutting them down, an abſolute property is veſted in the plaintiff, unleſs they had been cut down for reparations, and ſo employed in convenient time. All. 81, 82, &c. Udall v. Udall.——And Rolle was of opinion, that an action of trover would lie for the reverſioner againſt tenant in tail, after poſſibility of iſſue extinct; and he declared he was himſelf of that opinion, becauſe he had only an impunity if he committed waſte, but no intereſt in the trees.——P. 10 Rep. 44. b. Jenning's caſe.

2 Roll. Abr. 829. *contra* 50 E. 3. 4. So, where a

But, if there be leſſee for life, the remainder for life, *after the death of the remainder-man*, an action of waſte lies againſt leſſee *for waſte committed during the continuance of the remainder*.

leaſe is made *for years*, *remainder for life*, the *remainder in fee*; and leſſee for years does waſte; and then the leſſee for life in remainder dies; the remainder-man in fee ſhall have waſte, for waſte done during the meſne remainder for life. Mo. 18. pl. 64. Anon.

2 Roll. Abr. 829. 1 Inſt. 299. b. S. P. Becauſe the baron himſelf did the

Likewiſe, if a *feme*, *leſſee for life*, marries, and after *leſſor confirms the eſtate of the baron* to have for his life, by which the baron has a reverſion for life; yet, if waſte be committed after, the action lies againſt baron and feme, and this reverſion is not any impediment.

waſte and the wrong, and therefore ſhall not excuſe himſelf for doing the waſte, in reſpect that he himſelf has the remainder.

2 Roll. Abr. 829. A defendant

If leſſee *for life*, *and for a year after*, commits waſte, an action of waſte lies againſt him.

pleaded that the leaſe was *to him, his heirs, and aſſigns for life, and a year after*, and demanded judgment of the writ. But Thorp ſaid, that in this caſe the plaintiff could not have other writ than what he had, and that defendant might ſave his eſtate by proteſtation; and ſo he did, and pleaded *nul* waſte done. Br. Waſte, pl. 101.

1 Inſt. 54 a. For he himſelf has granted away

If a *man leaſes for life, and after grants the reverſion for years*, and after leſſee for *life commits waſte*, no action of waſte lies againſt him during the term for years.

the reverſion, in reſpect whereof he is to maintain the act on. *Id. ibid.* and 273. a.

But,

But, if a man leaſes *for life or for years, and after grants a leaſe to commence after the* end of the firſt eſtate, an action lies againſt the firſt leſſee, notwithſtanding this future intereſt: and the term ſhall be ſaved in this caſe. 1 Inſt. 54 a.

If there be a *feoffee of land upon condition*, and *the feoffor enter*, and *do treſpaſs*, and afterwards the *condition be broken*, and the *feoffor enter*, yet the feoffee ſhall have an action of treſpaſs againſt the feoffor, notwithſtanding that he hath not the land wherein the treſpaſs was done. Perk. § 97.

Where a *leaſe* is made *to the huſband and wife* for life or years, there, the wife ſhall not be puniſhed after the death of her huſband for *waſte done by the huſband*. F. N. B. 59. (J).

If a man leaſes *to* A. *during the life of* B. the *remainder to him during the life of* C., if he commits waſte, an action of waſte ſhall lie againſt him. 1 Inſt. 299. b. *So*, if a leaſe be made to *A.*

for his life, the remainder to *A.* for the life of *B.* if *A.* does waſte, an action of waſte doth lie againſt him; for the wrong-doer hath both the eſtates in him; and of that opinion was Sir James Dyer, Ch. J. 2 Inſt. 301.

But, if there be a *leaſe for years* or life, *remainder to a baron and feme in ſpecial tail, and leſſee do waſte*, and the *feme die without iſſue*; the baron ſhall not maintain any action upon the ſtatute. Mo. 18. pl. 64. Anon. But Brown ſaid,

that if the *remainder* be limited over *to the baron and his heirs*, and the feme die after the waſte done, the baron (as he apprehends) ſhall have action for this waſte done in the life of his feme, becauſe the eſtate of tenant in tail after poſſibility is drowned in the inheritance. But Dyer denied it. *Id. ibid.*

If leſſor *covenants* with leſſee *not to bring action of waſte during two years* againſt him, and after, during the two years, leſſee does waſte; leſſor may, after the expiration of the two years, bring action of waſte for the waſte done within the two years; for the covenant is *no diſpenſation* as to the waſte, as it was ſaid, but only with his complaint during the two years. Mo. 18. pl. 64. Anon. *But* otherwiſe it is, where one makes a *leaſe for two years diſpuniſhable of waſte*;

for there he has diſpenſed with the waſte, and not with the action only. *Id. ibid.* Anon.

If leſſee for life *without impeachment of waſte, and reverſioner, join in a leaſe for years*; leſſee is diſpuniſhable of waſte during the life of the tenant for life, but after his death he is puniſhable; for, as *Dyer* and *Brown* ſaid, though at firſt it ſhould be ſaid to be the leaſe of tenant for life, and the confirmation of him in reverſion, yet by ſuch death it is altered into another nature, and ſhall be ſaid the leaſe of him in reverſion. Mo. 72. pl. 196. Nudigate's caſe.

A. ſeiſed in fee makes *a leaſe for years*, and afterwards conveys the reverſion to the *uſe of himſelf for life, without impeachment of waſte*, remainder in fee: leſſee for years commits waſte: he ſhall not have the privilege to be diſpuniſhed of waſte; but after the death of him in reverſion for life he ſhall be puniſhed. Sir W. Jo. 51. pl. 2. Bray v. Tracy, Cro. Ja. 688. pl. 4. S. C. but that is

only upon the point of a leaſe for years to *A.*, remainder for life without impeachment of waſte to *B.*, remainder in tail to C., but ſaying nothing of the conveyance ſubſequent to the leaſe for years. The court held, that the plaintiff ſhould recover; for though in the life of *B.* the termor by his aſſent might have committed waſte, and he had not been puniſhable afterwards, yet when he is dead he that committed the waſte has done it to the diſheriſon of him in remainder, and it is all one as if it had been done after the death of tenant for life.

Br. Waſte, pl. 76. It was agreed, that the heir ſhall not have action of waſte, in time of his father, but in his own time, and iſſue was taken accordingly.

(K) Of the Proceſs and Proceedings in Actions of Waſte.

If the defendant be returned *nihil*, &c. ſo as peradventure he was never ſummoned, THE 13 *E.* 1. *c.* 14. enacts, *That of all manner of waſte done to the damage of any perſon, there ſhall from henceforth be no writ of prohibition awarded, but a writ of ſummons, ſo that he of whom complaint is, ſhall anſwer for waſte done at any time. And if he come not after the ſummons, he ſhall be attached, and after the attachment he ſhall be diſtrained.*

nor any other writ ſerved whereby he might have notice, yet a writ of inquiry of waſte ſhall be awarded by this branch of the ſtatute, for here it is not ſpecified that iſſues ſhould be returned, &c. but generally; and by the writ, the waſte ſhall be inquired of by the oath of twelve men, where the defendant or any for him may attend if he will, and the jurors may find againſt the plaintiff. 2 Inſt. 389.

(*a*) If the defendant appears upon the diſtreſs, and pleads, and after makes default, the plaintiff ſhall not by this branch have a writ to inquire of the waſte, becauſe it is out of the words and purview of this act. 2 Inſt. 390. *And if he come not after the diſtreſs* (*a*), *the ſheriff ſhall be commanded* (*b*) *that in proper perſon he ſhall take with him twelve*, &c. *and ſhall go to the place waſted.*

(*b*) Here are three things to be obſerved; firſt, That the ſheriff ought to go in proper perſon; for that though *in rei veritate* he is no judge, yet this writ is in nature of a commiſſion unto him, and he is in *loco judicis*, and therefore he ought to go *in propria perſona*. Secondly, Where ſome have holden that the ſheriff may inquire upon this writ, by oath of ſix or eight perſons, it appears that there ought not to be under twelve, for the words of this branch are *aſſumptis ſecum* twelve. Yet this is but an inqueſt of office, for it is taken *ſans miſe des parties*, that is, without any iſſue joined. Thirdly, The ſheriff muſt go *ad locum waſtatum* together with the jurors, and view the ſame, for *iſta cadunt potius ſub viſu quam ſub auditu*. 2 Inſt. 390.

It was agreed by the whole court, that if ſix of the jury are examined upon a *voire dire*, if they have ſeen the place waſted, that it is ſufficient, and the reſt of the jury need not be examined upon a *voire dire*, but only to the principal. Godb. 250. pl. 298. Gage v. Smith.

If the waſte be aſſigned in divers towns, the ſheriff and the jurors muſt view all the places waſted in every of the towns, but he may inquire thereof in any one of the towns, and this copulative doth ſo knit the words together, as he cannot inquire in a foreign town. 2 Inſt. 390. *And ſhall inquire of the waſte done, and ſhall return an inqueſt, and after the inqueſt returned they ſhall paſs unto judgment, like as it is contained in the ſtatute of* Glouceſter.

Compl. Attorney, 250, 257, 258, 259. The proceſs incident to action of waſte is, firſt, a writ of ſummons made by the curſitor of the county where the land lies, and on the return of this writ the defendant may eſſoin, and the plaintiff adjourn, *&c.* Then a *pone* is to be made out by the filazer of the county, on the return of which a *diſtringas* iſſues for the defendant to appear; and upon his appearance the plaintiff declares, and the defendant pleads, *&c.* Or, if the defendant makes default, a writ of inquiry goes to the ſheriff, to inquire by the oath of twelve jurors, what damage the plaintiff hath ſuſtained, and then the party hath judgment to recover the treble of it. Alſo, after judgment entered, a writ of ſeiſin is awarded to the ſheriff to give poſſeſſion to the plaintiff of the place waſted.

In waſte againſt two by the biſhop *ad exhæredationem eccleſiæ*, and proceſs continued till the grand diſtreſs returned, one came and the other made default, and he who appeared was compelled to anſwer alone, for the proceſs is determined againſt the other. Br. Waſte, pl. 99.

In an action of waſte the jurors ſhall have a view of the place waſted, *&c.* as an incident to the action of waſte, for in the action at the common law, the jurors ſhould have had the view. Vin. Abr. V. 22. P. 491. It was agreed by the whole court, if the jury be ſworn that they knew the place, it is ſufficient, although they be not ſworn that they ſaw it, and although that the place waſted be ſhewed to the jury by the plaintiff's ſervants, yet if it be by the commandment of the ſheriff, it is as ſufficient as if the ſame had been ſhewed unto them by the ſheriff himſelf. Godb. 209. pl. 289. Gage v. Smith.

Though the view in an action of waſte was not returned on the proceſs on which the firſt jurors appeared, and were ſworn, and tried the iſſue, yet it was reſolved to be good enough; becauſe although the jurors ought to have the view, yet it was not neceſſary for the officer to return it; but the court on the trial ought to examine the matter, whether the jurors have had the view or not; for on the trial ſix jurors, at leaſt, ought to have had the view, elſe the jury ſhall not be taken. And a day of continuance was given *eo quod* the jurors had not the view, and *interim videant*, &c. and in an aſſize the view of the jurors is requiſite, but it is never returned; for perhaps neither the ſheriff nor the officer knows whether the jurors have had the view or not; for the words of the writ are *et interim videant*, &c. and not *et interim haberi fac' viſum:* ſo that the jurors may view the place waſted, when the officer is not preſent, and therefore the officer is not obliged to return the view; but it ought to be examined on the trial, and the party may make his challenge to the jurors for that cauſe, if ſix of them at the leaſt have not had the view, and the officer had returned that they had the view: yet, if it appeared on the trial, by examination, that they had not the view, the return would be to no purpoſe, nor conclude any of the parties, plaintiff or defendant. 2 Saund. 254. Green v. Cole.

4 & 5 *Anne*, *c.* 16. § 8. enacts, That in any actions in any of her majeſty's courts at *Weſtminſter*, where it ſhall appear to the court that it will be neceſſary that the jurors ſhould have the view of the place in queſtion, the courts may order ſpecial writs of *diſtringas* or *habeas corpora*, by which the ſheriff or other officer ſhall be commanded to have ſix out of the firſt twelve of the jurors, or ſome greater number, at the place in queſtion, ſome convenient time before the trial, who ſhall have the matters in queſtion ſhewn to them by two perſons in the writ named to be appointed by the court.

In an action of waſte there ſhall be ſummons and ſeverance, for the writ is *ad exhæredationem*, and the action of waſte is a plea real. 2 Inſt. 307.

A plaintiff ſhall have coſts in all actions of waſte, where the damages found do not exceed twenty nobles, which he could not by the common law. Stat. 8 & 9 W. 3. c. 11.

2 Inſt. 146. 306. 11 Rep. 49. Liford's caſe.

Before any waſte is done, a prohibition may be had, directed to the ſheriff not to permit it; or he in remainder, &c. may have an injunction out of the Chancery to ſtay the waſte, and enter the houſe or lands, to ſee if waſte is committed, &c.

Hobart's Rep 112. Skeate v. Oxenbridge.

Though the *eſtate* be *executed by the ſtatute of uſes*, yet there may be *a general writ and ſpecial count.*

Id. ibid.

If the *writ mentions that* A., *being ſeiſed of the land ſince* 27 H. 8., *enfeoffed* B. *to uſes*, &c. and derives under it, though the writ *does not mention that the feoffment was to* B. *in fee*, yet inaſmuch as the *uſe had been to make the writs ſo ever ſince the ſtatute*, it is to be allowed, though if it was not in fee to *B.* but an eſtate for the life of *B.* it will paſs. But the *declaration* upon it *ought to allege the feoffment to be in fee.*

Het. 79. Foſſam's caſe.

A man after the ſtatute of 27 *H.* 8. made a *feoffment* in fee *to the uſe of himſelf for* term of his *life, and after* his deceaſe *to the uſe of* J. S. *and his heirs.* The *feoffee does waſte*, and *J. S. brought his action* of waſte. And now if his writ ſhall be general or ſpecial was demurred in judgment. And *Hutton* and the other juſtices were clearly of opinion, that the *plaintiff ought to have a ſpecial writ;* and ſo it was adjudged afterwards.

Thelnal's Dig. lib. 11. c. 52. § 7.

In waſte *againſt feme on a leaſe made to herſelf for life*, ſhe *pleaded that the leaſe was made to her and her baron for their two lives, and that after the baron's death no waſte was done, and ſo did not* plead to the writ; but it was ſaid the writ had been better if the leaſe had been ſuppoſed to the baron and feme.

Br. Waſte, pl. 2.

Waſte *by the feoffees in uſe againſt the leſſee for years of* ceſtui que uſe lies well, though no form of writ be thereof given in the regiſter or in the ſtatute. But *quære* the form of this writ; for it was *cum* W & M. *fuerunt ſeiſiti ad uſum* C., and did not ſay of what eſtate; and therefore held ill in this by ſeveral.

F. N. B. 56. (J).

In a writ of waſte, if the premiſes of the writ recite *quod non liceat alicui facere vaſtum in domibus, boſcis, & gardinis*, and in the end of the writ it is ſaid that the defendant *haſt done waſte in lands*, houſes, woods, gardens, *and exile of men;* ſo as there is *more in the end of the writ than is in the premiſes*, yet the writ is good: and *ſo if leſs* be in the end of the writ than is recited in the premiſes, yet the writ is good; as if it had been recited *quod cum præmiſſum ſit, quod non liceat alicui facere vaſtum, &c. in terris, domibus, boſcis, & gardinis;* and in the end it is recited *quod defend' fecit vaſtum in terris* only, or *in boſcis* only, or *in domibus* only, yet the writ is good.

Brownl. 238. Bedell v. Bedell.

If *leaſe* be made to *huſband and wife for life, and for twenty years after their deaths*, and the wife dies and waſte is committed, the wife ſhall not be named in the writ, nor the term after her death.

2 Inſt. 305.

Note, that the action of waſte *againſt the guardian* is general, *fecit vaſtum, &c. de terris, &c. quas habet vel habuit in cuſtodia de hæreditate prædict'*, which writ doth extend as well to the guardian *in ſocage as in chivalry.*

1. In what Caſes the Action ſhall be brought in the *Tenet*.

If leſſee for *life does waſte, and grants his eſtate*, yet action of waſte lies againſt him in the *tenet*. 2 Roll. Abr. 829.

It ſhall be in the *tenet* during the term, becauſe in the eye of the law he is tenant as to the action of waſte, and againſt him that was the wrong-doer did the action accrue, which he cannot avoid by his aſſignment, and againſt him ſhall the treble damage be recovered, and the place waſted. And ſo it is of meſne aſſignees; a juſt interpretation, that he that did the wrong ſhould anſwer the ſame; and this is the cauſe that general non-tenure is no plea in an action of waſte, but ſpecial non-tenure may be pleaded, as the granting over of his eſtate, before which no waſte was done. 2 Inſt. 302.

In waſte it is no *plea that the defendant had nothing in the land the day of the writ purchaſed*: for if *he does waſte, and grants his eſtate over*, yet waſte lies againſt him; for the grantee may ſay *that* no waſte was done after the grant made to him, and the other will incur no miſchief if he has done no waſte; for he may ſay, that ſuch a day he granted over his eſtate, before which grant no waſte was done. *Per* Finchden clearly, and the action of waſte was *quas tenet*. And yet *non-tenure is no plea*; for by him waſte is only treſpaſs, and by recovering againſt him, the grantee ſhall loſe the place waſted; for the plaintiff has elder title than the grantee. Br. Waſte, pl. 22.

In waſte *quas tenet* the *defendant ſaid, that he had nothing the day of the writ purchaſed, nor ever after*, judgment of the writ, and held no plea; for if a man does waſte, and grants his eſtate over, the *writ ſhall ſay, that they held as long as the term continued*, and by this the grantee who is no party to the writ, ſhall loſe the place waſted. Br. Waſte, pl. 25.

If a *guardian commits waſte, and grants his ward* over, the ward ſhall have waſte, during the infancy in the *tenet*, againſt the firſt guardian for the ſaid waſte. 2 Inſt. 305.

And if the ward brings it againſt any *during his nonage*, it ſhall be in the *tenet*. Br. Waſte, pl. 33.

And yet if he was guardian before the writ purchaſed, he ſhall not be *charged* but to his own time, and *every guardian for his own time*. Id. ibid.

If a *leaſe for life* be made *upon condition that if the leſſee do ſuch an act, his eſtate ſhall ceaſe*, and he commit ſuch an act, the writ ſhall be brought againſt the leſſee in the *tenet*, though his *eſtate is ended*. Brownl. 239. Anon.

If *feme leſſee for life grants his eſtate* over, *and after marries*, the action ſhall ſuppoſe that *tenent*. 2 Roll. Abr. 829.

So, if *leſſee for life does waſte, and after aliens*, and leſſor enters for the forfeiture, the writ ſhall be in the *tenet*. 2 Roll. Abr. 830. Br. Waſte, pl. 84.

takes notice only of leſſee for years, (this was the principal point of the caſe,) and that in ſuch caſe the writ ſhall be in the *tenet*; but that in caſe of *leſſee pur autre vie where ceſtui que vie dies*, it ſhall be in the *tenuit*.

Action was brought for waſte *in lands quas tenet pro termino annorum*, and *counted that he leaſed to the defendant*, 10 H. 7. *for term of one year, to commence at* Eaſter *next after, to continue for one year, and ſo the next year, and ſo from year to year as long as the parties pleaſed, by virtue of which poſſeſſion*, &c. *he occupied by the ſpace of twenty-four years, and aſſigned the waſte certain*, &c. *The defendant pleaded no waſte* done, and *found for the plaintiff*. And the action was brought *anno* 14 *H.* 8. And the *court held that the count abated the writ; for where it is* tenet, *and is thirty years after the making, and counts of twenty-four years*, this is a determination of the leaſe a long time before the writ purchaſed, and therefore ſhall be *tenuit*, and not *tenet*. Br. Waſte, pl. 95.—*But*, where a man *leaſes for years, and brings writ quas tenet* of the waſte, &c. and the *term expires pending the writ*, yet this writ *quas tenet* is good, *quod cur conceſſit*. Id. ibid.

2 Roll. Abr. 830. If a *leſſor bring waſte*, the writ ſhall be *quod fecit vaſtum, &c. in terris* which he holds of him.

Id. ibid. But, if he in the remainder bring action of waſte, the writ ſhall not be, which he holds of him, becauſe he does not hold of him.

Id. ibid. Br. Waſte, pl. 6. So, if ſuch remainder eſcheat, and the lord bring the action of waſte, the writ ſhall not be, which he holds of him.

Mo. 72. pl. 196. in Nudigate's caſe. If the *father leaſe for life and die*, and afterwards *his heir confirm the eſtate* of the leſſee for his life, he ſhall have action of waſte, *quas tenet* of his demiſe; becauſe the firſt leaſe is determined by the confirmation. *Per Dyer* and *Brown*.

Id. ibid. If there are two *joint-tenants of land limited to them and the heirs of one*, and they *join in a leaſe for years*, and the *tenant for life dies*, the other ſhall have an action of waſte of his demiſe. *Per Dyer* and *Brown*.

2. In what Caſes it ſhall be brought in the *Tenuit*.

2 Roll. Abr. 830. There is not any writ in Chancery in the *tenuit* againſt tenant for his own life. But—

Id. ibid. It ſhall be brought in the *tenuit againſt leſſee for years after the term paſſed*.

Id. ibid. But, if it be *not brought in the tenuit*, yet, *if there are any words in the writ which imply that it is paſt, it is good*, as *quas ei dimiſit*.

Id. ibid. Br. Waſte, pl. 47. *After the death of* ceſtui que vie *it ſhall be brought againſt the tenant pur auter vie* in the *tenuit*.

cites S. C. And *per Perſey*, if leaſe be made *to the feme, and ſhe take baron, who does waſte*, and the *feme die*, waſte againſt the baron ſhall be *quod tenuit*.—Br. Waſte, pl. 103. S. P. For he may hold over the term.

2 Roll. Abr. 830. If *tenant pur auter vie do waſte, and alien*, and leſſor enter for the forfeiture, the writ ſhall be againſt him in the *tenuit*.

Id. ibid. Likewiſe, if waſte be *brought againſt a guardian after full age* of the ward, the writ ſhall be in the *tenuit*.

Id. ibid. *So* it ſhall be in the *tenuit*, if it be brought after full age againſt a guardian *for waſte before aſſignment over*.

Id. ibid. If *feme leſſee for years do waſte*, and the *term incur*, and *ſhe marry*, the writ ſhall be againſt baron and feme, and ſhall ſuppoſe that they *tenuerunt*. (*Quære* this, for it ſeems it ſhall be the *feme tenuit dum ſola fuit*.)

Id. ibid. If *feme tenant pur auter vie do waſte*, and *ceſtui que vie die*, and *the feme marry*, the writ ſhall be that the feme *tenuit*.

Br. Waſte, pl. 95. If the *leſſee make a feoffment, and the leſſor re-enter*, the action of waſte ſhall be in the *tenuit, becauſe the leaſe is determined*. And *where he continues it, it ſhall be quas tenet*. Note the diverſity.

Id. ibid. F. N. B. 60. (L), in the new notes there (*b*), S. P. So, if tenant do waſte, and then *ſurrender* to his leſſor, the writ ſhall be in the *tenuit*, as ſome hold; but others hold it ſhould be in the *tenet*, whether he be tenant for life or years.

And if he in the reverſion agree thereunto, he ſhall not have an action of waſte in the *tenuit*, for he cannot, by his own act, alter the form and nature of his action, from the *tenet* to the *tenuit*; and he cannot plead, that before ſuch a ſurrender no waſte was done. 2 Inſt. 304.

Likewiſe,

Likewiſe, if grantee of a term *upon condition* do waſte, and after the grantor enter for condition broken, an action of waſte ſhall be maintainable againſt the grantee in the *tenuit*. 5 Rep. 12. b. Saunder's caſe.

Where *A.* was *leſſee for years* and *deviſed his term to* B. *and made* C. *his executor*, and died, and *C. did waſte, and aſſented to the deviſe*; in this caſe, though between the executor and deviſee, this has relation, and the deviſee is in by the deviſor, yet an action of *waſte ſhall be maintainable againſt the executors in the tenuit.* *Id. ibid.*

(L) Of the Pleadings in Action of Waſte.

IT is a good plea in waſte, that the houſe was ruinous at the time of the demiſe, and therefore fell: or that the houſe or trees fell by wind or tempeſt. Br. Waſte, pl. 130.

In an action of waſte brought by the leſſor againſt the leſſee, the leſſee in reſpect of privity cannot plead *riens en le reverſion*; but he muſt ſhew how and by what means the reverſion is deveſted out of him: but if the grantee of a reverſion brings an action of waſte, the leſſee may plead generally, that he has nothing in the reverſion. 1 Inſt. 356. a.

In an action of waſte by the heir againſt his father, upon a gift to the father and mother and to the heirs of the mother; the tenant ſaid, that he diſcontinued to *R.* in the life of the feme, *abſque hoc* that the plaintiff had any thing in the reverſion, in the right of his wife the day of the writ purchaſed, or after; and the plea was held double: and *per Martin* and others, nothing in reverſion only is a good plea there. *Contra*, where the plaintiff counts of his own leaſe, or of the leaſe of his anceſtor. But it is a good plea in waſte *ex aſſignatione*, upon grant of reverſion to the plaintiff. Note the diverſity. Br. Waſte, pl. 85.

And in waſte againſt tenant by the curteſy, it is a good plea that he diſcontinued in fee to *R.* in the life of the feme, and after *R.* leaſed to him for his life, ſaving the reverſion, and ſo nothing in reverſion the day of the writ purchaſed, *&c.* *Id. ibid.*

And where the plaintiff counts of his own leaſe, or of his anceſtors, the tenant may ſay *quod non dimiſit*, and ſhew how the heir has granted the reverſion to another to whom he attorned, after which attornment no waſte done. *Id. ibid.*

In waſte the defendant ſaid as to the grange, that the moiety was decayed before the leaſe, and the other moiety was uncovered by tempeſt; and before the defendant could repair it, the plaintiff entered, and was ſeiſed the day of the writ purchaſed; judgment *ſi actio*. *Per Hank*, the laſt plea is double, the tempeſt and the entry; but *Hull contra*. Br. Waſte, pl. 63. for *per* Hull, the entry is all the matter, for the tempeſt is not waſte, unleſs the defendant permits the timber to rot after the tempeſt. Br. Double Plea, pl. 30.

Where a leaſe is upon a condition, that if the tenant ſuffers waſte, he may enter, there he cannot enter for uncovering by tempeſt, unleſs he ſays that the leſſee had ſufficient time after to repair it, and did not. *Per Hull* clearly. *Id. ibid.*

Br. Waſte, pl. 86. In waſte for permitting a houſe to be uncovered, by which the timber became rotten and corrupt, defendant ſaid, that the day of the writ purchaſed, the houſe was ſufficiently repaired; and the beſt opinion was, that it is no plea; for it is in a manner double; the one, that if waſte was done it is amended; and the other, that there never was waſte. But, if he had ſaid, that after the waſte, it was ſufficiently repaired before the writ purchaſed, it ſeems to be a good plea.

Br. Negative, &c. pl. 21. Waſte in ten aſhes, the defendant ſaid, that the plaintiff gave them to *R. C.*, and commanded the defendant to cut and deliver them to the ſaid *R. C.*, by which he did ſo; judgment *ſi actio*: the plaintiff ſaid, that he did not cut by his command. *Per Newton* and *Paſton*, this is a *negative pregnant*, by which he ſaid that he did not command him; *quod nota*.

Br. Waſte, pl. 89. Br. Bar. pl. 30. S. C. And Brooke ſays, it ſeems to him, that Where a leaſe is by deed without impeachment of waſte, or by grant to be diſcharged of waſte, all by one and the ſame deed, the tenant may rebut, and plead in bar by it, and ſhall not be driven to his writ of covenant: *per Paſton*. *Brooke* makes a *quære*, If he ſhall be driven to his writ of covenant, if it be granted by another deed.

if the grant be by *another* deed, it may well be pleaded in bar alſo.

2 Roll. Abr. 835. If a man leaſes land to another *ſine impedimento vaſti*, it ſhall be a good bar in an action of waſte; for thoſe words (*ſine impedimento vaſti*) amount to as much as without impeachment of waſte.

Id. ibid. So, if a man leaſes the manor of *D.* and all lands and tenements, *&c.* parcel of the ſaid manor, to have the aforeſaid manor, lands, woods, *&c.* as houſe-bote and hay-bote, *ſine impedimento vaſti* for years; this ſhall be a good bar in an action of waſte; for the words (*ſine impedimento vaſti*) relate to all the things demiſed, and the expreſſing of houſe-bote, *&c.* is ſurplus and void.

Br. Waſte, pl. 89. Where the defendant juſtifies the waſte of cutting aſhes for fire-bote, he ought to ſurmiſe, that there were no underwoods upon the land, *&c.* And the ſame law ſeems to be where he takes beeches or other trees which are timber, by the beſt opinion of the court.

44 E. 3. 44. b. For the carrying them away by the leſſor is no excuſe of the waſte, If leſſee does waſte by cutting trees, and leſſor carries them away, (admitting the carrying away tortious, for there it is held, that he may have treſpaſs for them againſt the leſſor,) yet this is not any matter in bar of the action; but he ſhall be put to his treſpaſs.

which the leſſee was guilty of by the abatement. Br. Waſte, pl. 39. cites S. C.

Br. Waſte, pl. 112. In waſte for trees cut and ſold, the defendant muſt anſwer to both: for the ſale is traverſable, and admit Waſte in a houſe, and alſo in a wood in cutting the trees and ſelling them, *&c.* The defendant as to the houſe ſaid, that no waſte was done; and to the trees, that the houſe was ruinous in groundſels at the time of the demiſe, by which he cut for reparations, and put the trees in the groundſels; and *per cur.* this is a good plea where the plaintiff counts generally of cutting trees without more, but *contra* where he counts of ſale, as here; for there he ſhall anſwer to the ſale; by which *Cateſby* juſtified

as

as above, *abſque hoc* that he ſold them, and good reaſon, for the writ of waſte is, *quod non liceat alicui vaſtum, venditionem ſeu deſtructionem facere in terris, domibus, boſcis*, &c. that he cuts and ſells and buys them again, and beſtows them upon the repairs of the houſe, yet the tort which is ſuppoſed in the ſale is not anſwered; *per* Montague. And Knightly ſeemed to be of the ſame opinion; and he ought alſo to conclude, that it is the ſame waſte. D. 35. b. 36. a. pl. 33, 34. in caſe of Malverer v. Spink, D. 90. b. pl. 8. in caſe of Mervin v. Lyds.

Ne venda pas is no plea, but defendant ſhall juſtify as in the plea above, *abſque hoc*, that he ſold; or ſhall ſay, no waſte done generally. Br. Waſte, pl. 112. *per* Choke, J.

In treſpaſs it was agreed, that tenant for years may cut wood, but it was doubted of tenant at will; but it ſeems that as long as tenant at will is not countermanded, he may cut ſeaſonable wood, &c. *Littleton* ſaid, then he ought to ſay, they have uſed ſuch cuſtom in the country to cut underwood, for otherwiſe the juſtification is not good. *Quære inde.* Br. Waſte, pl. 114.

Note; Where hedge-bote or pale-bote are granted to be taken reaſonably, and where certain loads or a certain number of trees are granted annually for that purpoſe, here it is not neceſſary to ſhew that the fence is in decay: and note, that for fire-bote it is not neceſſary at the time of cutting to ſhew the neceſſity: ſo, for reparation, for it is reaſon and good huſbandry to cut them in ſome convenient time beforehand; becauſe that which is allowed certainly at ſome years may not be ſufficient. Noy, 23. Jenkins v. Jenkins.

If a man leaſes a houſe, and grants farther to leſſee, that he may make his beſt profit of it; this grant ſhall not be any bar in an action of waſte for abating the houſe; for the grant ſhall be intended, that he ſhall make his beſt profit according to the law, without tort and diſinheritance to the leſſor. *Dubitatur.* 17 E. 3. 7. S. C. cited Arg. Lat. 137. in the caſe of Daniel v. Upley.

So, if the leaſe be of a wood, with grant to make his beſt profit of it, he cannot cut and ſell. *Dubitatur.* 17E. 3. 7. b.

But, if a man leaſes land, and grants farther to the leſſee, that he ſhall make his beſt profit of the mines of ſtones, coal, and iron, open in the land; this grant ſhall be a good bar in an action of waſte for digging coals, ſtone, and iron, and ſelling: for the moſt profit of them is to ſell, and he can have little other profit. 17E. 3. 7. b. Leſſee for years of mineral lands, with liberty to dig, and make his profit of the mine, digged for mine, and ſold the gravel coming off it; this is no waſte, if the firſt act of digging be not waſte: for the ſale is not waſte, that being a ſubſequent act. Adjudged, Goub. 28. pl. 37. 27 E. C. B. Anon.

In waſte by him in remainder, he ought to ſhew the deed of remainder. Br. Waſte, pl. 28. He ſhall ſhew the deed, if it be demanded by the tenant. But *per* Finch, he need not ſhew it till then. Br. Monſtrans, pl. 15.

In waſte againſt tenant for years of the leaſe of the plaintiff himſelf, the defendant pleaded that the plaintiff *nil habuit in tenementis* but jointly with his wife in tail, &c. and held a good plea. Thekal's Dig. lib. 11. cap. 44.

So

Theloal's Dig. lib. 11. cap. 52. S. 25.

So in waſte againſt baron and feme, on a leaſe to them both made by the plaintiff's father, the tenants pleaded, that the plaintiff's father *ne leſſa pas* to them, *modo & forma*, &c. and held a good plea.

Br. Waſte, pl. 76.

But in waſte againſt tenant in dower, ſhe pleaded a grant made to her by the heir, to hold without impeachment of waſte, and averred that he had aſſets by deſcent; and the opinion was, that it is no plea: For the ſtatute of *Glouceſter* ſpeaks of warranty with aſſets to bar the tail, and not of grant with aſſets.

39 E. 3. 33.

In action of waſte againſt tenant in dower, it is a good bar, that the baron who was the anceſtor of the plaintiff, aliened to *B.* who aſſigned to her her dower, and ſo the reverſion is in him, and not in the plaintiff.

Br. Releaſe, pl. 46. If the heir granted away the reverſion,

In waſte againſt tenant by the curteſy, or in dower, they may ſay, that the plaintiff granted the reverſion to *M. N.* to whom they attorned.

and tenant attorned, the action failed at common law. 2 Inſt. 300.

Br. Negativa, &c. pl. 7.

In waſte, the plaintiff counted upon a leaſe for years, by him made to the defendant, and that he did waſte: and the defendant was not ſuffered to ſay, that he did not leaſe for term of years, but that he did not leaſe *modo & forma*, &c.; for if he leaſes for life or in fee, the defendant may plead it, and traverſe the count, *&c.*

Br. Waſte, pl. 35. Br. Non-tenure, pl. 55. * Br. Non-tenure, pl. 7.

In waſte againſt *A.* for tenements, which he held of the leaſe of *E.*, who held them for term of life of the leaſe of his father, the defendant ſaid, that he had* nothing in the tenements the day of the writ purchaſed, nor ever after; but *E.* was and is tenant; judgment of the writ, and *non allocatur;* upon which he ſaid, that *E.* was tenant the day of the writ purchaſed, *abſque hoc*, that he ever any thing had of the leaſe of *E.*, which was held a good plea, and the other maintained his writ; *quod nota*, and yet *non-tenure* is no plea in waſte; but it ſeems that this amounts to that *E. non dimiſit modo & forma.*

Br. Waſte, pl. 108. The leſſor was ſeiſed in fee, but in his leaſe did not except the gravel, and ſo his command, during the

Waſte was brought againſt tenant for life for digging clay and gravel: the defendant juſtified, by command of the plaintiff; and the beſt opinion was, that it is no plea, for the leſſor himſelf cannot juſtify to dig it, therefore his command is void; as if I command *J. S* to kill my father, which he does, I ſhall have appeal: and in formedon, if writ of eſtrepement is delivered to the tenant, the demandant cannot command him to cut the trees, but eſtrepement lies, for thoſe commands are void.

leaſe, is not good; and, by Townſhend, this gravel is part of the inheritance, and he cannot grant his inheritance by parol only without deed. See the Year Book, 2 H. 7. 14.

Mo. 51. pl. 158. Ward and Uxor v. Dettenſam.

But, where *W.* brought waſte againſt the defendant, tenant for life, by reaſon of a remainder to him limited by uſe; and aſſigned the waſte *proſternendo horreum;* the defendant pleaded in bar, that the great timber of the ſaid barn, at the time of the death of her huſband, was ſo rotten, *&c.* that it could not be repaired;

repaired; this was taken to be a good plea, and iſſue taken upon the matter.

The plaintiff made a leaſe for years to *A.*, and before the expiration thereof he made another leaſe of the ſame lands to *B.* the defendant, to begin preſently, and then brought an action of waſte againſt him for waſte done during the firſt leaſe: The court ſaid, that in ſuch caſe it would not be ſafe for him to plead no *waſte done*, for it would be found againſt him, and if he ſhould plead the ſpecial matter, as aforeſaid, *viz.* that the firſt leaſe was in being at the time of the waſte done, after the expiration whereof no waſte was done, this would be good, if the ſecond leaſe was not by indenture, otherwiſe, he will be eſtopped by the indenture from ſhewing that the ſecond leaſe had another beginning than the indenture purports, and then the waſte will charge him. And if defendant pleads the ſpecial matter, the plaintiff, by his replication, may eſtop him to plead any other beginning of the term than the letter of the indenture purports, and it will be no departure becauſe it ſtrengthens the declaration. 3 Le. 203. pl. 256. Thorp v. Wingfield.

Ancient demeſne is no good plea in an action upon the ſtatute of *Glouceſter*, for it is only a perſonal action, and the ſtatute is beneficial to the commonwealth. Ow. 24. C. B. Owen's caſe.

In waſte for cutting down 300 oaks, the defendant pleaded as to 200 of them, that the houſe leaſed was ruinous, *&c.* and that he cut them down to repair the houſes, and as to the reſidue, that he felled and keeps them to employ about the reparations *tempore opportuno*. And all the court, without argumenr, held it no plea: For if it ſhould be good, every farmer might cut down all the trees on his farm, when there was no manner of occaſion to repair. Cro. Eliz. 593. pl. 33. C. B. George v. Stamfield.

If two bring an action of waſte, the releaſe of one is a good bar againſt the other. 1 Inſt. 355. b. If the action by two be brought in the *tenuit*, a releaſe of the one is a bar to both. But otherwiſe it is in the *tenet*, for there the releaſe of one doth not bar the other. *Id. ibid.*

If there be tenant for life, the remainder over in tail, and he in remainder releaſe to the tenant all his right, this is a good bar againſt the releaſor in a writ of waſte; and yet neither fee nor fee-tail paſs. Br. Waſte, pl. 145. But, if tenant in fee releaſe to his tenant for life all his right, yet he ſhall have action of waſte.——So, if leſſee for life do waſte, and grant over his eſtate, and leſſor releaſe to the grantee; in an action of waſte againſt the leſſee, he ſhall plead the releaſe: and yet he has nothing in the land. 1 Inſt. 269. b.——And ſo in waſte ſhall tenant in dower, or by the curteſy, in the like caſe, and the vouchee and the tenant in a *præcipe*, after a feoffment made, and ſo in a *contra formam collationis*. *Id. ibid.*

(M) Of the Judgment in Actions of Waſte, and what ſhall be recovered thereby.

STATUTE of *Glouceſter*, 6 E. 1. c. 5. enacts, *That he* (*a*) *which ſhall be attainted of waſte, ſhall leaſe* (*b*) *the thing that he hath waſted: and moreover ſhall* (*c*) *recompenſe thrice ſo much as the waſte ſhall be taxed at.* (*a*) If one joint-tenant does the waſte, both ſhall be attainted of the waſte, *&c.* 2 Inſt. 303.——But treble damages ſhall be recovered againſt him that did the waſte only. 2 Inſt. 302.

(*b*) In

(*b*) In an action of waſte againſt a leſſee for life, for waſte done in three acres, the defendant claims fee; whereupon iſſue is joined; the jury find againſt the defendant, that he hath but an eſtate for life; and inquired further of the waſte, and found the waſte done in one acre only. The plaintiff cannot have judgment for the whole land, in reſpect of the forfeiture and treble damages: for that judgment is not according to this act, that is to ſay, of the place waſted, and treble damages in reſpect of the place waſted: wherefore he had judgment according to the ſtatute, of one acre and treble damages. 2 Inſt. 305.

(*c*) Whereſoever the common law gave ſingle damages againſt any, this act gives treble, unleſs there be any ſpecial proviſion made by this act. 2 Inſt. 306.

This ſtatute does not bind the king. *Per* Coke, Arg. Mo. 321. in Engleſield's caſe.

If the guardian ſuffers a ſtranger to cut down timber-trees, or to proſtrate any of the houſes, and according to his name of guardian doth not endeavour to keep and preſerve the inheritance of the ward in his cuſtody and keeping, nor to forbid and withſtand the wrong-doer, this ſhall be taken in law for his conſent: for in this caſe *qui non prohibet quod prohibere poteſt aſſentire videtur*; and if ſuch waſte and deſtruction be done without the knowledge of the guardian, or with ſuch number as he could not withſtand, then ought the guardian to cauſe an aſſiſe to be brought againſt ſuch wrong-doers, by the heir, wherein he ſhall recover the freehold and the damages for ſuch wrong and diſheriſon. So note a diverſity between the intereſt of a guardian created by law: for there in an aſſiſe the heir ſhall recover damages; but otherwiſe it is in caſe of a leaſe for years, which is the leſſor's own act. 2 Inſt. 305.

And for waſte made in the time of wardſhip, it ſhall be done as is contained in the Great Charter.

The committee of a ward did waſte, and after tendered marriage to the heir, and he refuſed, and married elſewhere. The waſte is found by office. The queſtion was, Whether the committee may bring forfeiture of marriage? The court upon adviſement held, that the committee by doing waſte loſt only the ward of the land, and not of the body, by the expreſs words of this ſtatute. Dy. 25. b. pl. 163. Anon.

And where it is contained in the Great Charter, that he which did the waſte during the cuſtody ſhall leaſe the wardſhip; it is agreed that he ſhall recompenſe the heir his damages for the waſte, if ſo be that the wardſhip loſt do not amount to the value of the damages before the age of the heir of the ſame wardſhip.

2 Inſt. 307. Upon the conſtruction of the ſtatute of *Glouceſter*, ſome queſtion has been made, Whether in this mixed action the place waſted is the principal or the damages? And in divers reſpects the one is more principal than the other: for in reſpect of the antiquity againſt tenant in dower, and tenant by the curteſy, the damages are the principal; and therefore they ſhall be ſometimes preferred, *viz.* the plaintiff to have execution of the damages before the place waſted; but in reſpect of the quality, the realty is ever preferred before the perſonalty; and therefore in waſte, if the defendant confeſs the action, the plaintiff may have judgment of the land, and releaſe his damages, which proves the realty to be the principal; for *omne majus dignum trahit ad ſe minus.*

F. N. B. 60. (R). If two coparceners leaſe land for life, and after waſte committed one dies; the aunt and niece muſt join in the action: and though the niece ſhall recover no damages, yet ſhe ſhall recover the place waſted: and it ſeems they ſhall hold the ſame in coparcenary.

Br. Waſte, pl. 24. In waſte at the *niſi prius* waſte was found in four oaks in divers parts in a wood: and it was doubted if he ſhall recover the wood or the place waſted: and at laſt it was awarded, that he recover the place waſted, and his treble damages.

If termor of a wood does waſte in one corner of the wood, he ſhall not loſe all the wood, *per* Fineux, Ch. J. but only the place waſted. Br. Waſte, pl. 96. ——But, if there are divers plots of the land in the wood in divers places; if the termor does waſte in the

the wood, he ſhall loſe thoſe plots, though he did not do waſte in them; for thoſe are parcel of the wood: And this ſeems to be where he has done waſte in the wood *ſparſim & circumquaque*; and this was ſaid by Fineux in the Reading of Theeher. *Ibid.*

If trees growing *ſparſim* in a cloſe are cut, in an action of waſte all the cloſe ſhall be recovered. 1 Inſt. 54. a. Brownl. 240. S. P.

Anon. and the treble value ſhall be levied by *fi. fa.* &c. *Id. ibid.*

If waſte be done in divers rooms in a houſe, the rooms ſhall be recovered in an action of waſte, and not all the houſe. 2 Inſt. 54.

But, if waſte be done in a houſe *ſparſim* throughout the houſe, all the houſe ſhall be recovered. *Id. ibid.*

If waſte be done in the hall of the houſe, yet all the houſe ſhall not be recovered, though ſome ſay, that the houſe has its denomination from the hall. *Id. ibid.* In ancient time, it was holden by ſome, that if the hall was waſted, the whole houſe ſhould be recovered; for that in thoſe days the hall war the place of the greateſt reſort and uſe, inſomuch, that the whole houſe was called by the name of the hall, as Dale Hall, &c. but the purview of the ſtatute of Glouceſter is, that he ſhall loſe that thing that he hath waſted. 2 Inſt. 303, 304.

Noy, Attorney-General, in Mr. Atkins's Reading held, that the 15 E. 3. tit. Waſte, 8. That in waſte of the hall the houſe ſhall be recovered, was good law, contrary to the opinion of 1 Inſt. 54. a. And he cited the caſe of Lord Abergavenny v. Sir Richard Southwell, in an action of waſte, for waſte done in the kitchen and larder of a caſtle, and all the caſtle was recovered, becauſe a caſtle is not dividable, and ſo adjudged. 11 Eliz. See D. 272. b. Marg. pl. 33.

If a man brings an action of waſte, becauſe the pales of a park, which encompaſs the park, were permitted to decay; but it is not averred that there were any deer in the park, or that thereby the deer were diſperſed, and in this action the plaintiff recovers; he ſhall not recover all the land which is compriſed within the pale, but only the place where the pale ſtood. And the court ſeemed to incline to it in a writ of error upon ſuch judgment in bank, the judgment being affirmed in the King's Bench to recover the place waſted. 2 Roll. Abr. 836.

If a man does waſte, and grants his eſtate over, yet upon an action brought againſt him, he ſhall loſe the place waſted: and his grantee, who is not party to it, ſhall loſe his intereſt. And therefore it is a good plea for the grantee, that ſuch a day he granted his eſtate over, before which grant no waſte was done: and in an action againſt the grantee it is a good plea, that *J. N.* granted it to him, after which grant no waſte was done. Br. Waſte, pl. 33.

In waſte by two upon a leaſe for term of life, one was ſummoned and ſevered, and the other ſued forth, and aſſigned the waſte in divers things, as in cutting willows, and found for the plaintiff, and damages were taxed, and he had judgment to recover the moiety of the damages, and the moiety of the place waſted, and as to the willows the court adviſed. Br. Waſte, pl. 116.

If a man does waſte in hedge-rows which furround a paſture, nothing ſhall be recovered but the place waſted, *viz.* the circuit of the root and not the entire paſture. Br. Waſte, pl. 136.

If the tenant of one houſe is diſſeiſor of the next houſe, and he pulls down both, and builds them into one new one, diſſeiſee ſhall recover all the houſe. Vin. Abr. V. 22. 509.

When

6 Rep. 44. Blake's caſe. When waſte is brought in the *tenuit*, damages are only to be recovered.

Brownl. 238. Anon. If leſſee for years or life grants a rent out of the land ſo leaſed, and afterwards commits waſte, if the lord recovers the place waſted, yet the land ſhall be charged.

(N) In what Caſes in general Waſte may be reſtrained by Injunction in Equity.

Stonor v. Strange, Mitf. Eq. Rep. 123. Whitelegg v. Whitelegg, 1 Br. Ch. Rep. 57. P. R. C. 213. [A Court of equity will interpoſe by injunction to prevent the aſſertion of a doubtful right in a manner productive of irreparable injury. Therefore, where the tenants of a manor, claiming a right of eſtovers, cut down a great quantity of timber of great value, their title being doubtful, the court entertained a bill at the ſuit of the lord of the manor to reſtrain the aſſertion of it. But in this, and indeed in all caſes of waſte, the title of the plaintiff muſt be ſet forth fully and particularly in his bill, elſe the defendant may demur. The bill muſt likewiſe be ſupported by an affidavit of the waſte committed or threatened; though in ſome caſes the injunction has been granted without one. But the court will not reſtrain the defendant from working a mine already opened, even where there is an affidavit (*a*), unleſs it appear that he has only a term in the eſtate for years or for life, and that the reverſion be in the plaintiff: or (*b*), that it be a breach of an expreſs covenant, or an undiſputed miſchief.

(*a*) Lowther v. Stamper, 3 Atk. 496.

(*b*) Anon. Ambl. 209.

Bradly v. Strachy, Barnardiſt. Ch. Rep. 399. If a parſon commit waſte upon the glebe, an injunction will be granted on the application of the patron. So, if the widow of the late incumbent commit waſte during the vacancy.]

Strachy v. Francis, 2 Atk. 217. Hoſkins v. Featherſtone, 2 Br. Ch. Rep. 552.

MS. Rep. Marquis of Powis v. Dorall, Cane. If a tenant for life plant woad on the land, which is of ſo poiſonous a quality that it deſtroys the principles of vegetation, without an expreſs power in his leaſe, where it is uſual to have ſuch powers, it may be conſidered as waſte, and the court of Chancery may grant an injunction.

Moor, 554. S. P. 1 Vern. 23. S. P. [3 Atk. 94. 210. 723. S. P.] If there be leſſee for life, remainder for life, the reverſion or remainder in fee, and the leſſee in poſſeſſion waſtes the lands; though he is not puniſhable for waſte by the common * law, by reaſon of the meſne remainder for life, yet he ſhall be reſtrained in Chancery, for this is a particular miſchief.

*That ſuch leſſee is not puniſhable by the common law, during the continuance of the remainder, though after its determination he is. *Vide* 1 Inſt. 54. 2 Inſt. 301.

1 Vern. 23. Although a court of equity will not aſſiſt a forfeiture, yet the tenant in poſſeſſion ſhall be reſtrained in equity from committing waſte in all caſes, in which waſte is puniſhable by law; and for this purpoſe an injunction will be granted before the bill is filed. Alſo, an injunction will be granted to ſtay waſte in behalf of an infant *in ventre ſa mere*. Equity will likewiſe (in ſome particular caſes) reſtrain the tenant from committing waſte, where it is diſpuniſhable by law, either by the nature of his eſtate, or by expreſs grant of *without impeachment of waſte*: but where, by the agreement of the parties, the leaſe is made *without impeachment of waſte*,

But, if ſuch leſſee has in his leaſe an expreſs clauſe of *without impeachment of waſte*, he ſhall not be injoined in equity.

waſte, equity will not reſtrain the leſſee from cutting timber, ploughing, opening mines, &c., though ſuch leſſee ſhall be reſtrained from pulling down houſes, defacing ſeats, &c. Hard. 96. 1 Chan. Rep. 13, 14. 106. 116. 2 Vern. 392. 711. 1 Salk. 161. 2 Chan. Ca. 32. 2 Chan. Rep. 94.

[A tenant for years, remainder to *B.* for life, remainder to *C.* in fee. *A.* is doing waſte. *B.*, though he cannot bring waſte, not having the inheritance, is yet entitled to an injunction. But (*a*) if the waſte be of a trivial nature, and *à fortiori* if it be a meliorating waſte, as by building on the premiſes, (ſee *Co. Litt.* 53.) the court will not injoin: nor, if the reverſioner or remainderman in fee be not made a party, who poſſibly may approve of the waſte.] Roſwell's caſe, 1 Ro. Abr. 377. (*a*) Molineux v Powell, Paſch. 1730, *per* Lord King. 3 P. Wms. 268. note [F].

If *A.* is tenant for life, remainder to *B.* for life, remainder to the firſt and other ſons of *B.* in tail male, remainder to *B.* in tail, *&c.* and *B.* (before the birth of any ſon) brings a bill againſt *A.* to ſtay waſte, and *A.* demurs to this bill, becauſe the plaintiff had no right to the trees, and no one that had the inheritance was party; yet the demurrer will be over-ruled, becauſe waſte is to the damage of the publick, and *B.* is to take care of the inheritance for his children, if he has any, and has a particular intereſt himſelf, in caſe he comes to the eſtate. Dayrel v. Champneſs. 1 Eq. Caſ. Abr. 400.

On a motion for an injunction to ſtay a jointreſs, who was tenant in tail after poſſibility, *&c.*, from committing waſte, it was urged, that ſhe being jointreſs within the 11th of *H.* 7. ought in equity to be reſtrained from cutting timber, that being part of the inheritance, which, by the ſtatute, ſhe is reſtrained from aliening; and the court granted an injunction againſt wilful waſte in the ſite of the houſe, and pulling down houſes. *Id. ibid.* Cook v. Whaley. [Pr. Ch. 454. S. C.]

[On a bill to reſtrain a jointreſs *without impeachment of waſte* from committing waſte, a perpetual injunction was granted to reſtrain her and her agent from ploughing the paſture and meadow lands of her jointure.] Baſſett v. Baſſett, Finch's Rep. 190.

But, where a jointreſs had a covenant that her jointure ſhould be of ſuch a yearly value, which fell ſhort, though her eſtate was not *without impeachment of waſte*; yet the court would not prohibit her committing waſte, ſo far as to make up the defect of her jointure. *But* quære *if an action of waſte be brought againſt her, if Chancery will injoin the action.* *Id. ibid.* Carew v. Carew.

It ſeems to be a general principle, however, that—

Tenant in tail, after poſſibility, ſhall be reſtrained in equity from doing waſte by injunction, *&c.* becauſe the court will never ſee a man diſinherited; *per Chance, Finch.* And he took a diverſity where a man is not puniſhable for waſte, and where he hath a right to do waſte; and cited *Uvedale*'s caſe, 24 *Car.* 1. ruled by the Lord *Roll*, to warrant that diſtinction. 2 Show. 69. pl. 53. Abraham v. Bubb. A woman tenant in tail, after poſſibility of iſſue extinct, was reſtrained from committing waſte in pulling down houſes, or cutting down trees, which ſtood in defence of the houſe, and fruit trees in the garden: but for ſome turrets of trees, which ſtood a ſtone's length or two from the court, would grant no injunction, becauſe ſhe had by law power to commit waſte: and yet ſhe was nevertheleſs reſtrained in the particulars aforeſaid, becauſe they ſeemed to be malicious. 2 Freem. 278, 279. pl. 349.

A. deviſed lands, on which timber was growing, to his wife for life, remainder to *B.* in fee, paying ſeveral legacies within a limited 2 Vern. 152. Claxton v. Claxton.

limited time, and in default of payment, the remainder to *C.*, he paying the legacies; and on a bill brought by *B.* the court gave him leave to cut timber or the payment of the legacies, though it was oppoſed by the tenant for life and the deviſee over, he making ſatisfaction to the widow for breaking the ground by carriage, waſte, *&c.*

2 Vern. 218. Affimwall v. Leigh & *al.*

So, where a man created a term for 500 years, in truſt for himſelf and his wife for life, remainder to truſtees for payment of debts and annuities; and by will deviſed the reverſion thereof to *A.* for life, without impeachment of waſte, remainder to his firſt and other ſons in tail male, with remainder over; *A.* being in want, the court gave him leave to cut down timber to the value of 500*l.* though the debts and annuities were not paid; the truſtees having no power to ſell the timber, the debts being like to have a long continuance, and there being a great deal of decaying timber on the eſtate.

Bewicke v. Whitfield, 3 Cox's P. Wms. 266. In this caſe, it is to be obſerved, the tenant for life was a co-plaintiff with the remainder-man in tail, and claimed no benefit from the ſale of the timber. But ſuppoſing a contract to be entered into between the tenant for life and remainder-man to ſhare in the profits of the ſale, (which ſeems not to be unreaſonable, for no timber can be cut, without the conſent of the tenant for life,) could the court in that caſe authorize the cutting down of the timber? For if the remainder-man in tail were to die before his eſtate veſted in poſſeſſion, the rights of the perſon next in remainder would be varied. Where, therefore, the court had authorized the cutting down of timber on the eſtate of an infant tenant in tail in remainder, and the tenant for life claimed a life eſtate in the money produced by the ſale, Lord Commiſſioner Eyre ſaid, he thought the court had done wrong in doing for the tenant in tail what he could not do for himſelf, and the money was ordered to be inveſted in the funds, that when the infant came of age, the claims of the parties might be diſcuſſed in a bill. Mildmay v. Mildmay, 4 Br. Ch. Rep. 76. It is, however, a rule, that the money raiſed by the ſale of timber cut down by tenant for life, impeachable of waſte, ſhall be paid to him who has the firſt eſtate of inheritance, whether in fee or in tail; and this, though there may be ſeveral intermediate remainders that may ariſe. Lee v. Aiſton, 3 Br. Ch. Rep. 37. But yet, where the tenant for life has alſo in himſelf the next exiſtent eſtate of inheritance, ſubject to intermediate contingent remainders, he ſhall not take advantage of his own wrong in cutting down timber, but the court will preſerve it for the benefit of the contingent remainder-men. Williams v. Duke of Bolton, Feb, 24, 1784, 3 Cox's P. Wms. 268. note (1).

[*A.* tenant for life, remainder to *B.* his ſon in tail, remainder to *C.* for life, with remainders over. *A.* files a bill in his own name and that of *B.* his ſon then an infant, ſtating (*inter alia*) that there were great quantities of timber upon the eſtate going to decay, and praying that he (*A.*) might be empowered to cut down and ſell ſuch timber as was decaying or at its full growth, for the benefit of *B.* The defendants by their anſwers admitted that there were ſeveral trees in a ſtate of decay, and that it would be for the benefit of all perſons intereſted in the premiſes to have them cut down. It was decreed, that the Maſter ſhould inquire what timber was ſtanding upon the eſtate that was in a decaying condition, which was neither a ſhelter nor ornament to the ſeat, and that ſuch decaying timber as the Maſter ſhould direct ſhould be cut down and ſold, and the produce of the ſale inveſted upon proper ſecurity in the names of truſtees for the benefit of *B.* the infant, to be paid him when he came of age.

Smallman v. Onions, 3 Br. Ch. Rep. 621.

In general, an injunction will not iſſue where the perſons applying for it are tenants in common with the perſon in poſſeſſion; for he has an equal title to the poſſeſſion with them, and they may have a partition againſt him. However, where it appeared that the perſon in poſſeſſion was inſolvent, and could not pay the plaintiffs their ſhare of the money produced by the ſale, Lord Chancellour granted the injunction.]

In

In what Caſes Waſte may be reſtrained in Equity, notwithſtanding the Words without *Impeachment of Waſte*, be contained in the Leaſe, &c.

It is true, that a leaſe *without impeachment* of waſte, takes off all reſtraint from the tenant of doing it; and he may in ſuch caſe pull up, or cut down wood or timber, or dig mines, &c. at his pleaſure, and not be liable to any action. Plowd. 135. [At common law, the clauſe, *without impeachment of waſte*, only exempted the tenant for life from the penalty of the ſtatute, the recovery of treble value, and the place waſted, not giving the property of the thing waſted. But in Lewis Bowle's caſe, 11 Co. 79. it was determined, that theſe words alſo gave the property: the neceſſary conſequence of which was, that in general, unleſs on particular circumſtances, he was not to be reſtrained in equity; for that would be to determine, that he ſhould not make uſe of that property which the law allowed him. But afterwards ſeveral inſtances were conſidered, in which this very large power might be exerciſed contrary to conſcience and in an unreaſonable manner by the tenant for life; as, where his act was to the *deſtruction* of the thing ſettled; which was the ground of Lord Bernard's caſe, the ſtrongeſt that could happen: yet that was not an original caſe without precedent or judicial opinion to ſupport it, as appears from a caſe 5 Ja. 1. (before Lewis Bowle's caſe,) which probably occurred then, though the determination there did not operate upon it. *Per* Lord Hardwicke, 1 Vez. 265.]

But though the tenant may let the houſes be out of repair, and cut down trees, and convert them to his own uſe; yet, where a tenant in fee-ſimple made a leaſe for years *without impeachment of* waſte, it was adjudged, that the leſſor had ſtill ſuch a property, that if he cut and carried away the trees, the leſſee could only recover damages in an action for the treſpaſs, and not for the trees: Alſo it hath been held, that tenant for life, without *impeachment of waſte*, if he cuts down trees, is only exempt from an action of waſte, &c. 11 Rep. 82. 1 Inſt. 220. 2 Inſt. 146. 6 Rep. 63. Dyer, 184.

And if the words are, *To hold without impeachment of any writ or action of waſte*, the leſſor may ſeize the trees, if the leſſee cuts them down, or bring trover for them. Wood's Inſt. 574.

In many caſes, likewiſe, the court of Chancery will reſtrain waſte, though the leaſe, &c. be made *without impeachment of waſte*. For

The clauſe of *without impeachment of waſte*, never was extended to allow the very deſtruction of the eſtate itſelf, but only to excuſe for *per permiſſive waſte*, and therefore ſuch a clauſe would not give leave to fell or cut down trees ornamental or ſheltering of a houſe, much leſs to deſtroy or demoliſh a houſe itſelf. Thus—

A bill was brought by a remainder-man to reſtrain the tenant for life, without impeachment of waſte, from cutting timber in *Weſtwood* Park improper to be felled; and Lord Chancellour granted the injunction to reſtrain the defendant from cutting timber, which ſerved for ſhelter or ornament to the houſe, or which grew in lines, avenues, or ridings for ornament, and alſo any other timber in the park, which was not of proper growth to be felled.—And his lordſhip in this caſe declared, that courts of equity had in this reſpect eſtabliſhed rules much more reſtrictive than thoſe of the common law; which gave tenant for life, without impeachment of waſte, as large a power over the timber, as tenant in fee-ſimple, that timber might be had for publick uſe. MS. Rep. in Chanc. 1744. Packington v. Packington. [3 Atk. 215. S. C. In this caſe the plaintiff alleged, that the defendant, Sir H. Packington, had cut down *a great number* of trees, and had *threatened* to cut down and deſtroy them *all*: that Sir H. Packington's agent had agreed for the ſale of 2000 trees, and that in conſequence thereof *ſome* trees had been actually felled.

felled. It does not appear from the allegations of the plaintiff upon moving for the injunction, whether the agent had admitted this fact. Sir H. Packington's anſwer was not come in. Lord Hardwicke granted the injunction to reſtrain Sir H. Packington, his agents, ſervants, and workmen, from cutting down timber-trees growing in Weſtwood Park aforeſaid, which were for the *ſhelter* or *ornament* of the ſaid manſion-houſe there; and alſo any timber-trees, which were planted or grew in any *lines, avenues, or ridings, for the ornament of the ſaid park, until the ſaid* Sir H. Packington *ſhould fully anſwer the plaintiff's bill.* Reg. Lib. B. 1744. fol. 325.]

2 Freem. Rep. 53. Abraham v. Bubb. His lordſhip ſaid, if there be tenant for life without impeachment of waſte, and he goes to pull down the houſes, &c. to do waſte maliciouſly, this court will reſtrain, although he hath expreſs power by the act of the party to commit waſte; for this court will moderate the exerciſe of that power, and will reſtrain extravagant humorous waſte, becauſe it is *pro bono publico* to reſtrain it; and he ſaid he never knew an injunction denied to ſtay the pulling down of houſes by tenant for life without impeachment of waſte, unleſs it were to Serjeant Peak in Lord Oxford's caſe, and ſaid, he believed he ſhould never ſee this court deny it again. *Ib.* 54.

Likewiſe, where *A.* upon his marriage ſettled lands to the uſe of himſelf and *M.* his wife, and the heirs of their two bodies; afterward *A.* died without iſſue, *M.* married *D.* the defendant, being then tenant in tail after poſſibility of iſſue extinct: and *M.* and *D.* having felled ſome trees in a grove that grew near, and was an ornament to the manſion-houſe, and having an intention to fell the reſt; the plaintiff, to whom the lands belonged in remainder, brought his bill to reſtrain *M.* from felling thoſe trees, and to have an injunction to ſtay the committing of waſte. This cauſe was referred, and if the parties could not agree, then to be ſet down again. But Lord Ch. *Nottingham* diſcovered his inclination *fortiter* for granting an injunction.

2 Freem. 55. Abraham v. Bubb.

So, where a leaſe was made by a biſhop for twenty-one years, *without impeachment of waſte*, of land that had many trees upon it, and the tenant cut down none of the trees till about half a year before the expiration of his term, and then began to fell the trees; the court granted an injunction: for though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreaſonable that he ſhould let them grow till towards the end of his term, and then ſweep them all away: for though he had power to commit waſte, yet this court will model the exerciſe of that power.

Id. ibid.

So, in the caſe of tenant for life, remainder to the firſt ſon for life, *without impeachment of waſte*, with remainder over, the firſt ſon, by the leave of the leſſee of tenant for life, comes upon the land, and fells the trees, although he could not in that caſe be puniſhed by an action of waſte, yet he was injoined by this court.

2 Vern. 738, 739. 1 Salk. 161. S. C. Vane v. Lord Barnard.

Likewiſe, where *A.* on the marriage of his eldeſt ſon, in conſideration of 10,000*l.* portion, ſettled (*inter alia*) *Raby Caſtle* on himſelf for life, *without impeachment of waſte*, remainder to his ſon for life, and to his firſt and other ſons in tail male; afterwards, having taken ſome diſpleaſure to his ſon, he got 200 workmen together, and of a ſudden ſtripped the caſtle of the lead, iron, glaſs, doors, and boards, *&c.*, to the value of 3000*l.*; the court, on the ſon's filing his bill, granted an injunction to ſtay the committing of waſte in pulling down the caſtle, and upon hearing the cauſe, decreed not only the injunction to continue, but that the caſtle ſhould be repaired, and put in the ſame condition it was in; and for that purpoſe a commiſſion was to iſſue to aſcertain what ought to be repaired, and a Maſter to ſee it done at the charge and expence of the father, and the ſon to have his coſts.

A biſhop of *London*, in *Edward* the Sixth's time, made a long leaſe, of which there were about twenty years to come, and the leaſe was made *without impeachment of waſte;* W., in whom by ſeveral meſne aſſignments the remainder of this leaſe was veſted, articled with brick-makers, that they might dig and carry away the ſoil of twenty acres ſix feet deep, provided they did not dig above two acres in the year, and levelled thoſe acres before they dug up others. The (now) biſhop of *London* having the inheritance in right of his biſhoprick, brought a bill to injoin the digging of the ground for brick: Lord Chanc. *Parker* directed, that *W.* might carry off the brick he had dug, but ordered an injunction to ſtop further digging.

1 P. Wms. 527. Biſhop of London v. Webb. His lordſhip ſaid, that before the ſtatute of Glouceſter, waſte did not lie againſt leſſee for years, and the being *without impeachment of waſte* ſeems originally intended only to mean, that the party ſhould not be puniſhable by that ſtatute, and not to give a property in the trees or materials of an houſe pulled down by leſſee for years *ſans waſte:* but he ſaid, that the reſolutions having eſtabliſhed the law to be otherwiſe, he would not ſhake it, much leſs carry it further, and that he took this caſe, the Biſhop of London v. Webb, to be within the reaſon of Lord Bernard's caſe; where, as he was not permitted to deſtroy the caſtle to the prejudice of the remainder-man, ſo neither ſhall the leſſee in the preſent caſe deſtroy this field againſt the biſhop, who has the reverſion in fee, to the ruin of the inheritance of the church. *Ibid.* 528, 529.

[A very conſiderable real eſtate was limited to Mrs. *Rolt*, who afterwards married the defendant the Lord *Somerville*, for life, without impeachment of waſte, remainder to the plaintiff *Rolt* for life, without impeachment of waſte, with ſeveral remainders over. The defendant, the Lord *Somerville*, to make the moſt of this eſtate during the life of his wife, pulled down ſeveral houſes and out-buildings upon the eſtate, and ſold them, and alſo took up lead water-pipes that were laid for the conveyance of water to the capital meſſuage, and diſpoſed thereof; and he alſo cut down ſeveral groves of trees that were planted for ſhelter or ornament of the capital meſſuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raiſed by the particulars before mentioned, and to put the eſtate in the ſame plight and condition it was in before. The defendant demurred, and inſiſted, that this waſte was committed by tenant for life without impeachment of waſte, and therefore he was not liable to be called to an account for what he had done either at law or in equity; and if he was, yet the plaintiff could not call him to an account, becauſe he was not a remainder-man of the inheritance. Lord *Hardwicke*—Though an action of waſte will not lie at law for what is done to houſes, or plantations for ornament or convenience by tenant for life without impeachment of waſte, yet this court hath ſet up a ſuperior equity, and will reſtrain the doing of ſuch things on the eſtate. In Lord *Bernard's* caſe the court reſtrained him from going on, and ordered the eſtate to be put in the ſame condition. In Sir *Blundel Charleton's* caſe, the Maſter of the Rolls decreed, that no trees ſhould be cut down that were for the ornament of the park; but Lord Chanc. *King* reverſed that, and extended it only to trees that were planted in rows. My only doubt is, as to the trees that have been cut down; for if this bill had been brought before ſuch trees (*a*) had been cut down as were for the ornament or ſhelter of the eſtate, this court would

Rolt v. Lord Somerville, 2 Eq. Ca. Abr. tit. Waſte (A), pl. 8. (*a*) Even where a ſon tenant in tail brought a bill againſt his father tenant for life, without impeachment of waſte, charging waſte in pulling up a *deal floor*, removing ſome young oaks, and turning meadow into plough land, but did not apply for an injunction, the bill was diſmiſſed. Piers v. Piers, 1 Vez. 521. For the ground of going into a court of equity is to ſtay the waſte, not by way of ſatisfaction for the damages,

but by way of prevention of the wrong. The account is only incident to the preventive juriſdiction by injunction, and is given upon the maxim of preventing a multiplicity of ſuits, that the party may not be obliged to proceed both at law and in equity. The court therefore have refuſed to entertain a bill merely for ſatisfaction for timber cut down after the eſtate of the tenant who cut it down was determined, no injunction having been prayed. Jeſus College v. Bloom, 3 Atk. 262.

would have interpoſed: but here, the miſchief is done, and it is impoſſible to reſtore it to the ſame condition as to the plantations, and therefore it can lie in ſatisfaction only; and I cannot ſay the plaintiff is entitled to a ſatisfaction for the timber, which is a damage to the inheritance; yet as to pulling down the houſes and buildings, and taking up the lead pipes, that may be reſtored, or put in as good condition again. In my Lord *Bernard*'s caſe there were directions for an iſſue at law to charge his aſſets, with the value of the damages, he not having performed the decree in his lifetime.—The demurrer was allowed as to ſatisfaction on account of the timber, but over-ruled as to the reſt.

Aſton v. Aſton, 1 Vez. 264.

Sir *T. A.*, in the ſame ſettlement in which he made himſelf tenant for life without impeachment of waſte, with full liberty to commit waſte, ſettled a jointure upon his wife for life without impeachment of waſte. On ſettling another part of his eſtate, he created a term on truſt to ſecure a rent-charge of 300 *l. per annum* to his wife, as a further part of her jointure, and afterwards out of the rents and profits thereof to raiſe money from time to time, to reimburſe her expences in ſuſtaining and repairing her jointure eſtate. A bill was brought by the daughter of Sir *T. A.* after his death and the death of her brother without iſſue, againſt her mother to injoin her from committing ſpoil and deſtruction on her jointure eſtate, and for ſatisfaction for the damage done thereby; ſuggeſting, that ſhe had cut down even ſuch timber as was not fit for repairs, and young ſaplins, *&c.*, leaving not a twig on the eſtate. Lord *Hardwicke* upon the general ground, conſidering the queſtion merely as it concerned tenant for life without impeachment of waſte under a ſettlement, ſeemed to think that the court could not interpoſe to prevent ſuch a tenant from cutting down timber in an improper ſtate. But on the ſpecial circumſtances of the caſe, his lordſhip expreſſed himſelf to this effect—This ſettlement is all in the ſettlor's own hand-writing, who does not appear to have been a lawyer: and though a counſel was ſaid to be employed, there is no evidence thereof. It is natural to ſuppoſe, that from the variety of expreſſions in the additional words to the clauſe, wherein he makes himſelf tenant for life, he thought there was ſome difference. Beſides, the term for his wife's reimburſement is extraordinary; and it is abſurd to ſuppoſe he meant to leave her at liberty to cut down and ſtrip the eſtate of every ſtick of timber, (which are the natural *botes* for repairs,) and then to come by this term to be reimburſed her expences in buying timber of repairs: it is contrary to the plain intent, which was that ſhe ſhould be tenant for life without impeachment of waſte to prevent trouble in little matters; but that ſhe ſhould be reimburſed out of this term what ſhe ſhould pay out of her own pocket. Therefore, as the defendant has cut down timber on this eſtate without applying it to repairs, ſhe ſhall have

no

no benefit of this term, till ſhe has reimburſed to the eſtate what ſhe has ſo unreaſonably cut away: and as to the future, the evidence being that ſhe has left no timber fit even for the repair of farm-houſes, I ſhall reſtrain her by the decree from cutting any more timber off the eſtate without leave of the court.

Chamberlyne v. Dummer, 1 Br. Ch. Rep. 166.

T. D. deviſed his real eſtates, ſituate at *C.*, *W.*, and *B.*, to his wife, the defendant, for life, remainder to *E. H.* for life, remainder to the plaintiff in fee. Juſt before his death he added two codicils, the laſt of which, and the material one in the preſent queſtion, was in theſe words—" Whereas I have deviſed my " eſtates by my laſt will and teſtament, as therein mentioned, " and my dear wife has no power to cut down any timber; now " *I give unto my ſaid wife for and during ſo long time as ſhe ſhall* " *continue my widow, full power and authority to cut timber upon any* " *part of my eſtate, for her own uſe and benefit, at all ſeaſonable times* " *in the year.*" The defendant, under this power, made contracts for, and began to fell timber: whereupon the plaintiff filed his bill againſt her, charging, that ſhe had cut down a great many trees that had been planted for ſhelter and ornament to the manſion-houſes, and which ſtood in the lawns, gardens, and pleaſure-grounds belonging to the teſtator, and alſo great numbers of ſaplins, and timber trees unfit to be cut, and praying an account of the timber ſo cut, and ſatisfaction for the ſame, and an injunction to reſtrain the defendant from committing waſte and deſtruction upon the eſtates. The defendant in her anſwer admitted, that ſhe had cut down ſeveral trees in the lawns and pleaſure-grounds, but inſiſted that it was for the improvement of the place, by widening the paſſages, and preventing damps: ſhe alſo alleged, that oak and aſh trees of ſuch a dimenſion were accounted timber trees, and that ſhe had cut down none under ſuch ſizes. An injunction (*a*), however, was granted to reſtrain her from cutting trees which were ſaplins, and not proper to be cut as timber. The defendant afterwards intermarried, and the cauſe coming on to be heard (*b*), Lord Chancellour was pleaſed to direct a trial at law upon the following iſſue, *viz.* Whether the defendant had cut any trees or other timber which had been placed, or deſignedly left for the ornament or ſhelter of the manſion-houſe, gardens, and pleaſure-grounds at *C.* and at *W.*; and alſo, whether ſhe had cut any ſaplins or young trees down which are not proper to be felled as timber, and what damage had been ſuſtained thereby.

(*a*) The injunction was ſaid to iſſue nearly in the terms of that of Obrien v. Obrien, 20th May 1751, which was, to reſtrain the defendants from cutting any timber trees or other trees growing upon the eſtates, which were planted or growing there for the ornament or ſhelter of the manſion-houſe, or that grew in viſtas, planted walks, or lines, for the ornament of the park part of the eſtate, and alſo from cutting down any ſaplins growing on any part of the eſtate not proper to be felled, till anſwer or further order.

(*b*) 3 Br. Ch. Rep. 549.

Leighton v. Leighton, 22d March 1747-8, 1 Br. Ch. Rep. 167.

A bill was filed by the eldeſt ſon tenant in tail, expectant on the death of the father tenant for life, to reſtrain the father from committing waſte, by cutting down timber, eſpecially ſuch as was ornamental to the houſe. The court, upon affidavit, and certificate of the bill filed, granted an injunction to reſtrain the defendant from committing waſte upon ſuch part of the eſtate, whereof he was ſubject to impeachment for waſte, and as to the manſion-houſe, out-houſes, gardens, and orchards, timber growing for ornament and ſhelter to the houſe, to reſtrain him from committing waſte therein till anſwer or further order.

Counteſs Dowager of Plymouth v. Lady Archer, 1 Br. Ch. Rep. 359.

Lands were deviſed to truſtees to be ſold, and the money to be laid out in the purchaſe of other lands, which, when purchaſed, were to be ſettled to the uſe of *A.* for life, without impeachment of waſte, remainder over. The rents and profits of the lands to be ſold were directed to be, till ſale, to the uſe of the ſame perſons who would be entitled to the lands that were to be purchaſed. It was decreed, that *A.*, the tenant for life, could not cut down timber on the lands that were directed to be ſold.

Counteſs of Strathmore v. Bowes, 2 Br. Ch. Rep. 88.

Although, as appears from the above caſes, an injunction will iſſue to prevent a tenant for life *without impeachment of waſte* from committing improper waſte, yet if the anſwer deny any intention of doing ſo, be not excepted to, and be full, the order for the injunction will be diſcharged.]

(O) What Relief may be given in Equity, in Caſes of Waſte.

MS. Rep. Wilſon v. Bragg. 3 March 1742.

A Bill was brought to reſtrain tenant in dower from getting peat: Lord Chancellour diſmiſſed it with coſts, as it appeared to be vexatious; the peat ſhe ſold not being above the value of 10*d.* But herein it was ſaid, that digging peat is in many places the ordinary bote; and perhaps the only fruit that can ariſe from the land. They do not carry away the ſoil, for they dig off the turf, then take away the peat, and lay the turf down again: and tenant for life can no more dig peat to ſell, than cut down timber to ſell; and the Chancellour ſaid, if he was to give any relief, he muſt direct an iſſue; but that the cauſe was of too frivolous a nature to maintain the expence.

2 Vern. 392. Hanſon v. Derby.

A bill being brought to redeem a mortgage, on the hearing, an account was decreed, and 240*l.* reported due; to which report the plaintiff had taken exceptions. The cauſe thus ſtanding in court, the Lord Keeper, on a motion, and reading affidavits, that the defendant had burnt ſome of the wainſcot and committed waſte, ordered the defendant to deliver up poſſeſſion to the plaintiff, who was a *pauper*, giving ſecurity to abide that event of the account.

MS. Rep. Mich. Vac. 1733, Lord Caſtlemain v. Lord Craven.

A. tenant for life, remainder to truſtees to preſerve, &c. remainder to *C.* the plaintiff in tail, remainder over, with power to *A.* with conſent of truſtees, to fell timber, and the money ariſing to be veſted in lands, &c. to ſame uſes, &c. *A.* felled timber to the value of 3000*l.* with conſent of truſtees, who never intermeddled, and *A.* had ſuffered ſome of the houſes to go out of repair. *C.* by bill prayed an account and injunction. The Maſter of the Rolls ſaid, that the timber might be conſidered under two denominations, to wit, ſuch as was thriving and not fit to be felled; and ſuch as was unthriving, and what a prudent man and a good huſband would fell, &c., and ordered the Maſter to take an account, &c. And the value of the former, which was waſte, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other

other is to be laid according to the ſettlement, &c. But as to repairs the court never interpoſes in caſe of *permiſſive waſte*, either to prohibit or give ſatisfaction, as it does in caſe of *wilful waſte*; and where the court have juriſdiction of the principal, *viz.* the prohibiting, it does in conſequence give relief for waſte done, either by way of account, as for timber felled, or by obliging the party to rebuild, &c., as in caſe of houſes, &c., and mentioned Lord *Bernard*'s caſe as to *Raby Caſtle*. 2 *Vern.* But as to repairs, it was objected, that the plaintiff here had no remedy at law by reaſon of the meſne eſtate for life to the truſtees, between plaintiff's remainder in tail, and defendant's eſtate for life, and that therefore equity ought to interpoſe, &c. and that this was a point of conſequence. *Sed non allocatur.*

A lord of a manor may bring a bill for an account of oar dug, or timber cut by the defendant's teſtator.—Thus,

A cuſtomary tenant of lands, in which was a copper mine, that never had been opened, opened the ſame, and dug out and ſold great quantities of oar, and died; and his heir continued digging and diſpoſing of great quantities out of the ſaid mine. The lord of the manor brought a bill in equity againſt the executor and heir, praying an account of the ſaid oar; and alleged that theſe cuſtomary tenants were as copyhold tenants, and that the freehold was in the plaintiff as lord of the manor and owner of the ſoil; and that the manner of paſſing the premiſes was by ſurrender into the hands of the lord, to the uſe of the ſurrenderee. It was inſiſted for the defendants, that it did not appear, that the admittance, in this caſe, was to hold *ad voluntatem domini ſecundum conſuetudinem*, &c. without which words, it was inſiſted, there could be no copyhold, as had been adjudged in L. Ch. J. *Holt*'s time. And L. Ch. *Cowper* ſaid it would be a reproach to equity to ſay, that where a man has taken another's property, as oar, or timber, and diſpoſed of it in his lifetime and dies, there ſhould be no remedy.

1 P. Wms. 406. Bp of Winchester v. Knight. But his lordſhip ſaid in this caſe, that as to the treſpaſs of breaking up meadow or ancient paſture-ground, it dies with the perſon. *Id. ibid.*

Converting a brewhouſe into tenements of a greater value, is waſte, notwithſtanding the melioration, by reaſon of the alteration of the nature of the thing and of the evidence; and ſo reſolved on a trial before *Hale*, Ch. J., and the jury gave the verdict accordingly, and 100 marks ſingle damages, which being trebled amounted to 200*l.* which the Chancery compelled *Cole* to take.

Lev. 311. Cole v. Green.

Leſſee for 500 years of land about 200*l.* a-year, built ſeveral houſes, and thereby improved the rents from 200*l.* a-year to 1400*l.* a-year, and quietly enjoyed the ſame for twenty years and more, and then an action of waſte was brought for pulling down a brick wall, and cutting down fruit-trees, and digging gravel for laying the foundations of the houſes built on the ſaid ground. He brought a bill ſetting forth, that ſuch building could not be accounted any waſte, but rather a melioration and improvement of the land. The defendant pleaded the ſtatute, by which proviſion is made for bringing actions of waſte. But the court over-ruled the plea, and ordered the defendant to anſwer and to ſpeed the cauſe.

Fin. Rep. 135. Wild v. Sir Ed. Stradling.

2 Vern. R. 263. pl. 247. Ligo v. Smith and Leigh.

An under-tenant of a jointreſs commits waſte *ſparſim*, ſo as at law the eſtate was forfeited, but inſiſted that he had improved the eſtate from 40*l.* to 60*l.* *per annum*, and offered to take a leaſe of it at that rent for 50 years, and to anſwer the value of the timber on a *quantum damnificatus*. *Quære.*

2 P. Wms. 240. Whitfield v. Bewit.

[It appears by Reg. Lib. B. 1723. fol. 576. that there were in this caſe truſtees to preſerve the contingent remainders, and the bill expreſsly ſtated applications to have been made to the heir of the ſurviving truſtee, to interpoſe and put a ſtop to the commiſſion of waſte, but that he refuſed to act.]

One ſeiſed in fee of lands in which there were mines, all of them unopened, by a deed conveyed thoſe lands, and all mines, waters, trees, *&c.* to truſtees and their heirs, to the uſe of the grantor for life, (who ſoon after died,) remainder to the uſe of *A.* for life, remainder to his firſt, *&c.* ſon in tail male ſucceſſively, remainder to *B.* for life, remainder to his firſt, *&c.* ſon in tail male ſucceſſively, remainder to his two ſiſters *C.* and *D.* and the heirs of their bodies, remainder to the grantor in fee. *A.* and *B.* had no ſons, and *C.* one of the ſiſters died without iſſue, by which the heir of the grantor as to one moiety of the premiſes, had the firſt eſtate of inheritance: *A.* having cut down timber and ſold it, and threatened to open the mines, the heir of the grantor, being ſeiſed of one moiety *ut ſupra*, by the death of one of the ſiſters without iſſue, brought his bill for an account of the moiety of the timber, and to ſtay *A.*'s opening of any mine: and it was adjudged the right to this timber belongs to thoſe who, at the time of its being ſevered from the freehold, were ſeiſed of the firſt eſtate of inheritance, and the property becomes veſted in them.

Vin. Abr. tit. Waſte, p. 523. cites MSS. Rep. 1 G. 1. in Canc. Turner v. Buck.

A bill was brought againſt the executors of a jointreſs to have a ſatisfaction out of aſſets for *permiſſive waſte* upon the jointure of the teſtatrix, *&c.* But by *Cowper*, J. the bill muſt be diſmiſſed; for here is no covenant that the jointreſs ſhall keep the jointure in good repair; and in the common caſe, without ſome particular circumſtances, there is no remedy in law or equity for permiſſive waſte after the death of the particular tenant.

1 Vern. 158. Brown v. Brown.

It has been ſaid in equity, that a remainder-man for life ſhall, in waſte, recover damages in proportion to the wrong done to the inheritance, and not in proportion only to his own eſtate for life.

MSS. Rep. Garth v. Cotton. 26 G. 2. [1 Vez. 524. 546. S. C. 3 Atk. 751. S. C.]

A. being tenant for ninety-nine years, if he ſhould ſo long live, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail, remainder to *B.* in tail; *A.* and *B.* before iſſue born of *A.* fell timber. The eldeſt ſon of *A.* afterward brings his bill for an account and ſatisfaction of the timber againſt *B.* *Per* Lord Ch.—The plaintiff has no remedy at law, either in his own name, or in the name of his truſtees. *A.*, if he had not conſented to it, ſhould have brought treſpaſs; for tenant for years is conſidered as a fiduciary for the remainder-man or his leſſor. If *A.* had had an eſtate for life, and no limitation to truſtees, the plaintiff could have had no remedy; becauſe tenant for life might have barred, or ſurrendered the whole eſtate to the remainder-man: but here the freehold was in the truſtees;

and

and the poſſeſſion of the leſſee for years is in law the poſſeſſion of the owner of the freehold. The truſtees however could not here have maintained waſte, becauſe the common law gave no action of waſte, but to the owner of the inheritance; and the ſtatute of *Glouceſter* gives the writ to the ſame perſon; but the truſtee is in no other condition than a remainder-man for life. Truſtees may bring a bill in equity to ſtay waſte, before the contingent remainder comes *in eſſe*. If the truſtees had brought ſuch a bill, the court, as to trees actually cut, would have obliged them to have made ſatisfaction in money, to have been ſecured to attend the contingent uſes. Where there is tenant for life or years ſubject to waſte, and timber is blown down, the owner of the firſt remainder in tail veſted ſhall have it; for the common law conſiders an eſtate in contingence as no eſtate: and when the tree is ſevered, the property veſts in ſomebody. If there be tenant for life, remainder for life, remainder in fee, the remainder-man can have no action for waſte, becauſe the plaintiff muſt recover the place waſted, which would be injuſtice to the remainder over; but ſuch a remainder-man of the inheritance after the intervening eſtate may have trover for the trees, and if remainder-man for life dies, in the life of remainder-man in fee, he may bring waſte. Though an injunction is a proper remedy, yet it has never been determined that a bill for an account cannot be maintained afterward: and though a recovery was ſuffered after waſte done, it was to the uſe of plaintiff and his heirs, which is no new uſe, and ought not to bar waſte in equity. It is true, the action of waſte dies with the perſon; but though waſte will not lie at law, as the perſon committing it is dead, yet he may have relief in this court. It is held in all caſes of fraud, the remedy never dies with the perſon, but relief may be had againſt the executor out of aſſets; and this court will follow the aſſets of the party liable to the demand; and colluſion in this court is the ſame as fraud.—Decreed a ſatisfaction to be made to the plaintiff, for the value of the timber, as he is now tenant in fee of the eſtate; but would not give any intereſt, as that would be carrying it too far.

[An eſtate was ſettled upon *A.* for her jointure without impeachment of waſte except in pulling down houſes and felling timber, remainder to her ſon *B.* for life without impeachment of waſte generally, remainder to truſtees to preſerve contingent remainders, remainder to his iſſue in tail, remainder to his ſiſter *C.* in tail. *B.* in the lifetime of *A.*, and with her privity, fells timbers upon the eſtate, and afterwards dies in her lifetime; whereupon *C.* brought an action of waſte againſt *A.* to recover treble damages, and the place waſted, and had a verdict. But it being proved that the timber was cut down with the knowledge of *C.*, and that ſhe encouraged the doing ſo, a perpetual injunction was granted to reſtrain her from proceeding any farther at law.] Aſton v. Aſton, 1 Vez. 396.

Of Wills and Teſtaments.

SEVERAL branches of theſe heads having been already treated of under the articles *Deviſes*, *Executors* and *Adminiſtrators*, and *Legacies*, little more remains than to conſider what formal circumſtances are neceſſary to the perfection of a will and teſtament, and by what means, and for what cauſes they may be avoided.

For the better underſtanding of theſe particulars, we will arrange the matter relative to the reſidue of this ſubject under the following diviſions, and inquire,

(A) What is a *Will* and *Teſtament*, and wherein they differ.

(B) Who are capable of making a Will and Teſtament.

(C) What are the Requiſites to conſtitute a good Will.

(D) Of the ſeveral Kinds of Wills: Wherein,

1. Of Wills in Writing.—And here,
   1. *What ſhall be a good Will in Writing to paſs Lands and Tenements*, &c.—*Wherein*,
      1. *In what Language and Hand a Will may be written.*
      2. *Of the Circumſtances of Signing, Atteſtation, Publiccion*, &c.
      3. *Of the Republication:—as what will amount to a Republication, and where a Republication will make a Deviſe good.*
   2. *What ſhall be a good Will in Writing of Goods and Chattels.*
   3. *What ſhall be a ſufficient Proof of a Will.*
2. Of Nuncupative Wills.

(E) Of

(E) Of the Nature and Effect of a Will and Teſtament.

(F) How Wills, &c. may be conſtrued.

(G) How Wills may be avoided: Wherein,

1. What ſhall be deemed a Revocation of a Will.
2. Where a Will ſhall be ſet aſide for Fraud, &c.
3. Where Fraud in obtaining a Will is examinable.

(A) What is a Will and Teſtament, and wherein they differ.

A Teſtament, is a juſt and complete declaration or ſentence of a man's mind, or laſt will of what he would have to be done with his eſtate after his death.—Or, according to ſome,— Terms de Ley, voc. Teſtament. Swinb. part 1. § 2. and 4. Shep. Abr. part 4. voc. Teſtament. [*Teſtamentum eſt voluntatis noſtræ juſta* [id eſt, ſolennis et legitima] *ſententia, de eo quod quis poſt mortem ſuam fieri velit. l.* 1. MODESTIN. LIB. 2. PANDECT.]

A will, is a declaration of the mind, either by word or writing, in diſpoſing of an eſtate; and to take place after the death of the teſtator. Carth. 38. Lea v. Lib. [*Alienatio in mortis eventum, ante eam revocabilis, retento interim jure poſſidendi et fruendi, eſt teſtamentum. Grot. lib.* 2. *De Jure Belli ac Pacis, c.* 6. *n.* 14.] A will ſhall have relation only to the teſtator's death, and not to the making, for till his death he is the maſter of his own will; and therefore the will of a papiſt in *Ireland* was held to be avoided by a ſubſequent ſtatute made in that kingdom, which enacts, that the lands of papiſts there ſhall not be deviſable, but deſcend in gavelkind. Vin. Abr. tit. Deviſe, (H. b.) p. 7.

It is in *Latin* called *teſtamentum*, i. e. *teſtatio mentis*, the witneſs of a man's mind; and to deviſe by teſtament, is to ſpeak by a man's will what his mind is to have done after his death: and it is ſometimes called a will, or laſt will, for theſe words are *ſynonyma*, and are indiſcriminately uſed in our law. However, by the civil law, it is only ſaid to be a teſtament when there is an executor (*a*) made and named in it, and when there is none, it is but a codicil only: for a codicil is the ſame that a teſtament is (*b*), excepting that it is without an executor; and a man can make but one teſtament that can take effect, but he may make as many codicils as he will. *Id. ibid.* 1 Inſt. 111. Swinb. part 1. § 5. [(*a*) Hence Vinnius gives the following as the moſt perfect definition of a teſtament: *Teſtamentum eſt ſuprema conteſtatio in id ſolenniter facta, ut, quem volumus, poſt mortem noſtram habeamus hæredem. Comment. in Inſtitut. lib.* 2. *c.* 10. (*b*) The civilians define a codicil to be *ultima teſtati vel inteſtati voluntas minùs ſolennis:* for by the Roman law, there might be a codicil, whether the party died teſtate or inteſtate: and if he died teſtate, the codicil might either be precedent or ſubſequent to the teſtament; and in this caſe the validity of the codicil depended upon the validity of the teſtament; the codicil had relation to the date of the teſtament, and required to be confirmed by the teſtament. But the codicils of an inteſtate derived all their efficacy from themſelves, ſtood in need of no confirmation, and were regarded only from the day on which they were made.

And by the common law, where lands or tenements are deviſed in writing, although there be no executors named, yet there it is properly called a laſt will; and where it doth concern chattels only, a teſtament. 1 Inſt. 111.

He

Shep. Abr. part 4. voc. Teſtament.

He who makes the teſtament, is called the teſtator; and when a man dies without a will, he is ſaid to die *inteſtate*.

2 Ld. Raym. 1282. Powel v. Beresford.

A teſtamentary ſchedule without witneſſes or an executor, has been declared a will.

Hickſon v. Witham, Finch. Rep. 195.

[So, a writing purporting to be an indenture, but by the party making it declared to be his will, has been conſidered as a teſtamentary inſtrument.]

(B) Who are capable of making a Will and Teſtament.

32 H. 8. c. 1. and 34 H. 8. c. 5. Swinb. part 11. § 2.

AN infant, until he be of the age of twenty-one years, can make no will of his lands by ſtatute of 32 & 34 *H.* 8. But by ſpecial cuſtom in ſome places, where land is deviſable by cuſtom, he may deviſe it ſooner; and of his goods and chattels, if he be a boy, he may make a will at fourteen years of age, and not before; and if a maid, at twelve years of age, and not before: and then they may do it without and againſt the conſent of their tutor, father, or guardian.

Id. ibid.

If he or ſhe hath attained to the laſt day of fourteen or twelve years, the teſtament by him or her in the very laſt day of their ſeveral ages aforeſaid, is as good and lawful, as if the ſame day were already then expired.

Swinb. part 11. § 2.

Likewiſe, if after they have accompliſhed theſe years of fourteen or twelve, he or ſhe do expreſsly approve the teſtament made in their minority, the ſame by this new will and declaration is made ſtrong and effectual.

1 Inſt. 89. b. [The doctrine above-ſtated, that the teſtamentary power commences in males at fourteen, and in females at twelve, ſeems to be the moſt relied upon. *Vide* Hargrave's edit. of Co. Litt. 89. b. note (b).]

And yet ſome ſay an infant cannot make a will of his goods and chattels, until he be eighteen years of age.

2 Vern. 469. [(*a*) This is a very looſe *dictum*, entitled to no attention.]

It has, however, been agreed in equity, that a female may make a will at twelve years of age of a perſonal eſtate, and a male at ſeventeen years of age, or fifteen (*a*), if he be a perſon of diſcretion.

12 H. 7. c. 24. Perk. § 502. Fitz. Exec. 40.

A feme covert cannot make a will of her lands and goods, except it be in ſome ſpecial caſes: for of her lands ſhe can make no will with or without her huſband's conſent, *ſtat.* 32 & 34 *H.* 8. 4 *Rep.* 51. *Br. Teſtament*, 13.—But of the goods and chattels ſhe has as executrix to any other, ſhe may make an executor without her huſband's conſent; for if ſhe does not ſo, the adminiſtration of them muſt be granted to the next of kin to the deceaſed teſtator, and ſhall not go to the huſband.

Plowd. 526.

But even of them ſhe can make no deviſe with or without her huſband's leave, for they are not deviſable; and if ſhe deviſe them, the deviſe is void.

Of the things due to the wife, whereof ſhe was not poſſeſſed during the marriage, as things in action, and the like, ſhe may make her will, at leaſt ſhe may make her huſband executor of her *paraphernalia*, *viz.* her neceſſary wearing apparel, being that which is fit for one of her rank. Some ſay ſhe may make a will without her huſband's leave, others doubt of this; however all agree, that ſhe, and not his executor, ſhall have this after her huſband's death; and that the huſband cannot give it away from her; and of the goods and chattels her huſband has either by her or otherwiſe, ſhe may not make a will without the licence and conſent of her huſband firſt had ſo to do: but with his leave and conſent ſhe may make a will of his goods, and make him her executor if ſhe will. And it is ſaid alſo, that if ſhe does make a will of his goods in truth without his leave and conſent, and after her death he ſuffers the will to be proved, and delivers the goods accordingly, in this caſe the teſtament is good: and yet if the huſband gives the wife leave to make a will of his goods, and ſhe does ſo, he may revoke the ſame at any time in her lifetime, or after her death, before the will is proved. But a woman after a contract with any man, before the marriage, may make a will as well as any other, and is not at all diſabled hereby.

12 H. 7. 24. 18 Ed. 4. 11. Perk. § 501. Fitz. Exec. 5. 28. 109. Br. Teſt. 11. [*Vide ſupra*, tom iv 244, 245.]

Likewiſe, a wife, whoſe huſband is baniſhed by act of parliament for life, may make a will as a feme ſole. 2 Vern. 104.

A mad or lunatick perſon, during the time of his infanity of mind, cannot make will of lands or goods: but ſuch a one as hath his *lucida intervalla*, clear or calm intermiſſions, may, during the time of ſuch quietneſs and freedom of mind, make his will, and it will be good. Swinb. part 11. § 3.

So alſo, an idiot, *i. e.* ſuch an one as cannot number twenty, or tell what age he is, or the like, cannot make a will or diſpoſe of his lands or goods; and although he make a wiſe, reaſonable, and ſenſible will, yet it is void: but ſuch a one as is of a mean underſtanding only, that has *groſſum caput*, and is of the middle ſort, between a wiſe man and a fool, is not prohibited to make a will. *Id.* part 11. § 4.

An old man likewiſe, who, by reaſon of his great age, is childiſh again, or ſo forgetful that he forgets his own name, cannot make a will, for a will made by ſuch an one is void. *Id. ibid.* part 11. § 1. 6 Rep. 23. Marquis of Wincheſter's caſe.

So alſo it ſeems a drunken man, who is ſo exceſſively drunk that he is deprived of the uſe of his reaſon and underſtanding, during that time may not make a will; for it is requiſite when the teſtator makes his will that he be of ſound and perfect memory, *i. e.* that he have a competent memory and underſtanding to diſpoſe of his eſtate with reaſon. Swinb. part 11. § 1. and § 6.

A man who is both deaf and dumb, and is ſo by nature, cannot make a will; but a man who is ſo by accident, may by writing or ſigns make a will; and ſo may a man who is deaf or dumb by nature or accident. *Id.* part 11. § 1. and 10.

And ſo alſo may a man that is blind. *Id.* part 1. § 1. and 11.

But

Wood, Inſt. 335. But an alien enemy, perſons convicted and *attainted*, and recuſants convict, cannot make a teſtament of lands or goods.

Fitz. Abr. Teſt. 1. Perk. §498. Neither may the head, or any of the members of a corporation, make a will of the lands or goods they have in common, for they ſhall go in ſucceſſion.

Swinb. part 11. § 12. 5 and 6 Ed. 6. c. 11. § 9. A traitor attainted, from the time of the treaſon committed, can make no will of his lands or goods, for they are forfeited to the king: But after the time he has a pardon from the king for his offence, he may make a will of his lands and goods as any other man.

So, if he dies before attainder, his will is good. Likewiſe his will of goods, which he hath as executor to another, is good, for they are not forfeited. *Id. ibid.*

Swinb. part 11. § 13. *N. B.* The forfeiture of a felon's lands relates to the time of the fact committed, but the forfeiture of goods, to the time of the judgment given. A man who is attainted or convicted of felony cannot make a teſtament of his lands or goods, for they are forfeited: But, if a man be only indicted, and die before the attainder, his will is good for his lands and goods both; and if he be indicted, and will not anſwer upon his arraignment, but ſtand mute, *&c.*, in this caſe his lands are not forfeited, and therefore he may make a will of them.

Plow. 61. Hales v. Petit. And if a man kill himſelf, his will as to his goods and chattels is void, but as to his lands is good.

Swinb. part 11. § 21. A man likewiſe who is outlawed in a perſonal action cannot make a will of his goods and chattels, ſo long as the outlawry continues in force, but of his lands he may make a will.

Wood, v. 1. 791. Shep. Abr. part 4. voc. Teſtament. But note; That however the wills of traitors, aliens, felons, and outlawed perſons are void as to the king or lord that has right to the lands or goods by forfeiture or otherwiſe; yet the will is good againſt the teſtator himſelf, and all others but ſuch perſons only.

Id. ibid. And note alſo; By the civil law the wills of divers others, as excommunicate perſons, hereticks, uſurers, inceſtuous perſons, ſodomites, libellers, and the like, are void; but by our law the wills of ſuch perſons, at leaſt as to their lands, are good by the ſtatutes that enable men to deviſe their lands.

Id. ibid. In ſhort, all perſons whoſoever, male or female, old or young, lay or ſpiritual, at any time before their death, whilſt they are able to ſpeak ſo diſtinctly, or write ſo plainly, that another may underſtand them, and perceive that they underſtand themſelves, may make wills of their lands, goods, and chattels, and that although they have ſworn to the contrary; and none are reſtrained of this liberty, but ſuch as are before named.

(C) What are the Requiſites to conſtitute a good Will.

TO conſtitute a good will it is neceſſary,

First, That the teſtator be a perſon legally capable of making a will. *See who are capable of making a will,* B. *ante.*

Secondly,

Secondly, That there be a perſon to take, and one that is capable; for in all gifts by deviſe, or otherwiſe, that are good, there muſt be a donee *in eſſe*, and not *in poſſe* only, and one that ſhall have capacity to take the thing given, when it is to veſt, or the gift ſhall be void. Shep. Abr. part 4. p. 13. voc. Teſt.

And hence it is, that where the deviſee of lands or goods, or an executor of a will, doth die before the deviſor, or him that makes the will, the deviſe and will is void, and that neither the heir nor executor ſhall have the thing deviſed. *Id. ibid.* Plow. 345. Brett v. Rigden.

A deviſe to the wife for life, and after to the children unpreferred, is good. 1 And. 60. Amner v. Luddington.

But a deviſe by a man to his heir and his heirs is void. 2 And. 11. Garmyn v. Arſtete.

One deviſed his leaſes of lands to *B.* his eldeſt ſon, except the ſum of 140*l.* to be paid out for portions for his daughters, and made *B.* his executor; and held a good deviſe to them after this manner, and that the daughters might ſue for it in the eccleſiaſtical court, or court of equity. Shep. Abr. part 4. p. 13. voc. Teſt.

If one deviſe to the ſon in tail, and if he die without iſſue, to the next of his name; the daughter after married cannot have it, for ſhe is not of his name. Cro. Eliz. 532. Bon v. Smith. But, if ſhe had not been married, ſhe would have had it, as being next of the name. *Id. ibid.*

One ſeiſed of a manor and lands deviſeth the ſame to his ſon, and after, by another part of his will, deviſeth part of the ſame to another of his ſons; theſe deviſes are good, and they ſhall be joint-tenants. 3 Leon. 11.

Thirdly, That the teſtator, at the time of making his will, have *animum teſtandi*, i. e. a mind or ſerious intention to make ſuch a will.

For it is the mind, not the words of the teſtator, that gives life to the will: Since if a man raſhly, unadviſedly, incidently, jeſtingly, or boaſtingly, and not ſeriouſly, writes or ſays, that ſuch a one ſhall be his executor, or have all his goods, or that he will give to ſuch a one ſuch a thing; this is no will, nor to be regarded. And the mind of the teſtator herein is to be diſcovered by circumſtances; for if at the time he be ſick, or ſet himſelf ſeriouſly to make his will, or require witneſſes to bear witneſs of it, it ſhall be deemed in earneſt; but, if it be by way of diſcourſe only, or of ſomewhat he will do hereafter, or the like, it ſhall be taken for nothing. Swinb. part 1. § 3.

Fourthly, That the mind of the teſtator in making his will be free, and not moved by fear, fraud, or flattery.

For when a teſtator is moved to make his teſtament by fear or circumvented by fraud, or overcome by ſome immoderate flattery, the ſame is void, or at leaſt voidable by exception: And therefore, if a man, by occaſion of ſome preſent fear or violence, or threatening of future evils, does at the ſame time, or afterwards by the ſame motive, make a will, it is void, not only as to him that puts him ſo in fear, but as to all others, although the teſtator confirms it with an oath: but, if the cauſe of fear be ſome *Id. ibid.* part 11. § 25. and part 7. § 2, 3, and 4.

ſome vain matter, or, being weighty, be removed, and the teſtator afterwards, when the fear is paſt, confirm the teſtament, in this caſe, perhaps, the will may be good. And if a man, by occaſion of ſome fraud * or deceit, be moved to make a will, if the deceit be ſuch as may move a prudent man or woman, and if the end be evil alſo, the will is void, or voidable at the leaſt; but, if the deceit be light and ſmall, or if it be to a good end, as where a man is about to give all his eſtate to ſome lewd perſon, from his wife and children, and they perſuade the teſtator, that the lewd fellow is dead, or the like, and thereby procure him to give his eſtate to them, this is a good will. And one may, by honeſt interceſſions, and modeſt perſuaſions, procure another to make himſelf or a ſtranger executor to him, or the like, and this will not hurt the will. Alſo, a man may uſe fair and flattering ſpeeches to move the teſtator to make his will, and to give his eſtate unto himſelf, or ſome friend of his; except it be in caſe where the flatterer firſt threatens him, or puts him in fear †, or to his flattery joins fraud and deceit; or where the teſtator is a perſon of weak judgment, or under the government of the flatterer, or in danger from him; as, when the phyſician ſhall perſuade his patient under his hand to make his will, and give his eſtate to himſelf ‡: Or the wife attending on her huſband in his ſickneſs ſhall neglect him, and in the mean time flatter him to give her all: Or where the perſuader is importunate, and will have no denial: Or when there is another teſtament made before; for in all theſe caſes, the will will be in danger to be avoided. If I be much privy to another man's mind, and he tells me often in his health how he intends to ſettle his eſtate, and he being ſick, I, of my own head, draw a will according to his mind, before declared to me, and bring it to him, and aſk him, whether this ſhall be his will or no? And he conſiders of it, and then delivers it back to me, and ſays, Yes; this is a good will. But if otherwiſe, ſome friends of a ſick man, of their own heads, ſhall make a will, and bring it to a man in extremity of ſickneſs, and read it to him, and aſk him, whether this ſhall be his will? and he ſays, Yes, yes: Or if a man be in great extremity, and his friends preſs him much, and ſo wreſt words from him; eſpecially if it be in advantage of them, or ſome friends of theirs: In theſe caſes the wills are very ſuſpicious.

Fifthly, That the will be made in the form preſcribed by law.

The forms which the law preſcribes, differ according to the ſpecies of property which is to be diſpoſed of, that is, whether it be real or perſonal. And this leads us to conſider the ſeveral kinds of wills and teſtaments, and the circumſtances requiſite to each.

* *N.B.* Fraud in wills of lands is only examinable in the courts of common law, not of Chancery. Swinb. 478. And fraud in a will of perſonal eſtate is only examinable in the eccleſiaſtical court. 2 P. Wms. 286. Steventon v. Gardiner & *al.* But ſee *poſtea*.

† For in that caſe it is to be preſumed, that the teſtator is rather moved by fear, than by the ſubſequent flattery.

‡ For the law will preſume that the teſtator did it, leſt the phyſician ſhould neglect or forſake him.

(D) Of the ſeveral Kinds of Wills and Teſtaments.

THERE are two ſorts of wills or teſtaments: Firſt, in writing, which is, where the mind of the teſtator, in his lifetime, by himſelf, or ſome other by his appointment, is put in writing: or, ſecondly, by word, or without writing, which is, where a man is ſick, and for fear that death, or want of memory or ſpeech, ſhould ſurpriſe him, that he ſhould be prevented, if he ſtaid the writing of his teſtament, deſires his neighbours and friends to bear witneſs of his laſt will, and then declares the ſame preſently, by word, before them: and this is called a *nuncupative* or *nuncupatory* will or teſtament; and this being after his death proved by witneſſes, and put in writing by the ordinary, is of as great force for any other thing, but land *, as when at the firſt in the life of the teſtator it is put in writing. See of *Nuncupative Wills, poſt.* 1 Inſt. 111. Perk. §476. Wood, part 1. 787.

* In ſome cities and boroughs lands may paſs as chattels by will nuncupative or parol without writing. 1 Inſt. 111. [But not without writing, and ſigned and attested in like manner as wills of other lands, ſince the ſtat. 29 Car. c. 3.]

A codicil is alſo in writing or by word, as a will or teſtament is. *Id. ibid.*

The civilians have other diviſions of wills and teſtaments, ſolemn and unſolemn, privileged and unprivileged, whereof the common law makes no mention.

1. Of Wills in Writing.

By the common law, no lands or tenements, (except by particular cuſtom,) were deviſable by any laſt will or teſtament, neither could they be transferred from one to another, but by ſolemn livery of ſeiſin, matter of record, or ſufficient writing (*a*). Becauſe it was preſumed, that the teſtator would do that *in extremis*, that he would not do in his health; that it proceeded from the diſtemper of his mind, by the anguiſh of his diſeaſe, or by ſiniſter perſuaſion, to which in his ſickneſs he was more ſubject. But this being altered by ſtatute, we are next to inquire —— 1 Inſt. 111. b. 1 Roll. Abr. 608.

(*a*) The true reaſon ſeems to be from the nature of the feudal tenure and the relation that was firſt eſtabliſhed betwixt the lord and his tenant. For though donations after length of time were made to the tenant and his heirs, or the heirs males or females of his body, under certain duties and ſervices expreſsly reſerved, or which the law created: and though the word *heirs*, &c. be words of limitation, and appropriated to meaſure out the length or continuance of the eſtate: yet they were always underſtood the heirs of the preſent tenant, who being liable to the ſame ſervices when they came into the tenancy, the lord was to have the tuition and education of ſuch heirs, in caſe they happened, by reaſon of their minority, to be incapable of performing the ſervices, that ſo he might, by his care and diſcipline, ſecure to himſelf tenants always capable thereof, either in their own perſons, if they happened to be males, or by proper marriages with his tenants, if they proved to be females; and therefore by no act of the tenant's could he diſpoſe of the feud, ſo as to defeat the lord of the advantages of his ſeignory. And hence it was, that a tenant could not deviſe it even to his own heir, ſo as to make him a purchaſer thereof; for then he coming in not by the donation of the lord, but the diſpoſition of the tenant, though he remained liable to the naked ſervices, yet the lord loſt the advantages of wardſhip, marriages, &c. which were annexed only to thoſe who came in, upon the terms of his own donation by deſcent. 1 Eq. Caſ. Abr. 401.

1. *What ſhall be a good Will in Writing to paſs Lands and Tenements.*

"The (*a*) ſtat. 32 *H.* 8. *c.* 1. uſually called the Statute of Wills, "enacts, That every perſon (*b*) having manors, lands, &c. ſhall "have power to give (*c*), diſpoſe, will, and deviſe by will, in "(*d*) writing or otherwiſe, by act executed in his lifetime, all "his ſaid manors, &c.; any law, ſtatute, &c. to the contrary "notwithſtanding.

(*a*) There have been ſeveral reſolutions concerning wills made purſuant to this ſtatute ſince the making thereof: but as the ſtatute 29 Car. which is now the proper pattern to follow, has altered the forms by requiring more ceremony and greater exactneſs, it will be ſufficient barely to mention ſome of the caſes on this ſtatute of 32 H. 8. (*b*) That the lands muſt be *ſua*, and therefore lands purchaſed after the will is made, will not paſs. *Vide* Plow. 344. [*Sed vide* 2 Vez. jun. 427.] (*c*) A deviſe of an authority to executors to ſell, is within the act. Moor, 341. (*d*) A man beyond ſea wrote a letter, in which he declared his will to be, that his land ſhould go in ſuch a manner; and adjudged a good will. Moor, 177. So, if a man had ordered one to make his will, and thereby to deviſe *Whiteacre* to *A.* and his heirs, and *Blackacre* to *C.* and his heirs, and he had written the deviſe to *A.*, but before the deviſe to *C.* was written, the deviſor died; yet as to *A.* this had been a good deviſe. 3 Co. 31. b. So, a will was held good, where a lawyer took only ſhort notes, with deſign to reduce it into form, which he afterwards did, but the deviſor died before it was read to him. 1 And. 34. A will wrote without the appointment of the teſtator, if read to him, and approved by him, was held good, ſigning and ſealing not being neceſſary. Cro. Eliz. 100. Dyer, 72. a. 2 Leon. 35.

"And farther, by the ſtatute of frauds and perjuries, 29 *Car.* 2. "*c.* 3 § 5. all deviſes and bequeſts of any lands or tenements de-"viſable by the ſtatute of wills, or by any particular cuſtom, "ſhall be in writing, and ſigned by the party deviſing the ſame, "or ſome other perſon in his preſence, and by his expreſs di-"rections, and ſhall be atteſted and ſubſcribed in the preſence of "the ſaid deviſor by three or four credible witneſſes, or elſe they "ſhall be utterly void and of none effect.

"And by § 6. no deviſe in writing of lands, tenements, or "hereditaments, or any clauſe thereof, ſhall be revocable, other "than by ſome other will or codicil in writing, or other writing "declaring the ſame, or by burning, cancelling, tearing, or obli-"terating the ſame by the teſtator himſelf, or in his preſence, "and by his directions and conſent: but all ſuch deviſes and be-"queſts ſhall remain in force until the ſame be burnt, &c. in "manner aforeſaid, or unleſs the ſame be altered by ſome "other will or codicil in writing, or other writing of the de-"viſor, ſigned in preſence of three or four witneſſes, declaring "the ſame."

Wood, part 1. 798. Dy. 72. Plow. 345.

Therefore, if a will be of lands or tenements, it muſt be in writing, and it muſt be committed to writing at the time of the making thereof; and it is not ſufficient that it be put in writing after the death of the teſtator, being firſt made by word of mouth only, for then it is but a nuncupative ſtill. But, if the will be firſt made by words of mouth, and be afterwards written, and then brought to the teſtator, and he approve of it for his will: or if the teſtator, when he declares his mind, appoint that the ſame ſhall be written, and thereupon the ſame is written accordingly in the lifetime of the teſtator, theſe are good wills of land, and

and as good as if they had been written at the firſt. Therefore, if one be very ſick, and another come to him and aſk him, whether his wife ſhall have his lands? and he ſay, Yes; and a clerk being preſent, put this in writing without any precedent commandment or ſubſequent allowance of the ſick man, this is no good will of the land. So, if one declares his whole mind before witneſſes, and ſends for a notary to write it, and dies before he comes, and the notary writes it after his death, this is no good will of the lands, but a good nuncupative will for the goods and chattels, except the teſtator declares his mind to be, that it ſhall not be his will unleſs it be put in writing; for then perhaps it may not be a good will even for his goods and chattels. So, if he that writes the will cannot hear the party ſpeak, and another, that doth ſtand by the ſick man, tells him what he ſays; in this caſe, if there be none others preſent to prove that he reported the very words of the ſick man, this will be no good will of the land. But, if a notary takes directions from the ſick man for his will, and after goes away and writes it, and then brings it again and reads it to the teſtator, and he approves it; or, if it be written from his mouth by the notary according to his mind, and his mind were to have it written, although it be not ſhewed or read to him afterwards, theſe are good teſtaments. So, if the notary only take certain rude notes or directions from the ſick man, which he agrees to, and they be afterwards written fair in his lifetime, and not ſhewed to him again, or not written fair until after his death; theſe are good wills of lands. But, if a ſick man bid the notary make a will of his lands, but do not tell him how, and the notary make a deviſe of it after his own mind, this is no good will: and yet if it be after read unto him, and approved by the teſtator, it may be good. If a will be found written in the teſtator's houſe, and not known by whom, and it be read unto and approved by the teſtator, this is not a good will in writing for lands and goods.

Having ſhewn how far writing is neceſſary, it remains to conſider,

1. *In what Language and Hand a Will may be written.*

It is not material in what matter or ſtuff, whether in paper or parchment, nor in what language, whether in *Latin*, *French*, *Dutch* *, or any other tongue, or in what hand or letters, whether in ſecretary hand, *Roman* hand, or court hand, or in any other hand, a will be written, ſo that it be fair and legible, that it be read and underſtood: neither is it material whether the ſame be written at large, or by notes or characters uſual or unuſual, as XX *s.* for twenty ſhillings, or when the figure 1 is uſed inſtead of the letter *A.* if it be uſual in the teſtator's writing, or the like, for the will is good notwithſtanding. So alſo, if ſome words be omitted, or improper ſentence uſed, when the intent and meaning is apparent; as, where a man ſays, "I make my wife of this my laſt "will and teſtament," leaving out the word *executrix*, yet the will is good:

Swinb. part 4. § 28.

* But *N. B.* It muſt be ſo framed as to paſs eſtates according to the rules of our law. 1 Vern. 85. Bovey v. Smith.

good: and this ſhall be underſtood. But, if it be ſo done as it cannot be read *, or by reading the mind of the teſtator cannot be known, then the will is void and of no force; in like manner as a nuncupative will is when the words ſpoken are ſo ambiguous, obſcure, and uncertain, that thereby the meaning of the teſtator cannot be known or underſtood.

* Where a will was written ſo blindly that it was ſcarce legible, and the legacies were in figures, it was referred to a maſter to examine what thoſe legacies were, and he to be aſſiſted by ſuch as were ſkilled in the art of writing. 1 P. Wms. 425. Maſters v. Maſters.

We now proceed to treat,——

2. *Of the Circumſtances of Signing, Atteſtation, Publication,* &c.

The clauſes of the 29 *Car.* 2. above recited, having rendered thoſe circumſtances neceſſary, it is next to be inquired, When, in legal conſtruction, theſe requiſites ſhall be deemed to have been complied with? which may be beſt collected by attention to the following caſes.

2 Str. 764. Warneford v. Warneford. It has been held, that ſealing a will, is a ſigning within the ſtatute of frauds and perjuries. [Gryle v. Gryle, 2 Atk. 176. *Sed vide* Smith v. Evans, 1 Wilſ. 313., and Right v. Price, Dougl. 244. *contra.*]

Perk. 477. But a will in writing need not be ſealed: but it is added, Q. If it be good to paſs freehold or inheritance?

3 P. Wms. 254. Stonehouſe & ux. v. Evelyn. [Grayſon v. Atkinſon, 2 Vez. 454. S. P.] Where the teſtator owns his hand before the witneſſes who ſubſcribe the will in the teſtator's preſence, the will is good, though all the witneſſes did not ſee the teſtator ſign; and it is obſervable that the ſtatute of frauds does not ſay, the teſtator ſhall ſign his will in the preſence of three witneſſes; but requires theſe three things; firſt, That the will ſhould be in writing. 2dly, That it ſhould be ſigned by the teſtator. And, 3dly, That it ſhould be ſubſcribed by three witneſſes in the preſence of the teſtator.

2 Str. 1109. Croft v. Pawlet. Nevertheleſs a will has been held to have been well executed, though it was not mentioned in the atteſtation to have been ſigned in the preſence of the teſtator.

2 Ch. Caſ. 109. Anon. [So, Jones v. Lake, Feb. 1, 1742, B. R. 2 Atk. 176. by Sanders, notes. 2 Vez. 455. S. C.] If a will is atteſted by three witneſſes, who ſeverally ſigned their names, not being preſent together; yet each ſigning being in the preſence of the teſtator, makes it a good will within the ſtatute.

3 Mod. 262. Lea & Lib. But, if a man ſubſcribes and publiſhes his will in the preſence of two witneſſes, and they ſubſcribe it in his preſence, and after makes a codicil in writing, reciting that he had made a former will and confirmed the ſame, (except what was excepted by the codicil,) and declares, that the codicil ſhall be taken as part of his will, and publiſhes it in the preſence of one of the witneſſes to the firſt will and another new witneſs; this is not a good will, for there were not three ſubſcribing witneſſes in the preſence of the teſtator;

teſtator; and one of the witneſſes to the codicil never ſaw the will. Adjudged, though it was objected, the will and codicil made but one will, and the circumſtance of three witneſſes wanting to complete the will, was perfected by the codicil.

So, if a man makes a will in ſeveral pieces of paper, and there are three witneſſes to the laſt paper, and none of them ever ſaw the firſt; this is not a good will. 3 Mod. 263. Lea & Lib.

[It was proved that *C.* made his will, conſiſting of two ſheets of paper all of his own hand-writing, and ſigned his name at the bottom of each page; and that he alſo made a codicil of his own hand-writing upon one ſingle ſheet, and called in *H.*, ſhewed him both the ſheets of his will, and his ſignature to every page thereof, and told him that was *his will;* and then ſhewed *H.* the codicil, and deſired him to atteſt both the will and codicil: which he did, in the preſence of the teſtator, and in the manner appearing upon the face of the inſtrument, and then went out of the room. *V.* and *L.* came in immediately afterwards, and the deviſor ſhewed them the codicil, and the *laſt ſheet of the will,* and ſealed both before them. *C.* then took each of them up ſeverally as his act and deed for the purpoſes therein mentioned. Then the witneſſes atteſted the ſame in the teſtator's preſence, but NEVER SAW *the* FIRST *ſheet of the will; nor was* THAT *ſheet* PRODUCED *to them; nor was the ſame, or any other paper,* UPON THE TABLE. *Both* the ſheets of the will were found *with the codicil* in the teſtator's bureau, after his death, all wrapped up in one piece of paper; but the two ſheets of the will were not pinned together. And the queſtion upon theſe facts was, Whether this will was duly executed according to the ſtatute of frauds? After three ſeveral arguments before the court of King's Bench, and one argument before all the judges in the Exchequer-chamber, Lord *Mansfield* delivered the judgment. His lordſhip ſaid, that the queſtion made at the trial, and ſubmitted by the caſe, as it then ſtood, turned upon the ſolemnity *of the* EXECUTION; and they were of opinion, "that the due execution of this will could "not be come at, in the method wherein the matter was then "put;" that if this were conſidered as a ſpecial verdict, they thought it was defectively found as to the point of the *legal execution* of the will; that every *preſumption* ought to be made by a jury, *in favour* of ſuch a will, when there was no doubt of the teſtator's intention; and that they all thought the circumſtances ſufficient to *preſume* that the firſt ſheet was in the room; and that the jury ought to have been ſo directed: but, upon a ſpecial verdict, nothing could be preſumed; therefore they were all of opinion, "that it ought to be tried over again;" and if the jury ſhould be of opinion, "that it was then in the room," they ought to find for the will generally, and they ought to *preſume,* from the circumſtances proved, "that the will *was* in the room."] Bond. *et al.* v. Seawell *et al.* 3 Burr. 1773. S. C. Black. Rep. 407. 422. 454.

A will of lands was originally executed in the preſence of two witneſſes only, and at the diſtance of four years afterwards, the teſtator re-executed his will, by drawing a pen on the old ſtrokes, in the preſence of one other perſon, who likewiſe ſubſcribed his MS. Rep. Jones v. Dale. B. R. Hil. 16 G. 2.

[2 Atk. 176. by Sanders, notes, S. C. 2 Vez. 455. S. C.]

name as a witneſs to it. Upon an ejectment, brought by the heir at law, and on a ſpecial verdict, it was determined by the court, that this will was properly executed, and atteſted, under the ſtatute of frauds and perjuries.

MS. Rep. Grayſon v. ——, In Canc. 25, 26 G. 2. [Grayſon v. Atkinſon, 2 Vez. 454. S. C.]

It was determined by the Lord Chancellour, that a will is well proved, though the witneſſes did not ſee the teſtator ſign his name; if he declared it to be his hand-writing to them, and they atteſted it in his preſence, and in the preſence of each other.

MS. Rep. Ellis v. Smith, Hil. and Mich. 27 G. 2. [Dougl. 244. notes. S. C.] Dormer v. Thurland, 2 P. Wms. 509.

A will was atteſted by three witneſſes, in the preſence of the teſtator and of each other, but the teſtator did not write his name or put his ſeal in their preſence, but pointed to the paper and ſaid, that was his will, and he had wrote it, and that his name, *William Ellis* ſubſcribed, was his writing and name; and laid his hand on the ſeal, and ſaid, that was his ſeal. On a queſtion in this cauſe, Whether this will, ſo executed, was good as a revocation of a former will, under the ſixth ſection of the ſtatute of frauds? Lord *Hardwicke*, aſſiſted by Lord Ch. Juſtice *Willes*, *Strange*, Maſter of the Rolls, and the Chief Baron, held clearly that it was; it not being doubted but that it was good as an original will, according to the authorities determined on this head, that the owning it to be his hand-writing was ſufficient.

2 Salk. 688. Shires v. Glaſcock. [In Caſſon v. Dade, 1 Br. Ch. Rep. 99. Lord Thurlowe, relying on the authority of this caſe, inclined to think a will well atteſted, where the teſtatrix could ſee the witneſſes through the windows of her carriage, and of the attorney's office.]

The teſtator deſired the witneſſes to go into another room, ſeven yards diſtant, to atteſt his will, in which there was a window broken, through which he might ſee them. And it was held, that this will was well atteſted according to the ſtatute of frauds: for though the ſtatute requires atteſting in the teſtator's preſence, to prevent another will from being obtruded in the place of a true one, yet it is enough if the teſtator might ſee. It is not neceſſary that he ſhould actually ſee them ſigning; for, at that rate, if a man ſhould but turn his back, or look off, it would vitiate the will: and the ſigning was in the view of the teſtator; he might have ſeen it, and that is enough. So, if the teſtator, being ſick, ſhould be in bed and the curtain drawn.

1 P. Wms. 239. Broderick v. Broderick.

But, where one deviſed lands to *J. S.* and his heirs, and duly ſubſcribed his will in the preſence of three witneſſes; who, for the eaſe of the teſtator, went down ſtairs into another room, and atteſted the will there, which was out of the preſence of the teſtator: and the heir at law was prevailed on to join in a leaſe and releaſe of the deviſed premiſes, in truſt for the deviſee; the will and the releaſe were both ſet aſide; for the releaſe reciting that the will was duly executed, was *ſuggeſtio falſi*, and the concealing from the heir, that it was not duly executed, was *ſuppreſſio veri*; either of which circumſtances are good reaſons for ſetting aſide a releaſe or conveyance.

3 Lev. 1. Lemayne v. Stanley.

If the teſtator writes the will with his own hand, though he does not ſubſcribe his name, but ſeals and publiſhes it, and three witneſſes

witneſſes ſubſcribe their names in his preſence, it is a good will; for his name being written in the will it is a ſufficient ſigning: and the ſtatute does not direct, whether it ſhall be at the top, bottom, *&c.*; and, by three judges againſt one, ſealing is a ſigning within the act. And note; it is not ſaid in the act, that the ſigning ſhall be in the preſence of the three witneſſes at the ſame time.

J. S. before the ſtatute of 29 *Car.* 2., *viz.* in 1668-9, wrote his will with his own hand on a ſheet of paper, and the writing went to the bottom on one ſide, and half-way on the backſide, which will, at the end of it, had the name and ſeal of *J. S.*, and notice was taken in his own hand of ſome interlineations. At a very little diſtance on the backſide of the ſame paper, a codicil was written, which extended almoſt to the bottom of the ſame backſide of the paper, and was dated 1679, which was after the *ſtatute of frauds*, and had the name of the deviſor ſubſcribed, and his ſeal affixed; in which codicil a legacy as to a houſe was revoked, and the ſame was thereby deviſed to *A.* for life, and after to his brothers ſucceſſively, but notice was not taken of the names of his brothers in the codicil, but they were named in the will. At the top of the will was written, "Signed, ſealed, and publiſhed, "as my laſt will and teſtament, in the preſence of the ſame, being "written here for want of room below." This was likewiſe written in the teſtator's own hand, and then the names of the three witneſſes were ſubſcribed; two of thoſe witneſſes were dead, and the third was produced at the trial, who teſtified that he was ſervant to the teſtator for four years, and about twenty-ſeven or twenty-eight years ago, he and the other two witneſſes were called up in the night, and ſent for into the teſtator's chamber, who produced a paper folded up, and deſired him and the others to ſet their hands as witneſſes to it, which they all three did in his preſence; but they did not ſee any writing, nor did the teſtator tell them it was his will, or ſay what it was; but he believes this to be the paper, becauſe his name is there, and the names of the other witneſſes, and he never witneſſed any other deed or paper for the teſtator; and though the teſtator did not ſet his name or ſeal to the will in their preſence, yet he had often ſeen him write, and believes the whole will and codicil to be of his hand-writing. And Lord Chief Juſtice *Trevor* inclined that here was ſufficient evidence to find the codicil well executed, and the jury found it accordingly.

Comyns's Rep. 197. Peate v. Ougley. It was inſiſted, that upon this evidence it is apparent that the codicil was written before the execution of the will; for otherwiſe there was no reaſon that the witneſſes ſhould write their names at the top of the firſt ſide of the will, and the words written by the teſtator's own hand as the reaſon of it, had been falſe, if the codicil had not then been upon that paper: for there would have been ſufficient room below the will for the witneſſes to atteſt it. The witneſs alſo ſays, that the execution was about twenty-ſeven or twenty-eight years ago; which time is ſubſequent to the codicil. But it was ſaid, the execution is ſufficient within the ſtatute; for there is no neceſſity that the witneſſes ſee the teſtator write his name: and if he writes theſe words, "Signed, ſealed, "and publiſhed as his will," and prays the witneſſes to ſubſcribe their names to that, it will be a ſufficient publication of his will, though the witneſſes do not hear him declare it to be his will; and a caſe was mentioned, determined by Lord Chan. Shafteſbury, before 29 Car. 2. where a man wrote his will with his own hand, and alſo theſe words, "Signed and publiſhed in the preſence of," and no witneſſes had ſubſcribed it; this was held to be a ſufficient publication. *Ibid.*

A. B. made a will or teſtamentary ſchedule, all of his own hand-writing, as follows: "In the name of God, *Amen.* I *A. B.* "do

2 Ld. Raym. 1282. Powel v. Beresford.

" do make this my laſt will and teſtament for fear of mortality " till I can ſettle it more at large. I do give and bequeath 1000*l.* " unto *D. P.* to be paid by my executor (or) adminiſtrator; and " for ſure payment thereof, I do charge all the real and perſonal " eſtate which I have in the world, I being very deſirous to make " a proviſion for the ſaid *D. P.* for ſeveral good reaſons inducing " me thereunto. In witneſs whereof I have hereunto ſet my " hand, this preſent 7th day of *December* 1704. Signed *A. B.*" He delivered the ſame to the ſaid *D. P.*, and about a fortnight before his death, *A. B.* declared he had left with *D. P.* an unqueſtionable ſecurity for 1000*l.* charged upon his real and perſonal eſtate, and that he had done the ſame for fear of mortality, till ſuch time as he could make a full and complete will; which he declared he would do as ſoon as his wife was brought to bed, but that he waited to ſee if it were male or female. He died ſuddenly 6th *February* 1704, leaving his wife then lying in of a daughter. The judge of the Prerogative Court gave ſentence againſt the will, and pronounced that *A B.* died inteſtate. On appeal to the delegates (among whom were *Holt*, Ch. J., *Price*, B., and Judge *Dormer*) the ſentence was reverſed, and they pronounced for the will.

2 Vern. 498. Burkitt v. Burkitt. *A.* by will in writing, atteſted by three witneſſes, deviſed a copyhold eſtate to his wife: and afterwards the teſtator on the day of his death, directed his nephew to obliterate ſome deviſes, but ſaid nothing as to the copyhold deviſed to his wife, and then cauſed a memorandum to be written, that he examined, peruſed, and approved of the will as ſo obliterated and altered by his nephew, in his preſence, but did not republiſh it in the preſence of three witneſſes, but directed his nephew to have it written out fair; but before it was brought back he became delirious; and this was held a good will as to the copyhold.

Comyns's Rep. 453. Limbery & *al.* and Hide. Teſtator gave inſtructions to make his will of his real and perſonal eſtate, and when it was brought to him he made ſeveral alterations, and then wrote the whole over as altered, with his own hand: this being found in his ſtudy, though not ſigned or ſealed, was held a good will. Note, the firſt ſentence was, that he died inteſtate, but that was reverſed by the delegates.

Prec. in Chan. 77. Serjeant v. Puntis. A will of lands *made before* the ſtatute of frauds, had but two witneſſes, and the teſtator *died after* the ſtatute, without altering his will: and his Honour thought it a good will, to paſs the lands; but the other ſide inſiſting to have it tried at law, he directed it accordingly.

1 P. Wms. 740. Longford v. Eyre. The proper way of examining a witneſs to prove a will as to lands, is that the witneſs A witneſs proving a will of lands, ſwears that he ſubſcribed the will, as a witneſs in the ſame room with, and at the requeſt of the teſtatrix; two others ſwore, that they ſaw the will executed by the teſtatrix, and that they ſubſcribed the ſame in the teſtatrix's preſence; a fourth witneſs was gone beyond ſea, and therefore could not be examined. *Cowper*, C. doubted as to the proof of the execution of this will, but would declare no opinion on the point until farther application, ſaying, that the heir at law, then an infant, might by that time come of age. Afterwards Lord *Mar-*

chfield

cleſfield held, that the bare ſubſcribing by the witneſſes in the ſame room, did not neceſſarily imply it to be in the teſtator's preſence, for it might be in a corner of the room in a clandeſtine fraudulent way; and then it would not be a ſubſcribing by the witneſs in the teſtator's preſence, merely becauſe in the ſame room; but that here it being ſworn by the witneſs, that he ſubſcribed the will at the teſtatrix's requeſt, and in the ſame room; this could not be fraudulent, and was therefore well enough.

ſhould not only prove the executing of the will by the teſtator, and his own ſubſcribing it in the preſence of the teſtator, but likewiſe that the reſt of the witneſſes ſubſcribed their names in the teſtator's preſence; and then one witneſs proves the full execution of the will, ſince he proves that the teſtator executed it; and likewiſe that the three witneſſes ſubſcribed it in his preſence. *Per* Lord Chan. Macclesfield, *Id.* 741.

[The law, as ſtated by Lord *Macclesfield* in the laſt caſe, ſeems conformable to the deciſion of the court of King's Bench in the caſe of *Right* and *Price*, in which the court held, that corporal preſence merely was not ſufficient, unleſs there was likewiſe mental knowledge of the fact. In this caſe, on the laſt day on which the teſtator made an effort to ſign the will but failed, the witneſſes being preſent, the form of an atteſtation was written on the ſecond ſheet, and they put their names to it in the room where the teſtator lay, but he was in a ſtate of inſenſibility. And the queſtion was, Whether this will was duly executed for paſſing lands according to the ſtatute of frauds? In ſupport of the will it was argued, that inſenſibility was ſomething ſhort of death, and if the teſtator was alive, it could not be ſaid that the will was not atteſted in his preſence. That the queſtion was, Whether the teſtator having done all that was neceſſary on his part, and the atteſtation having been made according to the words of the ſtatute, a fair tranſaction ſhould be ſet aſide becauſe a formality required, according to an implied intention of the legiſlature, had not been complied with: that it did not appear but that the teſtator might, by poſſibility, have opened his eyes while the witneſſes were ſubſcribing their names; and *that*, according to the law as laid down in *Shires* and *Glaſcock*, would have been ſufficient. *Sed per curiam*—The court will lean in ſupport of a fair will, and not defeat it for a ſlip in form, where the meaning of the ſtatute has been complied with: this was the principle of *Shires* and *Glaſcock*'s caſe, and other caſes of that ſort. But the caſe *then* before the court was not one where there was a meaſuring caſt and room for preſumption. All the witneſſes knew, at the time of the atteſtation, that the teſtator was inſenſible. He was a log, and totally abſent to all mental qualities. That it was uſual in precedents of wills to ſay, that the witneſſes ſubſcribed *at the requeſt of the teſtator*: that indeed was not expreſsly required by the ſtatute, but the practice ſhewed the general underſtanding, and the nature of the thing implied a requeſt. The atteſtation in the teſtator's preſence was as eſſential as his ſignature, and all muſt be done while he was in a capacity to diſpoſe of his property. In this caſe the teſtator could not know whether the will that he had begun to ſign was that which the witneſſes atteſted; he was dead to all purpoſes or power of conveying his property.]

Right v. Price, Dougl. 241.

It

It has been determined, that a truſt of an inheritance muſt be deviſed in the ſame manner as a legal eſtate. Thus where—

2 P. Wms. 258. Wagſtaff v. Wagſtaff. And his lordſhip held, that as the will did not refer to the deed of truſt, but *A.* had undertaken to deviſe the land as owner thereof, without any relation had to the pretended

J. S. ſeiſed of lands in fee, conveyed them by leaſe and releaſe to truſtees, to the uſe of them and their heirs, in truſt, (that after ſuch monies raiſed as therein mentioned) the truſtees ſhould convey to *A.*, his heirs and aſſigns, or to ſuch perſon or perſons as he or they ſhould direct; the monies were raiſed, and *A.* by will atteſted only by two witneſſes deviſed the premiſes to *B.*; Lord Chan. *Macclesfield* ſaid, there could be no queſtion, but that a truſt of an inheritance could not be deviſed otherwiſe than by a will atteſted by three witneſſes, in the ſame manner as a legal eſtate: for if the law were otherwiſe, it would introduce the ſame inconveniences as to frauds and perjuries, as were occaſioned before the ſtatute, by a deviſe of the legal eſtate in fee-ſimple. Decreed the will void, and that the truſtees ſhould convey the premiſes to the teſtator's heir at law.

power; this made it much ſtronger againſt the will. *Ibid.* 260.—It was ſaid *arg.* that this will, though not good by way of deviſe, ſhould be ſo by way of appointment, like a copyhold ſurrendered to the uſe of a will, which may be deviſed by a will atteſted by two witneſſes, or one witneſs only. But his lordſhip ſaid, that the copyhold paſſes by a ſurrender, and not by the will, and that if this matter had not been ſettled, it might be more reaſonable to ſay, when I have ſurrendered my copyhold to the uſe of my will, a will of this copyhold ſhall be ſo executed, and in ſuch manner, as by the act of parliament a will of lands ought to be executed: but this caſe having been ruled otherwiſe, he ſaid he would not ſhake it. *Ibid.* 258.—In Hil. Vac. 1727, his Honour admitted it to be ſettled, that where a copyhold in fee is ſurrendered to the uſe of a will, ſuch will, though executed in the preſence of one or two witneſſes only, is good, becauſe it paſſes by the ſurrender, and not by the will, which is only a declaration of the uſe of a ſurrender: but that if a copyholder be ſeiſed only of the truſt or equity of redemption of the copyhold, and deviſe ſuch truſt or equity of redemption, there muſt be three witneſſes to the will; for here can be no precedent ſurrender to the uſe of the will to paſs this truſt; and the truſt and equity of redemption of all lands of inheritance are within the ſtatute of frauds, otherwiſe great inconvenience would ariſe therefrom; and it is no prejudice to the lord to compriſe the truſt of a copyhold within that ſtatute, becauſe the perſon who has the legal eſtate of the copyhold is tenant to the lord, and liable to anſwer all the ſervices. *Ibid.* 261. Anon.—But in the caſe of Tuffnel and Page, Eaſt. 1740, Lord Hardwicke was of opinion, that the truſt of a copyhold would paſs by a will not atteſted according to the ſtatute of frauds, as a copyhold ſurrendered to the uſe of a will would do; for that equity ought to follow the law, and make it at leaſt as eaſy to convey a truſt, as a legal intereſt: and decreed accordingly. *Ibid.* at the bottom of the p. 261.

Barnard. Rep. in B. R. 367. Durrant v. Durrant.

Upon an iſſue directed out of Chancery, wherein the queſtion was, Whether a man was *compos* or not at the time of executing the will? it was held by the chief juſtice, that it was not neceſſary that all the witneſſes to the will ſhould ſee it executed: if one of them ſaw it executed, and the others were preſent, he ſaid it would be ſufficient.

2 P. Wms. 236. Whitchurch v. Whitchurch. A will not atteſted, &c. as in the preſent caſe, will be ſufficient to paſs a term in groſs; but not a truſt

J. S. poſſeſſed of a term of five hundred years in *Blackacre*, afterward purchaſes the fee-ſimple in *B.*'s name, and deviſes *Blackacre* by will, all of his own hand-writing, to *C.* in fee; but the will was neither dated, ſubſcribed, nor atteſted. Decreed *per* his Honour, that as this was a term which would have attended the inheritance, and in equity have gone to the heir, and not to the executor, in which reſpect it was to be conſidered as part of the inheritance, ſo the will which was not atteſted by three witneſſes, as the law required it to be when land was to paſs, ſhould not carry this term.

of a term attendant on an inheritance, nor conſequently the term itſelf. *Per* his Honour, *Ibid.* 238.—A will not atteſted as the ſtatute of frauds requires, ſhall not paſs any eſtate of which the heir, as heir, would

would otherwiſe have had the benefit. *Per* his Honour, *Ibid.*—Gilb. Rep. in Eq. 168. S. C. 2 Mod. Caſes in Law and Equity, 124. S. C.

Upon an ejectment by the heir at law, the queſtion for the opinion of the court was, Whether it ſhould be left to a jury to determine, whether the witneſſes to a will (being all dead) ſet their names in the preſence of the teſtator, and this merely upon circumſtances without any poſitive proof? *Per cur.*—This is a matter fit to be left to a jury, which is all that is referred to the court. The witneſſes, by the ſtatute of frauds, ought to ſet their names as witneſſes in the preſence of the teſtator; but it is not required by the ſtatute that this ſhould be taken notice of in the ſubſcription to the will; and whether inſerted or not it muſt be proved: if inſerted, it does not conclude but it may be proved *contra*, and the verdict may find *contra*: then if not concluſive when inſerted, the omiſſion does not conclude it was not ſo, and therefore it muſt be proved by the beſt proof the nature of the thing will admit. In caſe the witneſſes be dead, there cannot probably be any expreſs proof, ſince at the execution of wills few are preſent but the deviſor and witneſſes; then, as in other caſes, the proof muſt be circumſtantial, and here are circumſtances. Firſt, three witneſſes have ſet their names, and it muſt be intended they did it regularly. Secondly, one witneſs was an attorney of good character, and may be preſumed to underſtand what ought to be done rather than the contrary. And there may be circumſtances to induce a jury to believe, that the witneſſes ſet their hands in the preſence of the teſtator, rather than the contrary; and it being a matter of fact, it was proper to be left to them; as, whether the livery was given on a feoffment, when no livery is indorſed; whether a deed was executed when only a counterpart was produced, *&c.* And the court was of opinion, that the plaintiff ought to be nonſuited. Comyns's Rep. 531. Hands v. James.

A will ſhall not be read on proof of a witneſs's hand, unleſs there be poſitive proof that he is dead. Comyns's Rep. 614. Biſhop v. Burton.

Upon a trial at bar concerning the execution of a will, it did not appear upon the face of it, that the atteſtation of the witneſſes was made in the preſence of the teſtator, which being objected to, a caſe was cited, where Lord Chief Juſtice *Eyre* held it a matter proper to be left to a jury, whether they believed it to be ſo done or not: and Mr. Juſtice *Chappel* cited a caſe to the ſame purpoſe, *quod curia conceſſit*, and held it not neceſſary it ſhould be inſerted in the will, that the atteſtation was in the preſence of the teſtator, though by the ſtatute it is neceſſary it ſhould in fact be ſo atteſted. Vin. Abr. tit. Deviſe (N. 9), pl. 4. Croft on dem. of Dalby v. Pawlet.

If a copyholder, after admittance, ſurrenders the lands to the uſe of his laſt will, and by his laſt will gives them to *A.*, but the will is not atteſted by any witneſſes; yet *A.* is well entitled to the lands. *Per* Lord Chancellour. Barnard. Rep. in Chanc. 11, 12. Tuffnel v. Page. And his lordſhip ſaid, that the reaſon is, that the party is in by the ſurrender, and not by the will, and therefore it is good, though there be no witneſſes at all; but that it is neceſſary that the will be in writing, and if it be ſo, it is ſufficient, if it be ſigned by the party; and ſo it is where a perſon is entitled to the truſt of a copy-

a copyhold, though there were no ſurrender at all to the uſe of the will, nor the will atteſted by any witneſs, yet it is ſufficient to give the truſt of a copyhold eſtate. *Per* his Lordſhip, *Id. ibid.* [The neceſſity that a will of copyholds ſhould be in writing, is queſtioned by Mr. Watkins in his Treatiſe on Copyholds.]

Select Caſes in Chanc. 42. Appleyard v. Wood. Lord Chancellour ſeemed to be of opinion, that the deviſe of a truſt

A ſurrender was made of a copyhold eſtate to truſtees, to the uſe of the will; which was made with only two witneſſes to it. It was admitted, that a will of a copyhold eſtate does not require three witneſſes; but this is a deviſe of a truſt relating to lands, ſo within the very words of the ſtatute of frauds: the heir controverting the ſurrender and the will, this point was not determined, but two iſſues ordered.

muſt enſue the nature of the eſtate, and not make it neceſſary to have three witneſſes, as the copyhold might be deviſed without three witneſſes; but this may be a queſtion to be determined when the iſſues are tried. *Ibid.*—Vin. Abr. tit. Deviſe (N. 1), pl. 4. S. C. ſtates it thus:—*A.* ſeiſed in fee of copyhold lands, makes a ſurrender to the uſe of *B.* and *C.*, and their heirs, to the uſe of his will, and deviſes the land to *D.* Parker, Ch. was of opinion, that the circumſtances required by the ſtatute 29 Car. 2. in deviſes of lands, ought to be obſerved in this caſe; for, by this ſurrender, the fee of the copyhold was in the ſurrenderors, and only a truſt deviſed by the will, which cannot paſs by the deviſe, without the circumſtances required by the ſtatute of frauds, in relation to deviſes of lands, be duly obſerved. But the counſel inſiſting, that a deviſe of copyhold is not within the ſtatute; Lord Chancellour ſaid, that if the ſurrender had been only to the uſe of the will, that might have been a queſtion in this caſe, but now it is not; however, he inclined to think it neceſſary in that caſe, but would not determine that point, that not being the caſe before him.

2 P. Wms. 293.

A will made beyond ſea, of lands in *England*, muſt be atteſted by three witneſſes.

2 P. Wms. 506. Dormer, &c. v. Thurland, &c. Lord Chanc. King ſaid, that though he himſelf inclined to think the will of the lands good, if the teſtator ſhould acknowledge the name to be his, and the witneſſes ſhould ſubſcribe in his preſence, yet that point ſhould be reſerved to the defendant; and ſaid, that he

J. S. had a power at any time during the joint lives of him and *M.* his wife, by his laſt will, or any writing purporting to be his laſt will, under his hand and ſeal, atteſted by three or more credible witneſſes, (if he ſhould die before his wife, without any iſſue between them then living,) to charge lands with any ſum or ſums of money not exceeding 2000*l.* to be paid to ſuch perſons and in ſuch proportions as he ſhould appoint; with the like remainder to *M.* if ſhe ſhould die without iſſue in the life of her huſband *J. S.* There was no iſſue of the marriage, and *J. S.* by his laſt will in writing under his hand, atteſted by three witneſſes, but not ſealed, reciting his power, *&c.* diſpoſed of 2000*l.* to the plaintiffs (being his relations) in the proportions therein mentioned. There were three witneſſes to the will. Two of the witneſſes ſwore that the will was ſigned by the teſtator, in the preſence of all the three witneſſes; but the third ſwore, that the teſtator having written and ſigned the will before, called for the witneſſes, and declared that writing to be his laſt will, and that all the three witneſſes were then preſent, and ſubſcribed their names in his preſence. Lord Chan. *King* referred it to the judges of *B. R.*, who determined (on argument) that the will was void as a charge for want of being ſealed.

took this will to be a good one, and being ſo, to be a good charge. But in the caſe of Stonehouſe and Evelyn, in proving a will diſpoſing of a real eſtate; the proof was full that the three ſubſcribing witneſſes did ſubſcribe their names in the preſence of the teſtatrix; but one of them ſaid, he did not ſee the teſtatrix ſign, but that ſhe owned, at the ſame time the witneſſes ſubſcribed, that the name ſigned to the will was her own hand writing, which Sir Joſeph Jekyll held, without all doubt, to be ſufficient. 3 P. Wms. 254. And *ibid.* the reporter ſays, that on his mentioning his Honour's opinion above to Mr. Juſtice Forteſcue Aland, he ſaid, it was the common practice, and that he had twice or thrice ruled it ſo upon evidence on the circuit; and that it is ſufficient if one of the three ſubſcribing witneſſes ſwears the teſtator acknowledged the ſigning to be his own hand-writing. And it is remarkable, that the ſtatute of frauds

frauds does not ſay that the teſtator ſhall ſign his will in the preſence of three witneſſes, but requires theſe three things; firſt, that the will ſhould be in writing; ſecondly, that it ſhould be ſigned by the teſtator; and, thirdly, that it ſhould be ſubſcribed by three witneſſes in the preſence of the teſtator.

A will of land was duly ſigned by teſtatrix in the preſence of *A.*, and alſo publiſhed; which *A.* wrote the will, but is now dead: his hand was proved. After this the teſtatrix called in *B.* to be a witneſs to the will; ſhe told him it was her will, and publiſhed it as ſuch; after this ſhe called in *C.* and did the ſame. The queſtion was, Whether theſe witneſſes atteſting this will at ſeveral times, though all in the preſence of the teſtatrix, were according to the ſtatute of frauds and perjuries? Baron *Price* held it ill *, at *Lent* aſſizes at *Devon*, 1717. Vin. Abr. tit. Deviſe (N. 10), Ca. 3. p. 128.

* For the intent was, that all the witneſſes ſhould be together, that one might teſtify for the other; and this was a ready way to let in fraud and perjury, for after the firſt witneſs had atteſted it, there might be a raſure or interlineation *Per* Baron Price, *Ibid.*

Lord Keeper *Wright* held a publication of a will before three witneſſes, though at three ſeveral times, good within the ſtatute, and thought the writing of the will with the teſtator's own hand a ſufficient ſigning within the ſtatute, though not ſubſcribed or ſealed by him; but doubted whether owning the ſubſcription to be his was ſufficient: but the validity of the will is a queſtion at law, and therefore ordered it to be tried. Pr. Ch. 185. Cook v. Parſons.

If a man draws up his own will, and ſends it to counſel to be adviſed of the legality of it, this is no will, unleſs it has a publication after he receives it back from his counſel. If after his will comes from counſel, with alterations made by counſel, the party puts his ſeal to it, or ſubſcribes his name, or writes upon it, "this is my will;" though there be no witneſſes to it, yet this is a good publication, becauſe any of thoſe declare his intent, that it ſhould be his will: and though it have no formal beginning, but begin, "alſo I give and bequeath;" and though there be blanks for the names of ſuch perſons as he ſays he has made a leaſe or feoffment to, to perform his will, if there be ſuch a leaſe or feoffment, this is a good will, and ſhall direct thoſe perſons, to whom ſuch leaſe, *&c.* is made, to perform all things according to the directions of ſuch will. Vin. Abr. tit. Deviſe (N. 2), pl. 16.

If a teſtator ſigns his will, but delivers it as his act and deed; yet this will be a ſufficient publication. Vin. Abr. tit. Deviſe (N. 7), Ca. 13. p. 125.

[Where the witneſſes were deceived by the teſtator at the time of the execution, and were led to believe, from the words uſed by the teſtator at the execution of the inſtrument, that it was a deed and not a will (for it was delivered as his act and deed, and the words "*ſea'ed and delivered*" were put above the place where the witneſſes were to ſubſcribe their names): it was adjudged by the court, as it is ſaid, for the inconveniences that might ariſe in families from having it known that a perſon had made his will, that this was a ſufficient execution. Trimmer v. Jackſon, 4 Burn's Eccl. Law, 117.

So, if the deviſor ſhew the will unto the witneſſes, ſaying, "This is my laſt will and teſtament," or, "herein is contained "my laſt will," this is ſufficient without making the witneſſes Swinb. 52. God. O. L. 66.

privy

privy to the contents thereof, provided the witneſſes be able to prove the identity of the writing; that is to ſay, that the writing ſhewed is the very ſame writing, which the teſtator in his life-time affirmed before them to be his will, or to contain his laſt will and teſtament.

And a publication may be inferred from circumſtances, and will have the ſame force to render the inſtrument valid, as if expreſſed by parol declaration.

Wallis v. Wallis, 4 Burn's Eccl. Law, 114.

In a caſe which came on at the aſſizes at *Lincoln* before Mr. Juſtice *Deniſon* and a ſpecial jury, the facts were theſe: *W.* made his will in his own hand-writing, thereby deviſing his real eſtate, and the form of atteſtation was in theſe words, "*ſigned, ſealed, "publiſhed, and declared for the laſt will and teſtament of the ſaid* "W. *in the preſence of us*," I. M., J. W., and W. P. The heir at law brought an ejectment; and, to prove the will, the deviſee produced *W. P.*, one of the three ſubſcribing witneſſes, who depoſed, that about *July* 1760, *J. W.*, then butler to *W.* the deviſor, came and told him that he muſt come to his maſter; that, upon entering the room, he found his maſter ſitting with a table before him, on which were ſome papers open; and that his maſter called him and the ſaid *J. W.* and *I. M.* (then his houſe-keeper) up to the table to him, where they all came; then *W.* further addreſſed himſelf to them all, deſired them *to take notice*, and then took a pen, and, in all their preſence, ſigned and ſealed each part of his will, and laid both the ſaid parts open and unfolded before them to ſubſcribe their names as witneſſes thereto, which they all did, by the direction of the ſaid *W.* in his preſence, and in the preſence of each other, he ſhewing them ſeverally where to write their names. But that the ſaid *W.* otherwiſe than as above, did not declare or publiſh either part to be his will, or ſay what it was. The counſel for the plaintiff contended, that this was not a ſufficient proof, by one witneſs, of a complete execution of the will; and they produced, on the other hand, the other two ſubſcribing witneſſes, who, in many particulars, did not give a clear and diſtinct evidence; and could not recollect whether they had ſigned one or two papers; or whether then, or at any time before the ſaid *W.*'s death, they underſtood what they had ſo witneſſed to be *W.*'s will, though *J. W.* ſeemed to admit he conjectured it ſo to be. But both *J. W.* and *I. M.* ſwore that they did not ſee the ſaid *W.* either ſign or ſeal any part of his will; that *P.*, the other ſubſcribing witneſs, was not at that time in the room, when (at the ſaid *W.*'s deſire) they wrote their names to the two papers as they then appeared; that *W.* did not declare or publiſh it as his will, nor did they know it to be a will. The counſel for the deviſee then called *R. P.* the teſtator's groom, who ſwore, that one morning, in the beginning of *July* 1760, *J. W.* told him, that his maſter had much wanted him, and that, upon his the ſaid *R. P.*'s offering to go to his maſter to receive his orders, *J. W.* told *R. P.* that the buſineſs was done, and that *J. P.* had ſupplied his place, and that he the ſaid *W. P.*, *J. W.*, and *I. M.* had that morning been witneſſing their maſter's will.

And *S.* being called, ſwore, that in the beginning of *July* 1760, *I. M.* came one morning after breakfaſt into the kitchen, and told her that ſhe, and *J. W.* and *W. P.* had that morning witneſſed their maſter's will, though he had not told them it was ſo. Upon the ſtate of the evidence on both ſides, it was inſiſted for the plaintiff, that as the law ſtood before the ſtatute of frauds, publication of a will was an eſſential part thereof; and, if ſo, there was nothing in that ſtatute to take it away: and it was further inſiſted, that, by the ſaid ſtatute, one requiſite to a good and valid deviſe of lands was, that it ſhould be atteſted and ſubſcribed in the preſence of the deviſor by three or four credible witneſſes, and that the words *atteſted and ſubſcribed* muſt import, that it ſhould be publiſhed as a deviſe or will by the teſtator, in the preſence of the witneſſes. On the contrary, for the defendant it was contended, that neither before nor ſince the ſtatute, publication was neceſſary; and further, ſuppoſing any ſuch publication was neceſſary, that the teſtator had uſed words and done acts which amounted to a publication within the meaning of the ſtatute, which had not directed or preſcribed any particular form or manner in which ſuch publication ſhould be made; that the teſtator's uſing theſe ſignificant words to all the witneſſes when he called them up to the will, "*take notice,*" and then ſigning both parts of his will, and then delivering both the parts thereof to the witneſſes to atteſt, directing them where to ſign their names, and to witneſs each part under the common and uſual form of atteſtation, which the witneſſes did, was a ſufficient execution and publication of his will; the words "*ſigned, ſealed, publiſhed,* and *declared,*" being all written in the teſtator's own hand-writing, and the witneſs *P.* ſwearing that both parts of the will lay open to the inſpection of all the witneſſes when they ſubſcribed their names, and it appearing, by the evidence of *P.* and *D.*, that both the other witneſſes had declared that they had been atteſting *W.*'s will. And they ſaid that this was a much ſtronger caſe than that of *Peate* and *Ougly*. And Mr. Juſtice *Deniſon* was of opinion, that, if the witneſſes for the defendant were credited by the jury, this was a due execution within the ſtatute, and a ſufficient publication; and the jury found accordingly for the defendant. But the plaintiff's counſel inſiſted that the point, whether a good publication or not, ſhould be reſerved for a caſe to be argued above. However, the matter was compromiſed on the defendant's remitting the coſts. *Supra.*

An illiterate man drew up himſelf, and wrote on two ſides of a ſheet of paper, ſeveral deviſes and bequeſts, which he ſubſcribed; but they were neither ſigned nor witneſſed. He afterwards added a *memorandum*, (ſo called by the teſtator himſelf,) beginning at the end of the ſecond, or the beginning of the third ſide of the ſame ſheet of paper, by which he diſpoſed of a part of his perſonal eſtate, but ſaid, that he did not mean thereby to diſannul any part of his former deviſe or diſpoſitions. This memorandum was ſubſcribed by him in the preſence of three witneſſes, and he declared it to be his laſt will in their preſence, and he Carleton v. Griffin, 1 Burr. 549.

he delivered it to them, and deſired them to ſubſcribe and atteſt it, which they did in his preſence, and in the preſence of one another. The court of King's Bench held this to be a ſufficient publication of the original will to paſs the real eſtate.]

2 Vern. 441. Haynes v. Haynes. An uncle having deviſed his eſtate from his nephew and heir at law, a younger brother of the heir at law, at the uncle's funeral, ſnatched the will out of the hands of the executor, and tore it in many ſmall pieces, but moſt of them, and particularly that part wherein was the deviſe of the land, were picked up and ſtitched together again: and on a bill to have the will eſtabliſhed, it was decreed, that the deviſee ſhould * hold againſt the heir, and he to convey to him, although there was no direct proof made that the heir directed the tearing of the will.

* A will though gnawn to pieces by rats in the life of the deviſor, if by joining the pieces together the contents can be known, will be good. So, if a will continues in writing at the death of the deviſor, though gnawn, burnt, or loſt after, it ſhall ſtand good. Allen, 2. 55. A writing, in form of an indenture, and ſealed and delivered, if proved to be intended a will, ſhall be good as ſuch. 1 Ch. Caſ. 248. —— 1 Mod. 117.

3. *Of the Republication of a Will.—What will amount to a Republication; and where a Republication will make a Deviſe good.*

1 Vern. 330. Hall v. Dunch. If a man deviſes certain lands, and after aliens them to a ſtranger, and repurchaſes, and after ſhews his intent, that the ſaid will ſhall be his will; this is a new publication, and the lands ſhall paſs by the deviſe.

2 Vern. 209. Cotton and Cotton. So, the teſtator's ſaying his will was in a box in his ſtudy amounted to a new publication.

1 Freem. 264 ſtates it thus: A. deviſed his lands in D. and all his other lands unto his wife, and after purchaſed other lands, and then diſcourſing with B., B. deſired him to let him have thoſe new-purchaſed lands at the rate that he bought them; A. anſwered no; for that he had made his will, and ſettled his eſtate, and intended that his wife ſhould have his whole eſtate. The court ſtrongly inclined that this was a new publication, and applied particularly to the lands; and that it was no matter for alleging, *quod dixit animo teſtandi*, for that muſt neceſſarily be intended, when the diſcourſe had particular reference to the will. —— 2 Chan. Rep. 138. 140. S. C. ſays, a trial at law having been had upon this point, a ſpecial verdict was found by C. J. North's directions; and, on a ſolemn argument, all the judges of C. B. held it a republication of the will, and that the lands belonged to the wife, and that the court of Chancery affirmed the judges' opinion.

1 Roll. Abr. 618. If a man ſeiſed of lands, deviſes all the lands to *J. S.* and afterwards purchaſes the manor of *D.*, and after writes in his will that *J. D.* ſhall be his executor: yet this is not any new publication, to make the lands paſs.

Id. ibid. 1 Salk. 237. But, if after the purchaſe of the manor of *D.* he delivers the firſt will as his will, and ſays, that it ſhall be his will, without putting any words thereto; yet this is a new publication to make the lands newly purchaſed paſs.

1 Roll. Abr. 618. So, if a man ſeiſed of lands in *D.* deviſes to another by his will in writing all his lands in *D.*, and after purchaſes other lands in *D.*, and after one *J. S.* comes to him, and requeſts him to give him the buying of the lands laſt purchaſed; and he anſwers him, that he will not, but that his intent was, that thoſe lands ſhould go to his executors (the deviſee being made executor by the will) as his other lands ſhould: and after the deviſor cauſes a codicil

to

to be writ, in which there is a deviſe of ſeveral perſonal things, as corn and implements of houſehold, and annexes to it his firſt will; and after dies without other publication; yet this ſhall be a ſufficient publication to make the lands newly purchaſed to paſs by the will, for there need no other words in the will than there were before; and his intent appears that it ſhould be his will, by annexing the codicil.

But, if a man has iſſue of two daughters, *A.* and *B.*, and he deviſes lands to *A.* and to the heirs of her body, and for want of iſſue to *B.*, and *A.* dies in the life time of the teſtator, leaving iſſue, though after the teſtator annexes a codicil to his will, and thereby diſpoſes of ſome part of his perſonal eſtate; yet this will not amount to a republication of the will, nor give any title to the iſſue of *A.*, though the teſtator had declared in his will, that *B.* had married againſt his conſent, and that what he had given her was in full of her portion, and in bar of any further part of his real eſtate. 1 Abr. Eq. Caſ. 407. 2 Vern. 722. Hutton v. Simpſon. [Lord Camden, ſpeaking of this caſe in the Attorney General v. Downing, Ambl. 374. ſays, "In "Hutton v. Simpſon, it is ſaid, that annexing a codicil to a will, if it relates only to perſonal eſtate, "will not operate as a republication: but I am of opinion, that either the report is miſtaken, or that "it is not law. The principal queſtion was not, Whether the codicil was a republication of the will? "but, Whether the ſenſe of the words, *heirs of the body*, could be altered by the death of the teſtator's "daughter in his lifetime? and the teſtator afterwards making a codicil, held, they could not; as "in Stead v. Berrier, 2 Jon. 135." His lordſhip therefore was of opinion, that a will of lands would be republiſhed by a codicil that related wholly to perſonalty, provided it was atteſted by three witneſſes, grounding himſelf upon this, as Lord Thurlowe obſerved, that where the teſtator annexes a codicil to his will, he treats them as *one inſtrument*; and makes them *ſo from that time*. Lord Thurlowe therefore thought, that where a teſtator ſpeaks of a codicil to be annexed to his will, *he ſpeaks again of his will*, and at leaſt, in caſes of perſonal eſtate, it amounts to a republication. Coppin v. Fernyhough, 2 Br. Ch. Rep. 296.]

It has been doubted, if one deviſes a leaſe to his daughter, and afterwards renews the leaſe, and afterwards adds his codicil to his will, without taking any notice of the leaſe, whether the renewal of the leaſe is a revocation, and whether the adding of a codicil to his will is a republication. 2 Vern. 209.

It has been ſaid, however, that if a codicil be executed after making a will and purchaſing lands, it will amount to a republication, and paſs the lands purchaſed after making the will, and that it was ſo determined by all the judges in the caſe of *Acherley* and *Vernon*; which ſee *infra*. *Sed Q.* unleſs it appears he had his real eſtate under conſideration. MSS. Rep. Gibſon v. Rogers, in Canc. Trin. 23 G. 2. [Ambl. 93. S. C.]

A. having given a legacy *inter alia* to his ſon *Joſeph*, *Joſeph* died, and he afterwards had another *Joſeph*, and then by a codicil to his will, confirming his will, he took notice, that ſince the laſt, it had pleaſed God to give him another ſon, and gave him a ſmaller legacy. Determined, that this was a republication of his will, and amounted to a ſubſtituting of the ſecond *Joſeph* in the place of the firſt; and gave him the firſt legacy as well as the ſecond. MSS. Rep. Perkins and Micklethwaite.

If a man has iſſue three ſons, *A.*, *B.*, and *C.*, and deviſes lands to *B.* in tail, remainder to *C.*; and *B.* has iſſue two ſons, and dies; and after the deviſor ſays, "My will is that the ſons of *B.* ſhall "have the lands deviſed to their father, as they ſhould have had "if he had lived and had died after;" and then the deviſor dies: Cro. Eliz. 422. Fuller v. Fuller.

whether this ſhould amount to a new publication, *dubitatur*; two judges againſt two.

1 Lev. 243. Stroce v. Berapet. 1 Vent. 341. 2 Jones, 115. Raym. 408.

If *J. S.* has iſſue two ſons, *William* and *Robert*, and *Robert* has iſſue a ſon named *Robert*, and *J. S.* deviſes lands to his ſon *Robert*, and his heirs; and by the ſame will gives his grandſon 50*l.*, and *Robert* his ſon dies; and after *J. S.* by parol republiſhing his will ſays, "*Robert* my grandſon ſhall take by my will as *Robert* my ſon "ſhould have done:" yet the grandſon ſhall not have the lands, for lands cannot paſs but by will in writing; and his ſon *Robert* cannot import his grandſon *Robert*, eſpecially when, by the ſame will, he has made a diſtinction between his ſon and grandſon. The judgment to the contrary, given by three judges againſt the opinion of *Scroggs* in the Common Pleas, is ſaid by the reporter to have been reverſed in *B. R.* (as he heard), though it was argued, that the words of the will were proper enough to paſs the lands to the grandſon: for that the addition of *grand* only imported a diſtinction between father and ſon while living; but that the father being dead at the time of the republication, the grandſon might properly be deſcribed by the name of ſon.

Comyns's Rep. 381. Acherley v. Vernon. [3 Br. P. C. 107. S. C.] J. S. by will, dated 25 March 1700, deviſed all his lands to *A.* his nephew and his heirs, and directed, that he ſhould take the ſurname of Lytton; and his perſonal eſtate be deviſed to Dame —— Ruſſel, his ſiſter, and the ſaid *A.*, and made them executors. Afterwards J. S. purchaſed the equity of redemption of ſome mortgages in fee, which were mortgaged to him before he made his will, and 15 Jan. 1704, by a

J. S. by a will dated 17 *Jan.* 1711, deviſed to *M.* his wife 1000*l.* *per annum* for her life, to iſſue out of his real eſtate, his capital meſſuage at *H.* &c.; to his ſiſter *E.* 200*l.* *per annum* for her life; and 1000*l.* to *L.* her daughter, for her portion; and after other legacies, he deviſed the reſidue of his real and perſonal eſtate to *A.*, *B.*, *C.*, *D.*, and *E.*, and their heirs, executors, and adminiſtrators, on truſt to veſt the reſidue of his perſonal eſtate in lands of inheritance; and that his truſtees ſhould ſtand ſeiſed and poſſeſſed of his real and perſonal eſtate to the uſes of his will, during his wife's life; and after her deceaſe, if he ſhould die without iſſue, to the intent that his freehold and leaſehold eſtate, and the lands to be purchaſed, ſhould be ſettled to the uſe of the defendant *G.* for ninety-nine years; then to his firſt and other ſons in tail male, &c. *J. S.* purchaſed ſeveral fee-farm rents, aſſart rents, and other lands and tenements, and then by a codicil, 2 *Feb.* 1720, being two days before his death, he recites that he made a will, dated 1ſt *Jan.* 1711, and then ſays, "I hereby ra- "tify and confirm the ſaid will, except in the alterations hereafter "mentioned. The portion to my niece *L.* ſhall be made up "6000*l.*, and what I have given to my ſiſter and niece ſhall be "accepted by them in ſatisfaction of all they may claim out of "my real and perſonal eſtate, and on condition they releaſe all "right, &c. to my executors and truſtees in my will named; "and thus having provided for my ſiſter and niece, I deviſe all "the lands by me purchaſed ſince my will, to my truſtees and "executors in my will named, to the ſame uſes, and ſubject to "the ſame truſts to which I have mentioned to deviſe the manor "of *H.* and the bulk of my eſtate; and I revoke that part of my "will, whereby I appoint *A.*, *B.*, and *C.* three of my truſtees "in my will, and I deſire *K.* and *N.* to be two of my truſtees, "and deviſe my ſaid real eſtate to them accordingly." Lord Ch. *Macclesfield*, 20 *Nov.* 1723, decreed, that the will was confirmed

firmed by the codicil; that *J. S.* ſigning and publiſhing his codicil in the preſence of three witneſſes was a republication of his will, and both together made but one will; and by the ſaid will and codicil, his fee-farm rents, aſſart rents, and lands, contracted to be purchaſed, and all his real and perſonal eſtate, (except the copyhold purchaſed before his will,) did well paſs. On appeal to the Lords, the decree was affirmed.

codicil atteſted by three witneſſes, he ſays, "I "make this "codicil, "which I "will ſhall "be added

"to and be part of my laſt will, which I have formerly made." And Lord Ch. Cowper, aſſiſted by Sir John Trevor, Maſter of the Rolls, and Lord Ch. J., Trevor and Tracey, J., 16 June 1708, decreed, that this was not a republication. For ſince the ſtat. 29 Car. 2. there can be no deviſe of lands by an implied republication; for the paper in which a deviſe of lands is contained, ought to be re-executed in the preſence of three witneſſes. Cited arg' in the caſe of Acherley v. Vernon, as the caſe of Lytton v. Viſcounteſs Falkland, *Vid.* Comyns's Rep. 383 ——*A.* by will, dated 11 Oct. 1684, only executed, took notice that his lands were ſettled upon his ſon *B.* and *C.* in tail male, and then deviſed in theſe words: "In caſe my ſons ſhall have no iſſue male, then, for the preſervation of my name and "family, I deviſe my ſaid lands to my brother *G.* and the heirs male of his body iſſuing." *G.* died in the life of the teſtator, having iſſue a ſon; then Lord Lanſdown, by which the deviſe to *G.* in tail male lapſed. Aug. 15, 1701, the teſtator ſent for ſeven perſons, and ſaid, "I ſent for you to be wit-"neſſes to my will, and ſometimes to be witneſſes to the republication of my will;" and then took a codicil, dated ſame day, in one hand, and the will in the other, and ſaid, "This is my will whereby I "have ſettled my eſtate, and I publiſh this codicil as part thereof;" and then ſigned the codicil which lay on the table with the will, in the preſence of the witneſſes, who ſubſcribed it in his preſence. By this codicil he deviſed in theſe words; "Whereas I heretofore made my will, dated 11 Oct. 1684, "which I do not intend wholly to revoke; but in regard to the many accidents and alterations in my "family and eſtate, I by this codicil, which I appoint to be taken as part of my will, deviſe as follows;" and then deviſed ſeveral manors, *&c.* to his ſon *B.* in fee, and 1000*l. per annum* to his nephew, then Lord Lanſdown, for life. He then put the will and codicil together in a ſheet of paper, and ſealed them up in the preſence of the ſame witneſſes: but the will was not unfolded in their preſence, nor did any of them write their names as witneſſes on or under the will, or on the ſame paper; but on the codicil only. And Parker, Ch. J. and the whole court held this no republication. For ſince the ſtat. 29 Car. 2. there ſhall be no republication by implication; but the will muſt be re-executed, otherwiſe a deviſe of lands ſhall not be good. Comyns's Rep. 384. *Vid.* 10 Mod. 96.——Since the 29 Car. 2. the ſame forms are neceſſary to the republiſhing of a will as to the firſt making of it. Reſolved *per* Lord Ch. Cowper, Trevor, Ch. J., and Tracy, J. *Vid.* 10 Mod. Rep. 98. [In the principal caſe, however, it is clear that Lord Macclesfield did not adhere to the rule he laid down in Lord Lanſdown's caſe, becauſe the will was there (in the principal caſe) held to be republiſhed without re-execution, and conſequently muſt have been republiſhed, notwithſtanding the ſtatute of frauds, by implication. *Per* Lord Commiſſioner Eyre, 4 Br. Ch. Rep. 9.]

[So, one deviſed his manors to *A.*, *B.*, and *C.*, and all his meſſuages, lands, tenements, and hereditaments, in the county of ——, or elſewhere in any part of *England*, ſubject to an annuity, to the uſe of *P.* for life, remainder, *&c.* and, afterwards, entered into an agreement for the purchaſe of lands; and then made two codicils, the latter of which was on a *ſeparate paper*, and though not dated, was agreed to have been made about four or five days before his death; and recited therein that, having in his will appointed ſeveral limitations and remainders of his eſtate, ſome of which were not agreeable to his preſent intent, he revoked ſo much as ſhould be found inconſiſtent with that codicil, ratifying and confirming the other parts which ſhould not interfere therewith. This paper was atteſted as "ſigned, ſealed, and "publiſhed, and *declared* by the teſtator, as a codicil to his laſt "will and teſtament." It being contended, that the firſt codicil would not amount to a republication of the will as to the lands newly purchaſed, the agreement reſpecting them not being to be carried into execution until ſubſequent to the date thereof; the queſtion was, Whether the laſt codicil, which was ſubſequent to

Potter and Potter, 1 Vez. 437.

the time ſtipulated for carrying the agreement into execution, was a republication of the will as to theſe lands? And it was contended, that it could not be a republication, becauſe it was not by way of indorſement, or annexed to the will, or ſhewn that the will itſelf was at that time before the teſtator. But Sir *John Strange*, Maſter of the Rolls, was of opinion, that notwithſtanding theſe objections the latter codicil amounted to a republication; becauſe it was an expreſs declaration, that the reſt of his intent, not inconſiſtent therewith, ſhould continue and be confirmed; and his Honour ſaid, that it might be miſchievous to hold that no republication could be, but by the teſtator's taking the will in his hands and republiſhing it by an indorſement on it, or annexing the codicil to the will itſelf; the perſon intending to republiſh might be at a diſtance from the will itſelf, or might not have *it* in his power, by its being in cuſtody of another; and the teſtator might know the ſubſtance, though he could not repeat the particulars.

Gibſon v. Montfort, 1 Vez 489. 493. & Potter v Potter, *ſupra*.

And it was admitted by the counſel, in the caſe of *Gibſon* and *Montfort*, that if there was, in a codicil, a general clauſe of confirmation of a will; as if the teſtator therein ſay, "*I confirm my will*," this would make *that* codicil amount to a republication; becauſe it would be the ſame as if the teſtator had republiſhed every deviſe in the will over again. And of that opinion was Lord *Hardwicke*.

Doe on dem. Pate v. Davy, Cowp. 158.

This point was alſo ſo decided in the caſe of *Doe* on the demiſe of *Pate* againſt *Davy*. There *D.* by will, in 1767, after giving ſeveral legacies, made the following reſiduary deviſe: "And, as "to all the reſt and reſidue of my eſtate, of what nature, kind, "and quality ſoever, I give, deviſe, and bequeath the ſame unto "*W. P.*, &c. according to the nature of the reſpective eſtates." The teſtator *then* purchaſed ſome cuſtomary eſtates, and afterwards ſurrendered them to ſuch uſes, intents, and purpoſes as he ſhould by his laſt will and teſtament in writing thereof direct, limit, and appoint. He then made a codicil, by which, reciting that he had, by his will, deviſed all his fee-farm rents in manner therein mentioned, he deviſed the ſame to *C. D.* &c., and then proceeded as follows: "I do hereby ratify and confirm all and "every the gifts, deviſes, and bequeſts contained in my ſaid will, "except what I have hereby altered. And I do deſire, that this "preſent writing may be annexed to, accepted, and taken as a "codicil to my will, to all intents and purpoſes." And the queſtion was, Whether the execution of the codicil, ſubſequent to the purchaſe and ſurrender of the copyhold eſtates, amounted to ſuch a republication of the will as to paſs them? In favour of the heir at law, an attempt was made to diſtinguiſh this caſe from that of a deviſe of freehold, upon the ground that at the date of the will the teſtator had no copyhold eſtate, clearly then he had no intention to paſs any eſtate of copyhold to the deviſee. Then he afterwards purchaſed the lands in queſtion, and ſurrendered them to *ſuch uſes as he ſhould declare by his laſt will*, not to the USES DECLARED or *to be declared by his laſt will*. He then made a codicil,

codicil, by which he ratified and confirmed every gift in his will, except what he had particularly altered by it. This then, it was ſaid, was a ratification only of what he had before expreſsly given by his will. But the will contained no gift or deviſe of any *copyhold* lands, nor did the codicil refer to any; on the contrary, it was clear that the only object the teſtator had in adding the codicil was, to make the particular alteration there mentioned; conſequently the copyhold lands were undiſpoſed of, and the heir at law was entitled to them by deſcent. *Sed per curiam*—The caſe of *Acherley* and *Vernon* is in point, that the codicil, *reciting* that the teſtator had made his will, and *ratifying and confirming it* in the alterations aforementioned, was a republication of the will, and both together made but one will, whereby the lands purchaſed after the will paſſed.

And Lord *Hardwicke*, in the above-mentioned caſe of *Gibſon* and *Montfort*, thought that if the propoſition there admitted was law, then any other words that amounted to a confirmation of a will would do as well as words expreſsly confirming it. And, therefore, that the codicil in the principal caſe reciting, that "whereas the teſtator had, by his laſt will of ſuch a date, given "and deviſed to his executors a ſum of money in truſt for *A.* "and another in truſt for *B.* he revoked thoſe legacies, and "DESIRED that writing ſhould be a further part of his ſaid laſt "will and teſtament," amounted to a republication to give the will operation upon lands *ſubſequently purchaſed*, under a ſweeping clauſe, "as to all the reſt, reſidue, and remainder of the teſtator's "real and perſonal eſtate of what nature and kind ſoever;" for, his lordſhip ſaid, though there were not the words, *I confirm my will*, yet there were the words I DESIRE, *&c.*; between which and an actual confirmation there ſeemed very little diſtinction. But the caſe going off upon another ground, no judgment was given thereupon. Gibſon v. Montfort, 1 Vez. 485. 493. *et ſupra.*

A. B. by will deviſed his real eſtates to certain uſes. Afterwards, by deed, he conveyed them to the ſame uſes, until he married, and then to new uſes. After the execution of the deed, but before marriage, the teſtator, by a codicil, atteſted by three witneſſes, and intitled, "*A codicil which I direct and deſire to be* "*annexed, and taken and conſidered as part of my laſt will*," makes a farther diſpoſition of a part of his perſonalty, and impoſes a forfeiture on any perſon who ſhould diſturb his wife; after the codicil he marries. Lord *Northington* was very clearly of opinion, that the codicil was a republication of the will, being declared to be part of it, and annexed to it. Jackſon v. Hurlock, Ambl. 487.

W. B., being ſeiſed and poſſeſſed of real and perſonal eſtate, made his will duly atteſted to paſs real eſtates, and thereby gave and deviſed all his meſſuages, *&c.* and all other his real eſtate ſituate at *F.* or elſewhere to the plaintiffs in truſt to ſell, and diſpoſe of the money ariſing from the ſale in the manner thereby directed: after making the will, the teſtator made a codicil thereto, bearing date the 5th *November* 1785, *not* duly atteſted to paſs real eſtates, by which he made ſome proviſions in conſequence of the Barnes v. Crow, 4 Br. Ch. Rep. 2.

marriage of one of his daughters. After the making and publication of his will and ſuch firſt codicil, he bought the equity of redemption of an eſtate then in mortgage for a term of 500 years; and the fee, ſubject to the term, was afterwards conveyed to him. After this tranſaction, he made another codicil to his will, dated 27th *October* 1788, whereby he made ſome alterations in the ſtate of his affairs, and diſpoſed of a leaſehold eſtate; but the codicil did not mention the lands purchaſed ſince the date of the will, and concluded thus: "In witneſs whereof I the ſaid "teſtator *W. B.* have to this my writing contained in this and "part of the preceding ſheet of paper, which I declare to be a "codicil to my ſaid laſt will and teſtament, and which is to be "accepted and taken as part thereof, ſet my hand, *&c.*" The execution of this laſt codicil was atteſted by three witneſſes. The firſt was begun, and partly written on the laſt ſheet of the teſtator's will, and was a continuation from the foot of the ſaid will, and the ſecond codicil was begun, and partly written on the laſt ſheet of the firſt codicil, and was a continuation from the foot of the ſaid firſt codicil, and the will and codicils were annexed to each other by or at the requeſt of the teſtator. It was determined, that the laſt codicil in this caſe amounted to a republication of the will, and acted upon the after-purchaſed eſtate. Lord Commiſſioner *Wilſon* obſerved, that the teſtator ſaying, "I deſire "the codicil ſhall be part of my will," was equivalent to ſaying, "they ſhall be one inſtrument."

Heylin v. Heylin, Cowp. 130.

J. H. being ſeiſed in fee of certain freehold lands called *A.*, part thereof ſituate in the county of *E.*, and other part thereof in the county of *C.*, and being likewiſe ſeiſed of certain other lands called *B.*, partly freehold and partly copyhold, in the county of *E.*, duly made and publiſhed his laſt will, bearing date 13th *March* 1732, and thereby deviſed *all* his meſſuages, lands, tenements, and hereditaments, as well freehold as copyhold, ſituate, lying, and being in the counties of *S.*, *E.*, and *C.*, or either of them, to his wife for life, and after her deceaſe to various uſes: and deviſed all the reſt and reſidue of his real and perſonal eſtate to his wife, her heirs, executors, and adminiſtrators, and appointed her his ſole executrix. The teſtator, at the time of making his will, was mortgagee out of poſſeſſion of three fifth-parts of certain copyhold premiſes holden of the manor of *D.* in the county of *E.*, which he afterwards purchaſed, and was admitted to on 20th *October* 1735, and in the ſame year purchaſed one other fifth-part of the ſame premiſes; all of which he ſurrendered thus: "To "the uſes, intents, and purpoſes, declared or to be declared in "and by his laſt will and teſtament."—In the year 1736 he directed a 50*l.* legacy to be ſtruck out of his will, and ſubſcribed the following memorandum in the preſence of two witneſſes: "*September* 31ſt, 1736. The 50*l.* legacy to the poor of the pariſh "of *W* ſcratched out as above, was done in his preſence, and "by his immediate order, he having paid it himſelf." The teſtator died the following year, without revoking or altering his will, or making any codicil thereto, except the codicil or teſtamentary declaration

declaration above mentioned. On a queſtion ſent out of Chancery, Whether the copyhold lands to which the teſtator was admitted the 20th of *October* 1735, and which he ſurrendered to the uſe of his will, were ſubject to any of the uſes mentioned in his will of the 13th *March* 1732? The court of King's Bench certified, that the ſurrender did by expreſs reference to the uſes declared by the will, adopt and apply the words of the will to theſe copyhold lands, as if the teſtator had been ſeiſed thereof at the time of making his will; and therefore they were ſubject to the uſes to which all the teſtator's copyhold lands in the county of *E.* were deviſed by his will. Lord *Mansfield*'s words in delivering the opinion of the court deſerve attention: "The ſtating the nature "of a republication will go a great way in the conſtruction of "this ſurrender. When a man republiſhes his will, the effect is, "that the terms and words of the will ſhould be conſtrued to "ſpeak with regard to the property he is ſeiſed of at the date of "the republication, juſt the ſame as if he had had ſuch addi-"tional property at the time of making his will. Therefore, if "one deviſes lands by the name of *B.*, *C.*, and *D.*, and purchaſes "new lands, and republiſhes his will, the republication does not "concern ſuch new lands, becauſe the will ſpeaks only of the "particular lands *B.*, *C.*, and *D.* But, if the teſtator in his will "ſays, I give *all* my real eſtate, a republication will affect ſuch "newly-purchaſed lands, becauſe it is then the ſame as if the "teſtator had made a new will. Apply this rule to the caſe of a "ſurrender, and I am of opinion that the ſurrenderor may ex-"preſs himſelf ſo as to make it relate to a will actually made; "and that the copyhold lands ſo ſurrendered will paſs by it. Sup-"poſe a teſtator ſeiſed of copyhold lands makes his will without a "ſurrender, if he afterwards ſurrender them to the uſe of his will, "ſuch ſurrender will clearly make his will good, and is effectual "to paſs them: becauſe it only obviates the mode and form of "conveyance. What has the teſtator done here? having made "his will and declared his lands to uſes, he ſurrenders his newly-"purchaſed copyhold lands to the uſes, intents, and purpoſes "declared or to be declared in his will: it is preciſely the ſame "thing as if he had ſaid,—'And whereas I have made a will ſo "and ſo, and deviſed all my eſtate to *J. S.* to ſuch and ſuch uſes, "I mean theſe newly-purchaſed lands ſhould paſs to the ſame "uſes.' I cannot poſſibly make a doubt as to the conſtruction: "and there was no occaſion to ſtrike out the legacy of 50*l*, "unleſs he intended that particular part of his will ſhould be "cancelled, and the reſt ſtand."]

It was determined upon the opinion of all the judges, that if a will be made, and afterwards another will without cancelling the former; and then, by an act ſubſequent to both, the firſt will be confirmed, the limitations in that will ſo confirmed will take place: and alſo that if there are two inconſiſtent wills of the ſame date, neither of which can be proved to be laſt executed; they are both void by the common law for uncertainty, and will let in the heir at law: and alſo that although the wills are dated

MS. Rep. Philips v. Angeley, in Dom. Proc. June 1741. [1 Ves. P. C. 45. S. C.]

the ſame day, the limitations may take place if they are conſiſtent in both, to the diſinheriſon of the heir at law: and upon this opinion, the order appealed from, which was a diſmiſſiou of the plaintiff's bill in the court of Exchequer in *Ireland*, was confirmed in favour of Lord *Angleſey*, by the Houſe of Lords. *Vide* the printed copy.

2. *What ſhall be deemed a good Will in Writing of Goods and Chattels.*

Shep. Abr. 14. Voc. Teſt'.

If it be a will of goods and chattels, and be complete, there muſt be an executor named in it, and that executor that is named muſt be capable of the executorſhip; for this is the principal thing in it. And be there never ſo many legacies given, and no executor made, this will is but a codicil, and cannot be properly called a teſtament; for here the party dies inteſtate, and an adminiſtration of the goods muſt be granted: but where there is an executor, although there be no legacy given, yet it is properly ſaid to be a teſtament.

See titles *Executors and Adminiſtrators* and *Legacies*.

3. *What ſhall be ſufficient Proof of a Will.*

Swinb. Part 4. ſec. 28. and Part 7. ſec. 13. N. B. The law, in theſe particulars, with reſpect to wills of *lands*, &c. is altered by 29 Car. 2. c. 3. before taken notice of, which makes it neceſſary for the will to be ſubſcribed by the teſtator, or ſome one in his preſence, and to be ſubſcribed in his preſence by three witneſſes.

A written will, when it is written with the teſtator's own hand, proves itſelf, and therefore needs not the help of witneſſes to prove it; and for this cauſe, if a man's will be found written fair and perfect, with his own hand, after his death, although it be not ſubſcribed with his name, ſealed with his ſeal, or have any witneſſes to it, if it be known or can be proved to be his hand, it is held to be a good teſtament, and a ſufficient proof of itſelf; but if it be ſealed with his ſeal, and ſubſcribed with the name of the teſtator, and can be proved by witneſſes, it is the more athentick; and when it is found amongſt the choiceſt evidence of the teſtator, or faſt locked up in a ſafe place, it is the more eſteemed; for if it be written in another hand, and the teſtator's hand and ſeal, or one of them, not to it, although it be found in ſuch a place as before, yet ſome proof will be expected of it further by witneſſes in that caſe; and if writing be found under the teſtator's own hand, yet if it be but a ſcribbling writing, written copywiſe, with a great diſtance between every line, without any date, in ſtrange characters, with many interlineations, and lying amongſt his void papers, or the like; this will not be eſteemed a ſufficient will, nor a good proof of it, but it ſhall be accounted rather a draft or image of the teſtator's will, for a direction to him after to make his will by; and yet if it can be proved that the teſtator did declare himſelf that this ſhould be his will, this will be a good will, and a good proof of it.

Id. ibid.

If it be proved, that the teſtator ſaid his teſtament was in ſuch a ſchedule, in the hands of *J. S.*, and *J. S.* produce a writing, depoſing it to be the ſame, this is a ſufficient proof: but, if he ſays withal, it is written with his own hand, then it ſeems

ſome

ſome other proof, as by comparing hands, or the like, that it is his hand wherein it is written, will be expected.

If the witneſſes will prove the writing produced to be the laſt will of the teſtator, or that he ſaid it was, or it ſhould be his laſt will, or that it was the ſame writing that was ſhewed to them, and whereunto they are witneſſes, although they never heard it read, or ſet their hands to it, it is a ſufficient proof. *Id. ibid.*

Where there is no queſtion or oppoſition moved or had about or againſt a will, there, the oath of the executor alone is eſteemed a ſufficient proof of it, and in that caſe regularly no other proof is required; and where more proof is neceſſary, it is in the diſcretion of the ordinary what proof to admit or allow: and thoſe witneſſes, for number, nature, and quality, or ſuch other proof that he deems and accepts for ſufficient, is ſufficient; and the will ſo proved by ſuch witneſſes, or ſuch other proof, is ſufficiently proved.

[The doctrine above ſtated applies only to a will of perſonal eſtate; for if a bill be brought to eſtabliſh a will of real eſtate againſt an heir, all the witneſſes, if living, muſt be examined as to the ſanity of the teſtator. And this rule is ſo ſtrictly inſiſted upon by courts of equity (*a*), that they will not diſpenſe with it, though the heir at law, by his anſwer, ſtate, that he believes the will to have been duly made, *&c.*] Ogle v. Cook, 1 Vez. 177. Grayſon v. Atkinſon, 2 Vez. 454. Townſhend v. Ives, 1 Wilſ. 276.

(*a*) Potter v. Potter, 1 Vez. 274. The diſcovery of the inſanity of the teſtator has occaſioned the ſetting aſide of a will, even after 20 years poſſeſſion under it, and that too againſt a purchaſer. Squire v. Perſhall, 8 Vin. Abr. 169. pl. 13.

All perſons, male and female, rich and poor, are eſteemed competent witneſſes to prove a will, ſave only ſuch as are infamous, as perjured perſons, and the like; and ſuch as want underſtanding and judgment, as children, infants, and the like; and ſuch as are preſumed to bear affection, as kindred, tenants, ſervants, and the like. A legatee is reputed a competent witneſs to prove any other part of the will but his own legacy, or to prove any thing againſt himſelf touching his own legacy, but not otherwiſe; and therefore, where there are two witneſſes of a will, wherein either of them have ſomewhat bequeathed unto himſelf, this will cannot be ſufficiently proved for thoſe legacies, but for the reſt of the will it may be ſufficieatly proved. But ſee *poſtea*. Swinb. Part 4 ſec. 24.

[It has been a conſiderable queſtion, who thoſe witneſſes were that are deſcribed in the act by the word "credible," as will appear from the following caſes: *T. I.*, ſeiſed of hereditaments in fee, made his will, and thereby deviſed the ſame to *W. H.* and his heirs, and ſigned, ſealed, and publiſhed the will in the preſence of three witneſſes, who ſubſcribed the ſame. One of the witneſſes was *W. H.* the deviſee. It was objected, that this deviſe was void, *W. H.* not being a credible witneſs thereto under the ſtatute of frauds. On the part of the deviſee it was contended, that the will was good notwithſtanding the ſtatute, for the deviſee was a man of indiſputable credit: that, though he could not be ſworn upon a trial, yet it could not be ſaid but that there were three witneſſes Hilliard v. Jennings, Com. Rep. 91. S. C. 1 Freem. 510. 1 Ld. Raym. 505. Ca. B. R. T. W. 3. 276. Carth. 514. Nota. In the laſt reporter, this caſe is miſ-ſtated in ſeveral

witneſſes to the will, and that the will had been well proved by the other two witneſſes: that there was a difference between a matter which went to the credit of a witneſs's teſtimony, and a matter which went in bar of it; that the former excluded perſons from being witneſſes, as if a man were attainted of treaſon, or convicted of perjury or forgery, or any other matter of attaint; but that, where there was only an intereſt which barred him from being a witneſs, but did not touch his credit, it was otherwiſe: that the intent of the act was to prevent perjuries; but this could not be within the miſchief of the ſtatute; becauſe the deviſee, being a witneſs, could not be ſworn and examined upon it; and therefore the caſe was out of the ſtatute.

points; particularly by ſtating that his credibility at ſigning depended upon his competency at law, without ſtating why the latter, *viz.* the competency at law was the criterion of the former, *viz.* the credibility at ſigning; namely, that no perſon who would be incompetent to prove a will on a trial could be credible to atteſt it upon the execution. And alſo by narrowing his concluſion to the very caſe before him, by ſaying, "the will was void *quoad* the deviſe, and, as to the deviſe;" from whence it is natural to infer, that it might have been good as to any other deviſe. Whereas, if he had ſtated the general propoſition or principle, the reader could not have been miſled. The reaſon why the emphaſis is laid on that deviſe is, that, in fact, all the reſt of the will relates to perſonalty, reſpecting which the will was clearly good.

But it was argued on the other ſide, and ſo held by the court, that this will was not executed according to the ſtatute of frauds; for that a man who could not be a witneſs, which was the plaintiff's caſe, could not be a credible witneſs: that the intent of the act was to prevent frauds as well as perjuries; which intent would be evaded if the deviſee ſhould be admitted to be a witneſs, for he, being a party intereſted, might be induced to uſe fraud; and it was ſaid, that the ſtatute appointed three witneſſes, &c., to the end that the tranſaction might be in ſuch a ſolemn and notorious manner, that they might ſee that the deviſor, being infirm as well in underſtanding as in body, as all men generally *in extremis* were, did not ſuffer any impoſition; but that, *if perſons who could not give evidence of their ſubſcription* ſhould be admitted to be credible witneſſes, it was to admit ſo many dead letters to be witneſſes, which entirely evaded the intention of the act; and upon this point judgment was given againſt the deviſee.]

MSS. Rep. Anſtey v. Dowſing, Mich. 1744. B. R. [2 Str. 1253. S. C. This cauſe was afterwards carried on appeal to the Exchequer-chamber, where there was a difference of opinion among the judges; but the parties compounding, it was never determined, 1 Vez. 503.]

A teſtator by his will deviſed lands, and gave to the wife of *John Hailes* an annuity of 20*l.* a year to her ſole and ſeparate uſe; and to *J. Hailes* and his wife each of them a legacy of 10*l.*, and charged his whole real and perſonal eſtate with the payment of all his legaci and annuity: *J. Hailes* was one of the ſubſcribing witneſſes to this will: the legacies and ſatisfaction for the annuity were tendered and refuſed; and the queſtion now was on a ſpecial verdict, Whether this will was good and well atteſted within the ſtatute of frauds and perjuries? The court were of opinion, that the will was not properly atteſted, as *Hailes* was intereſted, and therefore not a credible witneſs; and gave judgment for the plaintiff the teſtator's heir at law.

Price v. Loyd, 1 Vez. 503.

[On a bill for eſtabliſhment of a will in the caſe of an infant, the objection taken was, that it appeared, on examination on the

interrogatories, that one of the witneſſes to the will was a creditor for a bill of fees and diſburſements, and had not releaſed. It was inſiſted, that, on an account taken, he would be found not to be a creditor. The Lord Chancellour ſent it to the Maſter, to inquire whether he was ſo: then it was objected, that the condition of the witneſs, as was determined in the caſe of *Anſtey* and *Dowſing*, muſt be taken to be at the time of atteſtation; and that if intereſted then, he could not be a good witneſs. It was anſwered, that, if that doctrine prevailed, it would overturn many wills, for ſervants were often made witneſſes, who generally had legacies given them. But, on the Maſter's ſpecial report, it appeared, that the witneſs to the will, at the time of the ſecond examination, was not a creditor of the teſtator; and it not appearing, at the time of atteſtation, that he was, Lord *Hardwicke* ſaid, he would not enter into a minute inquiry whether he was or not.] Price v. Loyd, 2 Ves. 374.

In order to remove the doubts which had ariſen who were to be deemed legal witneſſes within the ſtatute of 29 *Car.* 2. *c.* 3. § 5., it is enacted by 25 *Geo.* 2. *c.* 6. "that any perſon ſhall atteſt "the execution of any will or codicil, which ſhall be made "after the 24th *June* 1752, to whom any beneficial deviſe, le- "gacy, eſtate, intereſt, gift, or appointment of or affecting any "real or perſonal eſtate, other than and except charges on lands, "tenements, or hereditaments, for payment of any debt or debts, "ſhall be thereby given or made, ſuch deviſe, &c. or appoint- "ment, ſhall ſo far only as concerns ſuch perſons atteſting the "execution of ſuch will or codicil, or any perſon claiming under "him, be utterly null and void; and ſuch perſon ſhall be ad- "mitted as a witneſs to the execution of ſuch will or codicil, "within the intent of the act of 29 *Car.* 2. notwithſtanding ſuch "deviſe, &c.

"And it is alſo enacted, that in caſe, by any will or codicil "made or to be made, any lands, tenements, or hereditaments "are or ſhall be charged with debt; and any creditor, whoſe debt "is ſo charged, hath atteſted, or ſhall atteſt, the execution of ſuch "will or codicil, ſuch creditor ſhall be admitted as a witneſs to "the execution of ſuch will or codicil, within the intent of the "ſaid act. That if any perſon hath atteſted the execution of "any will already made, or ſhall atteſt the execution of any will, "&c. made on or before the 24th *June* 1752, to whom any le- "gacy is or ſhall be thereby given, whether charged upon lands, "tenements, or hereditaments, or not; and ſuch perſon before "he ſhall give his teſtimony concerning the execution of ſuch "will, &c. ſhall have been paid, or have accepted or releaſed, or "ſhall have refuſed to accept ſuch legacy or bequeſt, upon tender "made thereof; ſuch perſon ſhall be admitted as a witneſs to the "execution of ſuch will, &c., within the intent of the ſaid act. "Provided that in caſe of tender and refuſal, ſuch legatee ſhall "in nowiſe be entitled to ſuch legacy, but ſhall be barred from "his legacy; and in caſe of acceptance, ſuch legatee ſhall retain "his legacy, which ſhall have been ſo paid, ſatisfied, or accepted, "notwithſtanding ſuch will or codicil ſhall afterward be adjudged

"to

" to be void. That in caſe a legatee, &c., who hath atteſted " the execution already made, or which ſhall be made on or before " 24 *June* 1752, ſhall die in the teſtator's lifetime, or before he " ſhall have received or releaſed or refuſed (on tender) his legacy, " ſuch legatee ſhall be a legal witneſs to the execution of ſuch " will, &c., within the intent of the ſaid act of 29 *Car.* 2.; pro- " viſo, that the credit of every ſuch witneſs ſo atteſting, &c., " and all circumſtances relating thereto ſhall be ſubject to the " conſideration and determination of the court and the jury be- " fore whom any ſuch witneſs ſhall be examined, or his teſti- " mony or atteſtation made uſe of; or of the court of equity in " which his teſtimony or atteſtation ſhall be made uſe of; in like " manner as the credit of witneſſes in other caſes ought to be " conſidered of and determined. No perſon to whom any bene- " ficial eſtate, intereſt, gift, or appointment ſhall be given or " made, which is thereby enacted to be null and void, or who " ſhall have refuſed to receive any ſuch legacy or tender as afore- " ſaid, and who ſhall have been examined as a witneſs concern- " ing the execution of ſuch will or codicil, ſhall, after he ſhall have " been ſo examined, demand, or take poſſeſſion of or receive any " profit or benefit of or from any ſuch eſtate, &c. given by any " ſuch will or codicil; or demand, receive, or accept from any " perſon, any ſuch legacy or bequeſt, or any ſatisfaction or com- " penſation for the ſame, in any manner, or under any colour " or pretence whatſoever.' This act not to extend to the " caſe of any heir at law, or of any deviſee in a prior will or " codicil of the ſame teſtator, executed and atteſted according to " the act of 29 *Car.* 2., or any perſon claiming under them re- " ſpectively, who has been in quiet poſſeſſion for two years next " preceding the 6th of *May* 1751, as to ſuch lands, tenements, " or hereditaments whereof he has been in quiet poſſeſſion as " aforeſaid. This act not to extend to any will or codicil, the " validity or due execution whereof hath been conteſted in law " or equity by the heir of ſuch deviſor, or the deviſee in any " ſuch prior will, or will or codicil ſo conteſted, or any part " thereof, or for obtaining any codicil, for recovering the " lands, &c. mentioned to be deviſed in any other judgment " or decree relative thereto, on or before the ſaid 6th of *May* " 1751, and which has been already determined in favour of ſuch " heir at law, or deviſee in ſuch prior will or codicil, or any perſon " claiming under them reſpectively, or which is ſtill depending, " and has been proſecuted with due diligence; but the validity " of every ſuch will or codicil and the competency of the wit- " neſſes thereto, ſhall be adjudged and determined in the ſame " manner as if this act had never been made. No poſſeſſion of " any heir at law, or deviſee in ſuch prior will or codicil as afore- " ſaid, or of any perſon claiming under them reſpectively, which " is conſiſtent with, or may be warranted by or under any will or " codicil atteſted according to the intent of this act, or where the " eſtate deſcended or might have deſcended to ſuch heir at law, " till a future or executory deviſe by virtue of any will or codicil

" atteſted

" atteſted according to this act ſhould or might take effect, ſhall " be deemed to be a poſſeſſion within the intent of the clauſe " herein laſt contained. This act ſhall extend to ſuch of the " *Britiſh* colonies in *America* where the 29 *Car.* 2. is by act of " Aſſembly made, or by uſage received as law; or where by act " of Aſſembly or uſage the atteſtation and ſubſcription of a " witneſs or witneſſes are made neceſſary to deviſes of lands, *&c.*, " and ſhall have the ſame force and effect in the conſtruction of, " or for the avoiding of doubts upon, the ſaid acts of Aſſembly, " and laws of the ſaid colonies, as the ſame ought to have in the " conſtruction of, or for the avoiding doubts upon, the ſaid act " in *England*. Provided always, that as to the caſes ariſing in " any of the ſaid colonies, no ſuch deviſe, legacy, or bequeſt " aforeſaid ſhall be made null and void by virtue of this act, un- " leſs the will or codicil whereby ſuch deviſe, *&c.* ſhall be given, " ſhall be made after *March* 1. 1753."

[But, notwithſtanding this ſtatute, the queſtion reſpecting the credibility of witneſſes was again brought under conſideration in the court of King's Bench on a ſpecial verdict, in the caſe of *Wyndham* and *Chetwynd*. In that caſe, *W. C.* being ſeiſed of lands, *&c.* made his will and a codicil thereto, bearing date 14th *May* 1750; and after deviſing certain parts thereof in the will, charged the reſidue of his real and perſonal eſtates with the payment of all his juſt debts, legacies, and incumbrances. The will and codicil were duly executed in the preſence of, and ſubſcribed by, *S. S.*, *R. B.*, and *I. H.*—*S. S.* and *I. H.* were attornies at law, and had been employed by *W. C.* in or about the year 1747 to ſolicit a private act of parliament, and charged him as debtor in their books for the fees and expences of ſoliciting thereof, the ſum of 318*l.*, and the charge continued ſo until and after the death of *W. C.* Some time after which *S. S.* and *R. B.* delivered a bill for paſſing this act to the truſtees appointed in the act for the purpoſes therein mentioned: there was a clauſe in the act for payment of the expences attending the ſame, and before the examination of *S. S.* and *R. B.* as witneſſes on this ejectment, there was received from the truſtees the ſum of 302*l.* 4*s.* 8½*d.*, and the truſtees were willing to have paid the remainder of the demand, if it had not been for a miſcalculation. There was likewiſe a current account open and ſubſiſting between *S. S.*, *R. B.*, and *W. C.* for other buſineſs, on the balance of which account, if ſtated at that time, *S. S.* and *R. B.* were indebted to *W. C.* 138*l.* 14*s.* 10*d.* Alſo, at the death of *W. C.* there was due and owing from him to *I. H.* the other ſubſcribing witneſs, who was his apothecary, 18*l.* 5*s.* 5*d.*, 11*l.* whereof were due on the 25th *December* 1749, on ſimple contract; *W. C.* dieth on 17th *May* 1750. There were mortgages upon *W. C.*'s eſtates at the time of his ſigning the ſaid will and codicil, and of his death, to the amount of 24,000*l.* And at the time of his death he owed 1600*l.* upon bond, and 2874*l.* upon ſimple contract. His perſonal eſtate then amounted to 13,972*l.*, and was ſufficient to pay all the ſimple contract and bond debts. The eſtates in mortgage were of ſufficient value to diſcharge the incumbrances there-

Wyndham v. Chetwynd, 1 Bur. 414.

upon. The executor of *W. C.* paid *I. H.*, one of the witneſſes, the ſum of 18*l.* 5*s.* 5*d.* after *W. C.*'s death and before his examination in the cauſe. Upon theſe facts the queſtion was, Whether theſe paper-writings, or either of them, were or were not duly executed, ſo as to paſs lands? This depended upon two queſtions; firſt, Whether the facts, as ſtated, did make *theſe* intereſted witneſſes, and render them not credible? Secondly, if ſo, Whether the ſubſequent circumſtances did not remove the objection, and re-eſtabliſh their credibility? On the firſt it was argued for the deviſee, that theſe witneſſes were no legatees, and derived nothing from the gift or bounty of the teſtator; that they were juſtly entitled to payment of their debts, though no will had ever been made; that the perſonal aſſets were the proper fund for them to reſort to, and that it was ſufficient to pay their demands, therefore they were not intereſted in the charge on the real eſtate. On the ſecond, it was contended that they were competent witneſſes at the time of the examination, their debts being then diſcharged. That the word *credible* in the ſtatute 29 *Car.* 2. *c.* 3. was an ambiguous expreſſion, and capable of many ſenſes, but there ſeemed to be a parliamentary expoſition thereof in the ſtatute of the 4th and 5th *Anne*, *c.* 16. § 14. whereby three witneſſes were required to authenticate a nuncupative will, and it was declared, that ſuch as were good witneſſes in trials at common law, ſhould be deemed good witneſſes to eſtabliſh a nuncupative will. Now allowing the ſame expoſition to take place on the ſtatute of frauds, then, as theſe witneſſes would be unexceptionable on a trial at law in reſpect of intereſt, ſo they would be competent, and, therefore, credible witneſſes to the preſent deviſe. On the other ſide, it was argued for the heir at law, that, at the time of the atteſtation, the witneſſes were intereſted, and therefore incompetent; and that *then*, and not the time of examination, was the proper time of inſpecting their credibility, elſe it would open greater opportunities of fraud and perjury than exiſted before the act; that it would be ſetting up witneſſes to hire, and would put the validity of a will in the power of the witneſſes, by releaſing or not releaſing their intereſt. That if a witneſs was unexceptionable at the time of atteſtation, and afterwards became infamous or inſane, the will was nevertheleſs a good will, which proved that his condition at the time of atteſtation was alone to be regarded; that the word credible meant ſomething more than competent; that the law required competency before, and it was not to be imagined that the learned compiler of this ſtatute, Lord *Hale*, would put in a word that at beſt was ſuperfluous; that in the ſtatute of the 13th *Car.* 2. againſt deer-ſtealing, and in all the game laws, the expreſſion of credible witneſſes was uſed, which had always been underſtood to mean more than competent, and to give the juſtices a diſcretion, whether they would convict upon ſuch teſtimony or not, though the witneſſes were, in law, ſtrictly admiſſible; and the caſes of *Hilliard* and *Jennings*, and *Anſley* and *Dowſing*, were cited. After the court had taken ſome time to conſider of it, they all agreed, that the will was *duly* atteſted by three credible witneſſes.

And

And Lord *Mansfield* * delivered a very elaborate judgment, in which he took occaſion to enter very fully into the diſcuſſion of the meaning of the word "credible" in the ſtatute of frauds; which his lordſhip conſidered as capable of being conferred on an intereſted witneſs by payment or a releaſe.

* In a ſubſequent caſe, it is ſtated, that Lord Mansfield, previous to his delivering his opinion in the laſt-mentioned caſe, declared, that *it* was *his own*, and he was *perſonally* anſwerable for all its errors; the judgment of the court being *general*, that they held the will duly executed according to the ſtatute. Lord Camden arg. in Doe v. Kerſey, *infra*.

Doe on dem. of Hindſon v. Kerſey, 4 Burn's Eccl. L. 88.

John Knott, by a paper-writing purporting to be his will, deviſed his real eſtates to his wife for life, and after the deceaſe of his wife deviſed certain hereditaments, therein particularly deſcribed, to truſtees and their ſucceſſors for ever, upon truſt to apply the rents and profits thereof to ſuch poor people within the lordſhip of *Maulſmeaburn* as he therein named, *viz.* indigent orphans under ten years of age, unable to labour, poor aged people utterly paſt labour, poor impotent people lame or blind and who could not labour; and to put out the children of ſuch poor people as above, either ſons or daughters, apprentices as ſoon as they were fit for it. This paper-writing was ſigned, ſealed, and publiſhed by the ſaid *John Knott*, in the preſence of *Henry Holme*, *Robert Burra*, and *John Mitchell*, who ſubſcribed the ſame in the preſence of the deviſor. *Henry Holme* and *Robert Burra* were two of the truſtees above named, and they, and alſo *John Mitchell*, the other ſubſcribing witneſs, were, at the time of atteſting, and long afterwards, ſeiſed in fee-ſimple of lands, *&c.* within the lordſhip and townſhip of *Maulſmeaburn* aforeſaid, and during the time aforeſaid were poſſeſſed of and occupied the ſame, and inhabited within the lordſhip; the lordſhip of *Maulſmeaburn* was a large diſtrict, and maintained its own poor, and the witneſſes to the will were chargeable and taxable, and were actually charged, aſſeſſed, taxed, and paid towards the poor, and all other taxes of the ſaid lordſhips. It appeared that *Henry Holme* and *Robert Burra* had, previous to the time of the trial, releaſed all their intereſt under the ſaid paper-writing, purporting to be the will of the ſaid *John Knott*, to the other truſtees therein named; and alſo that they, and *John Mitchell* the other witneſs, had ſeverally conveyed away and diſpoſed of all their reſpective eſtates and intereſt lying in the within lordſhip and townſhip of *Maulſmeaburn* before the trial. And the queſtion was, Whether this paper-writing, purporting to be the will of *John Knott*, was ſufficient to paſs the hereditaments in manner abovementioned? which depended upon the queſtion, Whether the releaſe and diſpoſition of their reſpective eſtates and intereſts had reſtored the credit of the witneſſes? for, if not, it muſt fall to the ground, as the objection to it was not cured by the act of the 25 *George* 2. And it was held by *Clive*, *Bathurſt*, and *Gould*, againſt the opinion of *Pratt*, Chief Juſtice, that a witneſs, incompetent at the time of atteſtation, might purge himſelf afterwards either by releaſe or payment, and become competent by the rule of rule. But the cauſe was afterwards, to avoid any further litigation, adjuſted by agreement, and the parties divided the eſtate between them.

Ibid.

Ibid.

* But

Oxendon v. Penrice, Salk. 691, 5.

But a legatee may be a witneſs againſt a will; for the reaſon why a legatee is not a witneſs for a will being, becauſe he is preſumed to be partial in ſwearing for his own intereſt; it follows that a legatee, when he ſwears againſt a will, ſwears againſt his intereſt, and ſo is the ſtrongeſt evidence.

And if it ſtand indifferent to the witneſſes, whether the will, under which they are legatees and to which they are witneſſes, be valid or not; the witneſſes, though legatees, are credible.

Lord Aileſbury's caſe, cited 1 Burr. 427.

Thus, a deviſee died on the 10th of *February* 1746, having made a will, dated 15th of *May* 1746, of his whole eſtate real and perſonal, charged with debts and legacies: the three ſubſcribing witneſſes, as being in his ſervice at his death, had legacies; one 30*l.* a-year for life, the two others pecuniary legacies; all three releaſed the 2d of *February* 1746. The teſtator had alſo made a former will on the 20th of *December* 1744, atteſted by three diſintereſted perſons, under which the three ſubſcribing witneſſes to the will of 1746 would have had the ſame legacies. A bill was brought in Chancery to have the latter will eſtabliſhed. It was contended, that notwithſtanding the will of 1744, (which the teſtator had revoked, as he thought, effectually, and might probably have cancelled,) it was a benefit to the witneſſes, *at the time of ſubſcribing*, to have a legacy under the latter will. But the Lord Chancellour was clearly of opinion, that theſe were good witneſſes; for, at the death of the teſtator, it was indifferent to them which will prevailed; and his lordſhip declared the will of the 15th of *May* 1746 to be well proved, eſtabliſhed it, and decreed the truſt.

Pendock v. Mackender, 4 Burn's Eccl. Law. 93. H. 28 G. 1.

The queſtion, on a ſpecial caſe reſerved at the aſſizes, was, Whether a perſon who before the time of atteſtation had been indicted, tried, and convicted for ſtealing a ſheep, and was found guilty to the value of ten pence, and had judgment of whipping, was a ſufficient witneſs within the ſtatute?—The whole court of Common Pleas were clearly of opinion, after three arguments at the bar, that he was not a competent witneſs.

Hudſon's caſe, Skin. 79. Pike v. Badmerino, 2 Str. 1096. Lowe v. Jolliffe, 1 Bl Rep. 365.

[The atteſting witneſſes may, upon examination, deny the facts, which, upon the face of the inſtrument, they are preſumed to have atteſted. But in this caſe, the deviſee may produce evidence to contradict their teſtimony.]

Where, on an ejectment brought upon a will, a woman had ſworn againſt her own atteſtation, Yates, J. ſaid, that ſhe ought not to have been admitted to give this evidence. And Lord Mansfield obſerved, that this would not invalidate the will; for that there were caſes where one witneſs had ſupported a will, by ſwearing *that* which the other two witneſſes atteſted, although thoſe two had denied that they did ſo. And, in the principal caſe, a new trial was granted, the verdict having been given againſt the deviſee apparently upon this ground. Goodtitle v. Clayton, 4 Burr. 2224.

2 Ld. Raym. 1326. Cliffe & *al.* v. Gibbins & *al.*

Witneſſes have been examined to prove the teſtator's intent.

[So, Mallabar v. Mallabar, Ca. temp. Talb. 79.]

1 Ld. Raym. 262. Sir Richard Raine's caſe.

The probate of a will cannot be controverted at common law.

N. B. Though neither the courts of law, nor the courts of equity can determine the validity of a probate adverſarily; yet, if it comes in incidentally, and the incident is admitted by the parties, thoſe courts may determine it, and hold the parties bound by the admiſſion. Atk. 630. Sheffield v. the Ducheſs of Buckingham.

A re-

A recital of a will in a copyhold admittance is evidence againſt any but the heir. 1 Ld. Raym. 735.

2. If the probate or regiſter of a will be evidence to prove a pedigree. *Id.* 745.

According to *Holt*, Ch. J., the regiſtrar's book is good evidence to prove a will concerning lands. *Id.* 731. St. Leger v. Adams.

Parol evidence is not admitted to contradict the words of a will. *Id.* 1261. Lowfield v. Stoneham, & Caſ. temp. Talb. 240. Brown v. Selwin.

And proof of a will cannot be made againſt a man by the confeſſion of his own witneſs, without the actual production of the will itſelf. 1 Ld. Raym. 730. Pyke v. Crouch. *Id.* 847.

An executor may be ſued for a legacy where he proves the will, though he does not live in that dioceſe. Edgworth v. Smalridge.

A will was made in *French* and proved in *French*, and under it in the ſame probate the will was tranſlated into *Engliſh*, but it appeared to be falſely tranſlated. It was objected, that the tranſlation being part of the probate, and allowed in the ſpiritual court, it muſt bind; and the application muſt be to that court to correct the miſtakes, which until then muſt be concluſive. But *per* his Honour, nothing but the original is part of the probate; neither hath the ſpiritual court power to make any tranſlation: and ſuppoſing the original will was in *Latin* (as was formerly very uſual), and there ſhould be a plain miſtake in the tranſlation of the *Latin* into *Engliſh*, ſurely the court would determine according to what the tranſlation ought to be. And ſo it was done in this caſe. 1 P. Wms. 526. L'Fitt v. L'Batt.

2. Of Nuncupative Wills.

"By *ſtat.* 29 *Car.* 2. *c.* 3. § 19. for the prevention of fraudulent "practices, it is enacted, 1. That no nuncupative will ſhall be "good where the eſtate thereby bequeathed ſhall exceed the va- "lue of thirty pounds, that is not proved by the oaths of three "witneſſes, at the leaſt, that were preſent at the making thereof, "and bid by the teſtator to bear witneſs that ſuch was his will, "or to that effect. *And by ſtat.* 4 Ann. c. 16. § 14. *it is declared,* "*That all ſuch witneſſes as are and ought to be allowed to be good* "*witneſſes upon trial at law, by the laws and cuſtom of this realm,* "*ſhall be deemed good witneſſes to prove any nuncupative will, or any* "*thing relating thereto.*

"Nor unleſs ſuch nuncupative will were made in the time of the "laſt ſickneſs of the deceaſed, and in the houſe of his, her, or "their habitation or dwelling, or where he or ſhe has been re- "ſident for ten days or more next before the making of ſuch "will, except where ſuch perſon was ſurpriſed or taken ſick "being from his own home, and died before he returned to the "place of his or her dwelling.

§ 20. "That after ſix months paſſed after the ſpeaking of the "pretended teſtamentary words, no teſtimony ſhall be received

" to prove any will nuncupative, except the ſaid teſtimony, or " the ſubſtance thereof, were committed to writing within ſix " days after the making of the ſaid will.

§ 21. " That no letters teſtamentary, or probate of any nun- " cupative will, ſhall paſs the ſeal of any court, till fourteen " days, at the leaſt, after the deceaſe of the teſtator be fully ex- " pired, nor ſhall any nuncupative will be at any time received to " be proved, unleſs proceſs have firſt iſſued to call in the widow, " or the next of kindred to the deceaſed, to the end they may " conteſt the ſame, if they pleaſe.

§ 22. " That no will in writing concerning any goods or " chattels, or perſonal eſtate, ſhall be repealed; nor ſhall any " clauſe, deviſe, or bequeſt therein be altered or changed by any " words or will by word of mouth only, except the ſame be in " the life of the teſtator committed to writing, and after the " writing thereof read to the teſtator, and allowed by him, and " proved to be ſo done by three witneſſes at the leaſt.

N. B. It has been ruled in equity, that before probate, a nuncupative will is not pleadable in any court againſt an adminiſtrator.

§ 23. " Provided that any ſoldier in actual military ſervice, or " any mariner or ſeaman being at ſea, may diſpoſe of his move- " ables, wages, and perſonal eſtates, as before the making of this " act."

1 Ch. Caſ. 192. Verhorne v. Brewin.

1 Abr. Eq. Caſ. 403.

A. being ill, deſired *B.* to make her will, who wrote down only names and initial letters to this effect, *viz.* To *Tho. Weſt* 200 *l.*, to *Jo. Dev.* 100 *l.*, to *Reb. Cro.* 50 *l.*, to ſelf 10 *l.*, and to ſeveral other perſons, in like manner, to above 400 *l.*; which being more than her eſtate, *B.* made an alteration in the ſecond column, by ſubtracting part of the ſums from ſome of the legatees, as ſet down in the ſecond column, and then told *A.* the ſenſe of the propoſed deviſes: there were two perſons in the room that did not hear any thing that paſſed between *A.* and *B.* but only heard the teſtatrix at laſt pronounce, that all was well. *B.* went to a ſcrivener to have the deviſes drawn out at length and in form, and before ſhe returned the teſtatrix died: the judge below pronounced for this will; but upon appeal to the delegates, it was reverſed; and in this caſe it was agreed, that if the will had been written in words at length, ſo as they had carried a ſenſe and meaning in themſelves, it had been a good will; for that there was one witneſs that wrote it, and two that heard the teſtatrix pronounce that it was well: which would have been intended to have amounted to a ſecond witneſs, in regard it appeared on all hands, by ſeveral witneſſes, that the teſtatrix did then ſeriouſly diſpoſe herſelf to make her will; and for that was quoted the caſe of one *Pepper*, where a perſon diſpoſed herſelf to make her will, and dictated it to a perſon who wrote it down; and another, not called in as a witneſs, lay behind the hangings, out of curioſity; and yet ſuch will was allowed to be good, being proved by theſe two witneſſes: but they diſtinguiſhed this caſe, becauſe the

the will was not ſubſtantive, but was to take its ſenſe from the interpretation of the witneſs; and ſo there would be *inuendo* upon *inuendo*, which made purely a nuncupative will: and as ſuch, not being atteſted by the number of witneſſes appointed by the ſtatute of frauds and perjuries, the will and legacies were void.

Doctor *Shallmer*, by will in writing, gave 200 *l.* to the pariſh of *St. Clement's Danes*, and after, *Prew* the reader coming to pray with him, his wife put him in mind to give 200 *l.* more towards the charges of building their church, at which, though Dr. *Shallmer* was at firſt diſturbed, yet after he ſaid he would give it, and bid *Prew* take notice of it: and the next day he bid *Prew* remember of what he had ſaid to him the day before, and died that day. Within three or four days after the doctor's wife puts down a memorandum in writing of the ſaid laſt deviſe, and ſo did her maid. *Prew* died about a month after, and amongſt his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor ſaid to him about the 200 *l.*, and purporting that he had put it in writing the ſame day it was ſpoken: but that writing which was mentioned to be made the ſame day it was ſpoken did not appear, and theſe three memorandums did not expreſsly agree. About a year after, on application by the pariſh to the commiſſioners of charitable uſes, and producing theſe memorandums and proof by Mrs. *Shallmer* and her maid, they decreed the 200*l.* But on exceptions taken by the executors, the decree was diſcharged of the 200 *l.*, and Lord Chancellour held it not good, becauſe it was not proved by the oath of three witneſſes; for though Mrs. *Shallmer* and her maid had made proof, yet *Prew* was dead; and the ſtatute in that branch requires not only three to be preſent, but that the proof ſhall be by the oath of three witneſſes. 1 Abr. Eq. Caſ. 404.

A daughter depoſits 180*l.* in the hands of her mother (the defendant) and afterwards makes her will in writing, and thereby deviſes ſeveral legacies, and makes her mother executrix, but takes no manner of notice of the 180 *l.* Afterwards, by word of mouth, ſhe deſires her mother to give the 180*l.* to the plaintiff, if ſhe thought fit, and then ſoon after died: the mother proved the will, and this bill was brought againſt her, to have the 180*l.* paid. The mother, by her anſwer, admits ſhe had ſuch a ſum in her hands, that her daughter did make ſuch a requeſt to her, but that ſhe left it to her election, whether ſhe would give it to the plaintiff or not, by the very form of the deviſe; and inſiſted, that ſhe did not think fit to give it to the plaintiff. And in this caſe it was agreed, that this was not good as a nuncupative will, being above 30 *l.*, and not reduced into writing within ſix days after the ſpeaking, as the ſtatute requires. 2dly, That if the defendant had inſiſted on the ſtatute of frauds and perjuries, the court could not have relieved the plaintiff as upon a truſt: but in this caſe the defendant having by anſwer confeſſed the truſt, there was no danger of perjury from variety of proof, which was the miſchief the ſtatute intended to provide againſt; and therefore the court took *Id. ibid.* Gil. Eq. Rep 146. Jones v. Nabbs.

it to be in nature of a truſt, and decreed for the plaintiff: for the defendant expreſsly ſwore, ſhe did not think fit to give it to the plaintiff, and that the teſtatrix had left her at liberty. But this decree was againſt the opinion of ſeveral at the bar, who thought it too hard on the election left in the mother: but the court principally relied on the caſe of *Kingſman* and *Kingſman*, where a man deviſed away an eſtate of 2000 *l. per ann.* and upwards, from his ſon and heir to a bargeman; and by his will deviſed 20 *l. per ann.* to his ſon, with this clauſe, that if he behaved himſelf well, and gave no trouble or diſturbance concerning his will, that he might make it up 80*l.* if he thought fit: and the court decreed the 80 *l. per ann.* to the ſon. But note, the 80 *l. per ann.* in the caſe of *Kingſman* and *Kingſman* ſeems to have been decreed purely upon the circumſtances and hardſhips of the caſe; but in the preſent caſe there were no ſuch circumſtances or ingredients of hardſhip on the plaintiff: but *quære*, for it ſeems to be a truſt in the hands of the mother.

(E) The Nature and Effect of a Will or Teſtament, and of a Codicil.

1 Inſt. 112. 4 Rep. 61. b. Forſe and Hembling's caſe. But N. B. tho' it does not take effect till after the teſtator's death, yet it is inchoate, though not conſummate, from the execution of it; and to many purpoſes in law ſhall relate to the time of the making of it. 1 P. Wms. 97. Lord Bindon v. Earl of Suffolk.

A Will or teſtament is of that nature, that it differs much from other acts and deeds that men do and execute in their life-time: for although it be made, ſealed, and publiſhed in ever ſo ſolemn a manner, yet it has no life nor virtue in it until the teſtator's death: for it is a maxim in law, *omne teſtamentum morte conſummatum eſt, & voluntas eſt ambulatoria uſque ad extremum vitæ exitum:* it is therefore reſembled until death to the interlocutory ſentence, and after death to the definitive ſentence of a judge; and hence it is ſaid, *ſed legum ſervanda fides, ſuprema voluntas quod mandat fierique jubet parere neceſſe eſt.*

Shep. Abr. Part 4. p. 9. voc. Teſt.

And for this reaſon a man may alter or make void his will at his pleaſure; and he may make as many new wills and teſtaments as he pleaſes, and there is no way to bar a man of this liberty.

Lit. 168. Swinb P. 1. § 5. Br. Teſtament, 20.

And the latter teſtament always revokes and overthrows the former: but otherwiſe it is of a codicil, for a man may make as many of theſe as he will, and make no teſtament at all. Or, if he makes a teſtament, he may afterwards make as many codicils as he will, and one of them will not overthrow the other; for in the firſt caſe they muſt be all annexed to the letters of adminiſtration, and the adminiſtrator muſt perform them; and in the latter caſe they muſt be all annexed to the teſtament, and the executor muſt take care to perform them.

Shep. Abr. Part 4. p. 9. voc. Teſt.

A teſtament therefore is ſaid to have three degrees. 1ſt, An inception, which is the making of it. 2dly, A progreſſion, which is the publication of it. 3dly, A conſummation, which is the death of the teſtator.

In

In grants therefore the firſt is of the greateſt force, but in teſtaments the laſt is of the greateſt force. 1 Inſt. 112. b. But if the latter will cannot be found, or the contents of it are unknown, it is no revocation of the former. Show. Caſ. in Par. 146. [*Vide infra.*]

But, when a teſtament is perfect by the death of the party, it as effectually gives and transfers eſtates, and alters the property of lands and goods, as acts executed by deeds in the lifetime of the parties: for hereby deſcents of lands are prevented. And a man may make eſtates in fee-ſimple or fee-tail, for life or years, of lands, tenements, rents, reverſions, or ſervices, as effectually as by deed; and theſe eſtates alſo will be good without any livery of ſeiſin or attornment; and hereby alſo rents, and power to diſtrain for them, may be reſerved, conditions created and annexed to eſtates or things deviſed. Shep. Abr. Part 4. p. 10. vec. Teſt.

And therefore they that take by deviſes of land, are ſaid to take in the nature of purchaſers.

And if therefore a tenant in tail makes a feoffment to the uſe of himſelf in fee, and after deviſes the ſame land to his wife in fee, and dies, the ſon is not remitted though the father dies ſeiſed, for the deviſe prevents the deſcent. Dy. 221. pl. 16.

(F) How Wills ſhall be conſtrued.

IT is to be obſerved, that where the words of a will have a plain ſenſe, and no doubt is in any matter within or without the words, touching the matter of the deviſe, there the words of the will ſhall always be taken to be the intent of the deviſor, and his intent to be what the words ſay. 2 And. 17. Lowen v. Bedd.

That all the words of a will are to be carried to anſwer the intent of the deviſor; but this is to be underſtood in caſes where the intent of the party may be known by the words that are in the will. 2 And. 10, 11. 134.

That if there are inconſiſtent and contradictory words in a will, ſome words muſt be rejected to make it ſenſe. Thus, where a teſtator gave the intereſt of a ſum of 6000 *l.* to *Mary Comfortle*, his daughter, for her life, and after deceaſe gave the money between *Charles Comfortle* her huſband, and their children: and in another part of the will he ſaid, "and in caſe there be no ſuch child "or children, I give it to *Charles Comfortle* and ſuch children." Lord Chancellour rejected theſe latter words, as they were abſurd and contradictory. MSS. Rep. Boon v. Comfortle, Paſ. 24 G. 2. in Canc. [2 Vez. 277. S. C. by the name of Boon v. Cornforth.]

A. having a wife and no children, made his will, and ſaid,— leſt it ſhould pleaſe God that he ſhould not return, he gave and deviſed a real and perſonal eſtate, or to that effect. He returns, has children, and dies, without altering his will: the plaintiff being a legatee, and there being a direction in the will for the ſale of the real eſtate to pay his legacy; Lord Chancellour was of opinion that the diſpoſition was merely contingent, and that no part of the will was to take effect but on the contingency of his return; and ſo avoided determining the principal queſtion, how far the alteration MSS. Rep. Parſons v. Lenow, Hil. 22 G. 2. in Canc. [1 Vez. 189. & Ambl. 557. S. C. by the name of Parſons v. Lanoe.]

tion of the teſtator's circumſtances would be a preſumptive revocation as to the real and perſonal eſtate; but as to the perſonalty, ſeemed to rely on the caſe of *Lug* and *Lug;* and as to the real eſtate, he ſaid, that the ſtatute of frauds and perjuries made a material difference between that and the perſonal eſtate.

Shep. Abr. Part 10. voc. Teſtament. That a will muſt have a favourable interpretation, and as near to the mind and intent of the teſtator as may be, and yet ſo withal as his intent may ſtand with the rules of law, and not be repugnant thereunto; it being a rule or maxim of law, *Quod ultima voluntas teſtatoris perimplenda eſt, ſecundum veram intentionem;* and that, *Sed legum ſervanda fides, ſuprema voluntas quod mandat fierique jubet parere neceſſe eſt.* In deeds the rule of conſtruction is, that the intention muſt be directed by the words; but in wills, the words muſt follow the intent of the deviſor; and ſuch a conſtruction is to be made of them, as to make uſe of all the words, and not of part, and ſo as they may ſtand together, and have no contrariety in them.

Bridg. 105. Standiſh v. Short.

Shep. Abr. Part 11. p. 11. voc. Teſtament. That ſuch a ſenſe ſhall be made of a deviſe, that it may be for the profit of the deviſee, and not to his prejudice.

Id. ibid. That general and doubtful words in a will ſhall not alter an expreſs deviſe before, nor carry any thing contrary to the apparent intent.

Id. ibid. That the clauſes and ſentences of a will ſhall be ſeverally tranſpoſed to ſerve the meaning of it. And conſtruction ſhall be made of the words to ſatisfy the intent, and they ſhall be put in ſuch order as that the intent may be fulfilled.

Id. ibid. That no ſenſe may be framed upon the words of a will, wherein the teſtator's meaning cannot be found.

Styles, 148, 149. That to give a thing to ſuch a perſon to whom the law gives it, is as if it had not been given; and ſo a deviſe of a man's land to his heirs is void.

Shep. Abr. Part 11. p. 11. voc. Teſtament. That a conſtruction of a will muſt be gathered out of the words of the will, and not by any averment.

1 Freem. 292. Steede v. Berrier. 5 Rep. 68. Ld. Cheyney's caſe. That though a parol averment ſhall not be admitted to explain a will, ſo as to expound it contrary to the import of the words, yet when the words will bear it, a parol averment may be admitted. —— As, for inſtance, to aſcertain the perſon, but in no caſe to alter the eſtate.

[2 P. Wms. 337. 1 Vez. 231. 1 Atk. 411. 2 Vez. 216. 1 P. Wms. 674. 2 P. Wms. 142. Ambl. 175. 3 Vez. jun. 148. Parol averments are admitted to aid the expoſition of a written will, not only where there is an ambiguity as to the perſon, or as to the ſubject-matter deviſed, but alſo where words of equivocal import are uſed expreſſive of the quantity of intereſt, or extent of the ſubject-matter of the deviſe. Thus, a teſtatrix, by her will, gave the following bequeſts: "I give to *M. P. the ſum of* "500l. *ſtock in long annuities.* I give to *M. H. the ſum of* 500l. *ſtock in long annuities*; I alſo give "unto Miſs *I. E. the ſum of* 200l. *ſtock in long annuities, the* intereſt thereof *to accumulate until ſhe ſhall* "*attain twenty-one, and then the whole* to be transferred *to her by my executors.* Alſo, *I give unto Miſs* "H. D. *the ſum of* 100l. *ſtock in long annuities,* the intereſt *thereof to accumulate, until ſhe attains twenty-*"*one, and then the whole* to be transferred *to her by my executors*—And all the reſt and reſidue of my "eſtate and effects, both real and perſonal, whatſoever and whereſoever, I give, deviſe, and bequeath "the ſame, and all and every part thereof, unto my ſaid two nephews *M. F.* and *T. F.*, their heirs, "executors, adminiſtrators, and aſſigns for ever." It turned out that the teſtatrix had only 120l. a year long annuities. And the queſtion was, Whether the legatees ſhould have the reſpective ſums given to them raiſed by ſale of ſo much of the ſtock as would produce the ſame; or whether they were entitled under

under the will to annuities of the ſums reſpectively given them, and conſequently to divide the 120*l.* a year between them, leaving nothing to the reſiduary legatees? And this depended upon the queſtion, Whether, in this caſe, the court could let in averments of the ſtate of the teſtatrix's property at the time of her deceaſe? Upon the firſt hearing of the cauſe, Lord Thurlowe was of opinion, that parol evidence could not be admitted; becauſe, the teſtatrix having uſed words ſo near thoſe a man of buſineſs would make uſe of to diſpoſe of ſo much *per annum*, the court were bound to declare the legatees entitled to the things as deſcribed, *viz.* annuities. But, on a rehearing of the cauſe, his lordſhip changed his opinion. He ſaid he ſhould have thought that, had the will ſtood clear of all other criticiſms, although it were not an accurate deſcription of 500*l.* joint intereſt in the annuities, yet it was a ſufficient one of 500*l.* ſtock in the long annuities; at the ſame time, it was impoſſible not to obſerve that the expreſſion "the ſum "of 500*l.*" was going out of the way. But accurate phraſes were not called for; and if the words were found to expreſs the intention of the teſtatrix, that was ſufficient, and if it had ſtood by itſelf, it was ſufficient to ſhew what the words meant "an annual ſum of 500*l.*" The difficulty occurring was this, that ſhe had been ſpeaking of a ſum of 500*l.*, which expreſſion, if ſtanding alone, ought not to be interpreted by any other context, but muſt take its *whole complexion* from the word *ſtock*: but, if it ſtood with the context to admit of any other conſtruction upon it, he muſt conſider what the teſtatrix meant by the whole of the words "the ſum of 500*l.* &c." and the additional words "the intereſt thereof "*to accumulate.*" According to the natural ſenſe of the words "ſum of 500*l. given to A. at twenty-* "*one, and the* intereſt *thereof to accumulate,*" he muſt ſuppoſe the firſt ſum to be the principal ſum, and the ſecond the intereſt of the principal ſum. It had been contended that the word "*ſtock*" in the annuities could not mean the annuity; becauſe it would extend to the 3 *per cents.*, which were annuities, but there the ſtock was denominative of the *capital* ſums; otherwiſe as to the long annuities, they were denominated ſo by the annuity; and the circumſtance of their being both annuities made it very probable, that if a perſon were to ſpeak of it as a groſs ſum, he would ſpeak of the ſtock, and not of the annuity merely. So far practice might warrant, that if the words had ended with annuities, without ſpeaking of intereſt, there would have been no neceſſity for evidence to have controuled them: but the ſecond part of the ſentence, "and the intereſt thereof to accumulate," raiſed a doubt whether *ſhe meant a ſum* as producing intereſt, or the ſtock itſelf. The term intereſt was not a proper phraſe, but this was not a groſſer inaccuracy than thoſe in the reſt of the will: the word transferred had been relied on as a technical phraſe, but it weighed nothing, becauſe the thing to be bequeathed was not the ſtock, but the produce of the ſtock together with the ſtock itſelf. The intereſt, which was the growing produce of the legacy ſhe meant to give, was to be laid out in order to accumulate, ſhe muſt have meant by the word *annuity* ſomething. There was no doubt if the word *ſtock* had been left out, but the meaning would be that the ſum of 500*l. was to be diſpoſed of in long annuities, and to make a produce*, and that produce to accumulate until the legatee ſhould attain twenty-one. This being the doubtful interpretation upon the face of the will, the queſtion aroſe, Whether the ſtate of the teſtatrix's fortune was not applicable to the conſtruction of the will? It appeared by ſome other parts of the will, that ſhe was extremely anxious to make an ample proviſion for the family of the *Fonereaus*; conſidering then the ſituation of her fortune, it was perfectly inconſiſtent to ſay, that ſhe could mean to give *ten times more than ſhe was worth* in legacies. His lordſhip's opinion therefore was, that the judgment muſt be reverſed, and that he could let in the evidence of the value of the eſtate, not to *controul the bequeſts* which the teſtatrix had made in words themſelves diſtinct, nor to controul a bequeſt which ſhe had made of a ſubject which ſhe had accurately deſcribed; but, becauſe the words ſhe had uſed in the deſcription were, upon the whole of the context, uncertain *whether ſhe intended it as the intereſt of the groſs ſum to accumulate*, or 500*l. per annum*. The peculiarity of this will furniſhed ſufficient doubt to warrant the admiſſion of collateral evidence to explain it, and, if ſo, the ſtatement of the teſtatrix's fortune, was applicable to the purpoſe of ſuch an explanation. Fonereau v. Pointz, 1 Br. Ch. Rep. 472.]

That one part of a will ſhall be expounded by another: as where a man leaves an eſtate to another and his heirs, and afterwards mentions to have given him an eſtate-tail; heirs ſhall be taken to mean heirs of the body, and the deviſee ſhall take only an eſtate-tail. 2 Freem. 267. Bamfield v. Popham.

(G) How Wills may be avoided.

WILLS may be avoided either by act of the party himſelf, as by *revocation*; or by legal ſentence after the death of the teſtator, as for *fraud*, &c. Therefore we will conſider,

1. What ſhall be deemed a Revocation of a Will.

By the 29 *Car.* 2. *c.* 3. it is enacted, "That no deviſe in writ- "ing of lands, tenements, or hereditaments, or any clauſe there-

" of, ſhall be revocable, otherwiſe than by ſome other will or codicil " in writing, or other writing declaring the ſame, or by burning, " cancelling, tearing, or obliterating the ſame by the teſtator him- " ſelf, or in his preſence and by his directions and conſent, but " ſhall continue, &c. unleſs altered by ſome other will or codicil in " writing, or other writing of the deviſor, ſigned in the preſence of " three or more credible witneſſes declaring the ſame." And by the ſame act, " no will in writing concerning perſonal eſtates ſhall be " repealed, nor any clauſe or bequeſt therein altered by words, or " will by word of mouth only, except the ſame be, in the life of " the teſtator, committed to writing, and read to and allowed by " him, and proved to be done by three witneſſes."

Raym. 334. But, where a man, by will in writing, deviſed the reſidue of his perſonal eſtate to his wife, and after, ſhe dying, he, by a nuncupative codicil, bequeathed to *J. S.* all that he had given to his wife, it was reſolved good; for, by the death of the wife, the deviſe of the reſidue was totally void; and the codicil was no alteration of the former will, but a new will for the reſidue.

2 Abr. Eq. Caſ. 769. Sir Rich. Temple-man's caſe, Mich. 4 Anne, in C. B. Revocations by the act of the party are either expreſs, as where the deviſor expreſsly declares his mind, that his will ſhould be revoked; or implied, as where the eſtate or thing deviſed is altered after making of the will.

N. B. Where the ſpiritual court ſet aſide a will as revoked by the teſtator, their ſentence extends only to the perſonal eſtate, and does not revoke a deviſe of the real eſtate. 3 P. Wms. 166. Sir Samuel Marwood v. Turner.

MSS. Rep. Sparrow v. Hardcaſtle, in Canc. Paſc. 27 G. 2. [3 Atk. 798. and Ambl. 224. S. C. *Vide* 2 Vez. jun. 432-3.] *Per Hardwicke*, Lord Chancellour—The general principle is, that at the time of the deviſe, the deviſor muſt have a diſpoſing capacity, and an eſtate in the land deviſed; and the eſtate muſt remain in the ſame plight and condition until his death: for the leaſt alteration by any act of his makes it a different eſtate, and ſhews a different intention, and therefore is an actual revocation. Thus, if one ſeiſed in fee deviſes, then enfeoffs another to the uſe of himſelf in fee, though it is the old uſe that remains, yet it is a revocation, though it is his on the feoffment. So of a bargain and ſale without enrolment. So, if a man, thinking himſelf tenant in fee, deviſes, and then, apprehending himſelf to be only tenant in tail, ſuffers a recovery with intent to confirm his will, it is a revocation. As to mortgages, they are exceptions out of the rule. At law a mortgage for years, and in equity a mortgage in fee, are revocations *pro tanto* only; and the reaſon is, that a mortgage is only a ſecurity; and though it be a conveyance of a real eſtate, yet in this court it is a chattel intereſt only, and goes to the executor, and it gives no dower. In the caſe wherein theſe leading principles were eſtabliſhed, after the teſtator had deviſed all his manors, lands, tenements, and hereditaments, he by a deed conveyed an advowſon which he was ſeiſed of at the time of making his will, to and to the uſe of truſtees and their heirs, in truſt to preſent the church when void to a particular perſon, if qualified, on the terms preſcribed therein; and if ſuch perſon ſhould be incapable, then to preſent ſuch clerk as *A.* ſhould nominate;

minate; and in default of nomination by him, as the truſtees ſhould think fit. The perſon intended was preſented; and on a bill brought by the heir at law of the teſtator, to have a legal conveyance of the reſidue of the advowſon; the queſtion was, Whether this deed, being only a truſt for a particular purpoſe, as it was alleged, was a total or partial revocation? It was determined by Lord Chancellour, after arguing as above, that it was a total revocation; it being a grant of the legal intereſt; and the truſt was a real and beneficial intereſt given by it to the truſtees, that of nominating themſelves in default of *A.*'s nominating: and he decreed a conveyance to be made according to the prayer of the bill.

J. S. ſeiſed of a leaſe for lives, deviſes it; and afterwards *J. S.* ſurrenders the old leaſe, and takes a new one to him and his heirs for three lives. Decreed by Lord Chanc. *King*, that this renewal of the leaſe was a revocation of the will as to his particular. For by the ſurrender of the old leaſe, *J. S.* the teſtator had put all out of him, had diveſted himſelf of the whole intereſt, ſo that there being nothing left for the deviſe to work upon, the will muſt fall; and the new purchaſe being of a freehold deſcendible, could not paſs by a will made before ſuch purchaſe. *Ib.* 171. 3 P. Wms. 166. 170. Marwood v. Turner.

So, where a teſtator deviſed by his will a leaſehold eſtate under *Magdalen College, Oxon*, and after the making of his will renewed his leaſe by ſurrendering the old one, and making a new leaſe; it was determined by Lord Chancellour, that this was a revocation of his will. And though the teſtator, after the renewal, looking among his papers, had ſaid "this is my will," that was held to be no republication. MSS. Rep. Sir Tho. Abney v. Miller in Can. Trin. 1743. [2 Atk. 593. and 2 Vez. 418. S. C. *Note*; in this caſe there were two leaſes, and as to the diſpoſition of one of them the Chancellour held, that the will remained valid, becauſe the leaſe was incomplete at the teſtator's death, for although he had ſurrendered and accepted a new leaſe, yet it was not ſealed with the college ſeal, till after his death.]

[A teſtatrix deviſed all her lands, tenements, and hereditaments at *W.* in *Yorkſhire*, and all her tithes and eccleſiaſtical dues out of *W.* aforeſaid, or any other town or places near the ſame. At the time of making the will, ſhe was poſſeſſed of a leaſe of theſe tithes under the archbiſhop of *York*. After making the will ſhe ſurrendered this leaſe, and took a new one, of which ſhe was poſſeſſed at the time of her death. The queſtion was, Whether the renewal was a revocation of the will? And the court held, that it was; for there is no real diſtinction between the words *all my tithes at* W. and the words *all my leaſe or intereſt in my leaſe at* W.; becauſe both muſt refer to the intereſt ſhe had at the time of making the will. Then that intereſt did not remain at the death of the teſtatrix; for, by the ſurrender, ſhe ſo far altered her intereſt, that what were her tithes under the leaſe at making the will, could not be conſidered, under the foot of this clauſe, as being the ſame at the time of her death; but ſhe acquired a new eſtate in them, to commence at and run out to a different period of time. It muſt then be conſidered, that the teſtatrix acquired a new intereſt ſubſequent to the will, and, conſequently, ſuch an intereſt as would not paſs by the words uſed. Rudſtone v. Anderſon, 2 Vez. 418.

Again,

Hone v. Medcraft, 1 Br. Ch. Rep. 261.

Again, *S.* by his will, among other deviſes, gave and deviſed unto *B. the perpetual advowſon and diſpoſal of the living or rectory of W. for ever, together with the tithes of all ſorts thereof.* The rectory of *W.* was held by the teſtator by leaſe from *New College, Oxford*, for the term of ten years. After the will made, the teſtator ſurrendered up that leaſe, and took a new leaſe from the college for ten years more, and was poſſeſſed of the rectory, by virtue of that leaſe, at the time of his deceaſe. And the queſtion was, Whether the deviſe of the advowſon was revoked by the ſurrender and renewal? And it was held, that the ſurrender and renewal were a revocation.

Powell on Deviſ. 589. *Vide* Bunter and Cooke, Salk. 237. 1 P. Wms. 575.

It is neceſſary here to obſerve, on theſe caſes of revocations of wills reſpecting leaſes by ſubſequent ſurrender and renewal of the leaſe, that they turn merely on the penning of the will, *viz.* whether the words are ſufficient to paſs the ſubſequent renewed intereſt, and not on any inability in point of law to give by will an after-taken leaſe; and therefore, if ſuch leaſe be diſpoſed of by will by a proper form of words, it will paſs notwithſtanding any ſubſequent renewal. As, if a teſtator give "all his eſtate, right, and intereſt he ſhall have to come in ſuch leaſe at the time of his death:" ſuch right of renewal will paſs by a general deviſe of the reſidue; or by a deviſe of the leaſe together with a right of renewal. And in the latter caſe, if the deviſor do nothing, the expiration of the old term will not bar the deviſee; becauſe the deviſe carries the right of renewal as well as the leaſe itſelf.

2 Atk. 599. 3 Atk. 177.

Sterling v. Lydiard, 3 Atk. 199.

Upon this principle Lord *Hardwicke* held, in the caſe of *Sterling* v. *Lydiard*, that where the teſtator clearly meant to diſpoſe of his whole perſonal eſtate, a renewal of a leaſe, after the will made, was no revocation of it. In the caſe alluded to, the teſtator deviſed in the following manner, *viz.* "As to *all and ſingular my leaſehold eſtate*, goods, chattels, and *perſonal eſtate* whatſoever, I "give the ſame to my daughter *A.*;" and if ſhe died without iſſue living, then he limited it over in the ſame manner to *B.* In the reſiduary clauſe the teſtator repeated the words "*all and ſingular*, &c." After making this will, he renewed a leaſe *with the dean and chapter of* Windſor. And on the queſtion, Whether this renewal was a revocation of the will as to the leaſe? Lord *Hardwicke* ſaid, there was no doubt but the leaſehold eſtate paſſed by the will. The leaſe here was not a ſpecifick legacy. It was nothing like it. The clauſe was only an enumeration of the ſeveral particulars of the teſtator's perſonal eſtate, but the deviſe was general of the whole.

Carte v. Carte, 3 Atk. 174.

Again, *C.*, in right of a prebend, in 1714, demiſed certain eſtates by indenture to one of his children for twenty-one years, and afterwards a ſurrender was yearly made thereof, and a new leaſe granted by *C.* The leſſee always executed a declaration of truſt, declaring that his or her name was made uſe of in ſuch leaſe, in truſt for the father for ſo many years as he ſhould live of the term, and then for ſuch perſon or perſons as he ſhould by deed or will appoint; and in default thereof, to and among his children equally. In *January* 1735, *C.* made his will, and, after

giving

giving ſeveral legacies, bequeathed to his ſon *T. all the reſt of his goods, chattels, and eſtate, whether real or perſonal, in poſſeſſion and reverſion*, and made him executor. And then came this ſupplemental clauſe; " *Item*, It is my mind and will, that *T.* ſhall have " the diſpoſal of the leaſe of my prebend of made " to my daughter *S.*, and that he ſhall receive to himſelf all the " *profits* and *advantages* ariſing from it." Afterwards, in *Auguſt* 1739, a ſurrender and new leaſe was made to *S.*, and a declaration of truſt delivered as before-mentioned. Then *C.* died; and Lord *Hardwicke*, upon that part of the caſe which related to the operation and extent of the words in the will, ſaid that the queſtion was, Whether the benefit of the renewed leaſe in 1739 paſſed to *T.* by the will of 1735? which depended upon the queſtion, Whether the will of 1735 was ſufficient to paſs not only the truſt of the leaſe then in being, but alſo the benefit of the ſubſequent renewals? And he took the conſtruction of this clauſe in as extenſive a manner, as if the teſtator had particularly recited and repeated the leaſe and declaration of truſt, and given it to his ſon; the effect of which would have been to have given him the whole truſt, not the truſt of the then exiſting term only, but alſo all the renewals; and therefore extended to all future leaſes as well as thoſe in being. The word *advantages* was undoubtedly ſufficient to take in all the advantages and benefits belonging to the truſt. It comprized not only the profits but the renewals, which were conſequential. The words of the will were very ſufficient to paſs not only the truſt and beneficial intereſt then ſubſiſting, but alſo the renewed leaſe.]

If the latter part of a will is inconſiſtent with the former part of it, it ſuperſedes and revokes it. *Per Reynolds*, C. B., and *Comyns* and *Thompſon*, Barons, *in Scacc.* Fitzgibbons, 195. Attorney General v. Governor and Company of Chelſea Water-works.

It was agreed to be the conſtant rule of this court, that where a legacy was given to a child, who afterward upon marriage, or otherwiſe, had the like or greater ſum, it ſhould be intended in ſatisfaction of the legacy, unleſs the teſtator ſhould declare his intent to be otherwiſe; and it was ſaid, the words of ratifying and confirming do not alter the caſe, though they amount to a new publication, being only words of form, and declaring nothing of the teſtator's intent in this matter. Thus— 2 Free. Rep. 224. Irod v. Hurſt. [For caſes on this point ſee vol. 4. tit. Legacies (D).]

Defendant's teſtator by his will gave his four daughters 600*l.* a-piece, and afterward married his eldeſt daughter to the plaintiff, and gave her 700*l.* portion; after that he makes a codicil, and gives 100*l.* a-piece to his unmarried daughters, and thereby ratifies and confirms his will, and dies. Plaintiff preferred his bill for the legacy of 600*l.* given to his wife by the ſaid will. And his Honour held, that the portion given by the teſtator in his lifetime ſhould be intended in ſatisfaction of the legacy. *Id. ibid.*

J. S. had four daughters, *A.*, *B.*, *C.*, and *D.*, and by his will deviſed to *A.* 1000*l.*, and by the ſame will deviſed to them 1500*l.* a-piece for their portions; which laſt ſums of 1500*l.* were to be raiſed Prec. in Chan. 183. Ward v. Lant.

raiſed out of a real eſtate deviſed by his will for that purpoſe. *A.* marries in *J. S.*'s lifetime; and *J. S.* gave her 4000*l.* portion. And *per* Lord K. *Wright*, this 4000*l.* portion muſt be taken to be a ſatisfaction of the 1500*l.* given *A.* by the will for her portion; and a revocation of the will *pro tanto:* but as to the 1000*l.* that being a general legacy, *A.* muſt have it, notwithſtanding the 4000*l.* given her for her portion.

Vin. Abr. tit. Deviſe (R. 2), pl. 16. Parker v. Lamb.

J. S. deviſed lands in *S.* to *A.* his ſon for ninety-nine years, determinable upon three lives, and by his will charges the ſaid lands with an annuity of 40*l. per annum* to his daughter *M.*, and afterward deviſes the ſame lands for ninety-nine years, determinable upon three other lives, reſerving 50*l.* a-year rent; this is, during the continuance of the leaſe, a revocation; but it is no revocation as to the 40*l. per annum* annuity, there being rent enough reſerved to ſatisfy that.

Prec. in Chan. 263. Hoſkins v. Hoſkins.

J. S. by will (*inter alia*) deviſes to *B.* his younger ſon 750*l.*, and afterwards buys him a cornet of horſe's commiſſion, and paid 650*l.* for it, and it was proved he intended this 650*l.* ſhould be diſcounted out of his legacy, and that he would ſtrike ſo much out of the will, as ſoon as the accounts came to *London* to him, but died before they came, without altering his will. Decreed, that the money paid for his commiſſion ſhall go in diminution of the legacy, and be taken in payment and ſatisfaction for ſo much.

Vin. Abr. tit. Deviſe (P), pl. 10.

If a man deviſes lands, and afterward mortgages the ſame for years, and then levies a fine *ſur conuſance de droit come ceo*, and not a fine *ſur conceſſit;* this will be a revocation: but, if there had been a fine *ſur conceſſit*, it had revoked only *pro tanto*.

Prec. in Chan. 298. Bird v. Hooper. His Honour mentioned the caſe of Lord Guernſey, who married a daughter of

A. by will gave his children ſeveral legacies, and to his eldeſt ſon 2000*l.* Afterward he gave him 400*l.* to go to *Italy;* and being a merchant, enters on the debtor-ſide of his book, *My ſon debtor* 400*l.* Then by a codicil, having taken an account of the eſtate, and finding it would not anſwer all the legacies, he retrenches 400*l.* out of each of the younger children's legacies, without taking any notice of the eldeſt ſon, or his 400*l.* His Honour decreed the whole 2000*l.* to the eldeſt ſon.

Sir John Banks, with whom he had a conſiderable fortune in land. Afterward Sir John builds a houſe upon the land, and being a merchant, makes an entry, Lord Guernſey debtor ſo much, for building the houſe; and then makes his will, and deviſes the reſidue of his eſtate to his two daughters: and yet it was held, that this houſe ſhould fall into the lump of the fortune given to Lady Guernſey. *Ibid.*

1 Abr. Eq. Caſ. 407.

A man makes his will duly executed and atteſted according to the ſtatute of frauds and perjuries, and at the ſame time, in like manner, executes a duplicate thereof. Some time after, the teſtator, having a mind to change one of his truſtees, orders his will to be written over again, without any variation whatſoever from the firſt, ſave only in the name of that truſtee; and when it was ſo written over, he executes it in the preſence of three witneſſes, and the three witneſſes ſubſcribed their names, but not in his preſence: after this the teſtator cancels the duplicate, by tearing off the ſeal, and then dies. And the queſtion was, Whether

ther this ſecond will, not being good, as a will to paſs lands, ſhould yet be a revocation of the firſt; and if it ſhould not, whether the cancelling the other ſhould be a revocation thereof within the ſtatute of frauds and perjuries? And it was decreed, that neither the making of the ſecond nor the cancelling of the firſt was a revocation thereof; though in the ſecond there was an expreſs clauſe, that he did thereby revoke all former and other wills. Wherein my Lord Chancellour took this diſtinction, that the ſecond was not intended barely a revocation of the firſt, ſo as to ſignify his intention of dying inteſtate, or without any will; but it was intended as an effectual will to paſs the lands to the perſons, and in the manner thereby deviſed: and therefore if it was not good as a will to that purpoſe, it was no revocation of the firſt, but as it was ſuppoſed to be valid as a will for paſſing the lands by the ſecond: and if a man by his will deviſes lands to *A.*, and after makes a ſecond will, and thereby deviſes the ſame lands to *B.*, if this ſecond will be not good as a will to paſs the lands to *B.*, it ſhall be no revocation of the deviſe in the firſt to *A.*; for it is plain *A.* was to loſe only what *B.* was to gain; and if *B.* gains nothing by the ſecond, *A.* ſhall loſe nothing that was given him by the firſt. But, if a man executes a ſecond will, which appears to have no other intention than to revoke the firſt, and to die inteſtate, though this ſecond be not in all circumſtances duly executed as a will whereby to paſs lands, yet it will operate as a revocation of the firſt. And as to the cancelling or tearing of the firſt will, that is no revocation of it in this caſe, becauſe that was no ſelf-ſubſiſting independent act, but done to accompany, or in a way of affirmation of the ſecond: it was done from an opinion, that the ſecond had effectually revoked the firſt, and therefore he tears the firſt as of no uſe: but the firſt was not effectually revoked by the ſecond: and the act of tearing the firſt will not deſtroy it neither: for though a man may, by the ſtatute of frauds, as effectually deſtroy his will, by tearing or cancelling it, as by making a ſecond; yet if he does make a ſecond, and intends that as a revocation of the firſt, if it be inſufficient for that purpoſe, as in the principal caſe, the tearing and cancelling being only in conſequence of his opinion, that he made a good ſecond will, it ſhall not deſtroy the firſt; but it ought to be ſet up again in equity.

But if a man cancels or revokes either the duplicate or original will, there is an effectual avoiding of both, they being both but one will, and therefore muſt ſtand or fall together. 2 Vern. 742. Onions v. Tyrer.

[A teſtator, (who had for two months together frequently declared himſelf diſcontented with his will,) being one day in bed near the fire, ordered *M. W.*, who attended him, to fetch his will, which ſhe did, and delivered it to him, it being then whole, only ſomewhat eraſed. He opened it, looked at it, then gave it ſomething of a rip with his hands, and ſo tore it as almoſt to tear a bit off, then rumpled it together, and threw it on the fire, but it fell off. It muſt ſoon have been burnt, had not *M. W.* taken it up, which ſhe did, and put it in her pocket. The teſtator did not ſee her Bibb v. Thomas, 2 Bl. Rep. 1043.

her take it up, but ſeemed to have ſome ſuſpicion of it, as he aſked her what ſhe was at; to which ſhe made little or no anſwer. The teſtator at ſeveral times afterwards ſaid, that was not and ſhould not be his will, and bid her deſtroy it. She ſaid at firſt, "So I will, when you have made another;" but afterwards, upon his repeated inquiries, ſhe told him that ſhe had deſtroyed it, though in fact it was never deſtroyed; that ſhe believed he imagined it was deſtroyed. She aſked him who his eſtate would go to when the will was burnt? he anſwered, to his ſiſter and her children. He afterwards told a perſon that he had deſtroyed his will, and ſhould make no other until he had ſeen his brother *J. M.*, and deſired the perſon would tell his brother ſo, and that he wanted to ſee him. He afterwards wrote to his brother, ſaying, "I have deſtroyed my will which I made; for, upon "ſerious conſideration, I was not eaſy in my mind about "that will;" and deſired him to come down, ſaying, "If I "die inteſtate, it will cauſe uneaſineſs." The teſtator, however, died without making another will. The jury, with the concurrence of the judge, thought this a ſufficient revocation of the will; and ſo it was held to be by Lord Chief Juſtice *De Grey* and the whole court, on a motion for a new trial and the rule diſcharged: the Chief Juſtice obſerving, that this caſe fell within two of the ſpecifick acts deſcribed by the ſtatute of frauds; it was both a burning and a tearing: and that throwing it on the fire, with an intent to burn, though it was only very ſlightly ſinged and fell off, was ſufficient within the ſtatute.]

1 Abr. Eq. Caſ. 409. Hyde v. Hyde. 3 Chan. Rep. 155. S. C. and decreed, and adds, that all agreed that the ſecond will, though not ſealed and ſubſcribed as the ſtatute of frauds directs; yet it is good for the perſonal eſtate, it being *caſus omiſſus* out of the ſtatute, and then it was good at common law. *Ibid.* 161.

A man makes his will in writing, and thereby deviſes all his real and perſonal eſtate to his wife, her heirs and executors, in truſt to pay his debts and legacies; and then deviſes ſeveral legacies to his children, and other perſons, and concludes, "In witneſs "whereof I have to this my laſt will and teſtament, containing nine "ſheets of paper, and to a duplicate thereof, to be left in the hands "of ſuch a one, ſet my ſeal to every ſheet thereof, and to the laſt of "the ſaid ſheets my hand and ſeal, in the preſence of three wit"neſſes, who all ſubſcribed their names in due form of law." Afterwards the teſtator being minded to add other truſtees to his wife, and make ſome alterations in his will, ſends for a ſcrivener, and gave directions to prepare a draught of inſtructions for another will, which the ſcrivener does accordingly, and the teſtator read it over and approved of it very well, and ſets his hand to it; and being at a tavern, thinking he had now made a new will, he pulls out of his pocket the firſt will and tears off the ſeals from the firſt eight ſheets, which the ſcrivener ſeeing, aſked him what he was a doing? "Why," ſays he, "I am cancelling my firſt will." "Pray," ſays the ſcrivener, "hold your hand, the other will is not "perfected; it will not paſs your real eſtate for want of being exe"cuted purſuant to the ſtatute of frauds and perjuries." "I am "ſorry for that," ſays he, and immediately deſiſted from tearing off any more of the ſeals; and in ſome ſhort time after dies, without having done any thing further to perfect the ſecond will or cancel the firſt. After his death, on application to the ſpiritual court by the

the wife, who was made executrix of his laſt will, they ſentenced it a good will as to the perſonal eſtate, and admitted her to prove it: and on a bill brought by the legatees againſt the wife, and other truſtees, to have a ſpecifick performance of the truſt in the firſt will, and that the eſtate might be ſold, purſuant to the directions of that will; it was inſiſted upon, that the firſt will was revoked either by making the ſecond, or by tearing off the ſeals from the firſt; but Lord Chancellour held, that the ſubſequent will could be no revocation as to the real eſtate, not being executed according to the ſtatute of frauds and perjuries: and that as to the tearing off the ſeals from the firſt eight ſheets, that not being done *animo cancellandi*, was no revocation; and that the ſeal remaining whole to the laſt ſheet was ſufficient, and in ſtrictneſs it was not neceſſary that all the ſheets ſhould be ſealed: but becauſe the ſpiritual court had ſentenced the ſecond a good will of the perſonal eſtate, his lordſhip held it a good will for the whole perſonal eſtate, and that ſuch legatees of perſonalties in the firſt will, as are left out in the ſecond, muſt loſe their legacies; but for thoſe that had legacies by the firſt will chargeable on the real eſtate, if the ſame legacies were deviſed to them by the ſecond will, that they ſhould ſtill continue chargeable on the real eſtate; provided ſuch legacies were not increaſed or enlarged by the ſecond will: for though the ſecond will was not ſufficient in itſelf to charge the real eſtate, yet ſince the real eſtate remained well deviſed by the firſt will, they ſhould be ſtill ſecured by that real eſtate; for they were not deviſed out of land like a rent, but only ſecured by land, which before was well deviſed; but for new abſolute perſonal legacies deviſed by the laſt will, they ſhould be chargeable only upon the perſonal eſtate, and ſhould have the preference to be firſt paid out of the perſonal eſtate before the other legacies in the firſt will, charged upon the real eſtate, becauſe they had ſeveral funds, out of which they were to be paid; the perſonal legacies in the laſt will out of the perſonal eſtate, which was well deviſed by that will; and the legacies charged upon, or ſecured upon the real eſtate, which was deviſed by the firſt will, out of the real eſtate.

[On a ſpecial verdict in ejectment, the jury found, that *A.*, ſeiſed in fee of the lands in queſtion, made his will, and thereby deviſed them in manner therein ſtated, and after making that teſtament, *viz. &c.* he made *aliud teſtamentum in ſcriptis*, but what were the contents thereof, or its purport, or effect they did not know. The queſtion was, Whether the latter will, ſo found, was a revocation in law of the deviſe of lands in the former? And the court declared their opinion, that they were not ſatisfied the ſecond will did revoke the former; becauſe it was not found that any lands were deviſed by the ſecond will, ſo that it might or might not be conſiſtent with the former; and when the matter ſtood indifferent, the court would not ſuppoſe a revocation of a will ſolemnly made. And this judgment was affirmed on appeal to the Houſe of Lords.

Seymour *et al. v.* Noſworthy *in Sac.* Hard. 374. S. C. Show. Par. Ca. 146. S. C. by the name of Hitchins *v.* Baſſet, *in Banco Regis*, 3 Mod. Rep. 203. Comb. 90. 2 Salk. 592. 1 Show. 537.

On a ſpecial verdict in ejectment, the jury found, that *L.* ſeiſed in fee of *chambers*, and having a conſiderable perſonal property, in 1748,

Goodright *v.* Harwood, 3 Wilſ. 497.

2 Bl. Rep. 937. Cowp. 87. 7 Br. P. C. 344.

1748, by will, *duly atteſted to paſs real property*, gave and deviſed all his real and perſonal eſtate of what nature or kind ſoever, or whereſoever, unto his dear friend *H.*; that, afterwards, in the year 1756, *L.* made and publiſhed *another* will and teſtament in writing, *in the preſence of three ſubſcribing witneſſes, who duly atteſted the ſame;* that the diſpoſition made by *L.* in the will of 1756 was different from the diſpoſition in the will of the year 1748, *but in what particulars was unknown to the jurors; but they did not find that the teſtator cancelled his will of the year* 1756, *or that the defendant deſtroyed the ſame; but what was become of the ſaid will, the jurors ſaid they were altogether ignorant.* The queſtion was, Whether the latter will, being expreſsly found by the jury to be *different* from the former, was a revocation of it? Thoſe who argued, that the laſt will, thus found, revoked the firſt, attempted to diſtinguiſh this caſe from that of *Hitchins* and *Baſſet*, upon the grounds that, in this caſe, the jury were ſo far from being totally ignorant of the contents of the ſecond will, that they were enabled to find, and did find, that the diſpoſition in 1756 was *different from* that in 1748; and they contended, that the fact that it concerned lands was ſufficiently found by the mode of deviſing, and that it extended to the eſtate in queſtion, was inferred from the teſtator's having *no other eſtate* which required the ſolemnities of the ſtatute of frauds. But, on the other ſide it was contended, that, before a latter will could be determined to revoke a former, it muſt be ſhewn to contain an inconſiſtent diſpoſition, or circumſtances muſt be made out from whence that might be preſumed, as ſpoliation, or the like; but here the jury expreſsly found, that they did not know in what the difference conſiſted, though they found it different; that nothing could be preſumed upon a ſpecial verdict; nothing ſpecifically appeared touching the will in 1756; and the arguments for its being a revocation were fallacious; for it did not appear what were the contents thereof, *et de non apparentibus et non exiſtentibus eadem eſt ratio:* that preſumptions were always in the affirmative, there could not be any negative preſumption; that no preſumption could ariſe from a diverſity, unleſs that diverſity were ſhewn and found; that therefore a ſecond *will* in the dark, which neither the jury nor the court ever ſaw, and were *wholly ignorant* of the contents of, ought not to be ſet up; for, if it were, an heir might avail himſelf, by deſtroying the ſecond will, to defeat both wills. And upon theſe grounds it was adjudged, in the court of King's Bench, on a writ of error from the court of Common Pleas, that the latter will, ſo found, was not a revocation, and the judgment below reverſed; and that reverſal was afterwards affirmed in the Houſe of Lords.

Goodright v. Glazier, 4 Burr. 2512. *et vid.* Perk. fol. 210. § 479. 44 Aſſ. pl. 36. M. 44 E. 3. 33.

A teſtator made a will of his lands, and afterwards gave the ſame lands to the ſame perſon by a latter will, but omitted to cancel the former, and afterwards cancelled the latter, and both wills were in the teſtator's cuſtody at the time of his death, the ſecond cancelled, the firſt uncancelled. The queſtion was, Whether, under theſe circumſtances, the firſt will was to be conſidered as revoked, and the deviſor conſequently dead inteſtate.

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Per curiam—A will is ambulatory till the death of the teſtator. If the teſtator let it ſtand till he die, it is his will; if he do not ſuffer it to do ſo, it is not his will. Here though the teſtator made two wills, yet the ſecond will never operated; for it was only intentional, and the teſtator changed his intention, and cancelled the ſecond, ſo that it had no effect; it was as no will at all, being cancelled before his death; then the former, which was never cancelled, ſtood as his will; for none of the caſes of revocations in law, by alteration of circumſtances, applied to this ſort of caſe, and it was clearly not a revocation within the meaning of the ſtatute of frauds, none of the circumſtances delineated in that ſtatute exiſting in this caſe. *Vid.* § 6.

N., in 1759, duly executed his laſt will and teſtament, and alſo a duplicate thereof, but at the ſame time declared that it was not a will to his liking, and that he ſhould alter it. Afterwards, in 1761, he made another will, which was alſo duly executed, the deviſes in which were different from thoſe in the will of 1759, and at the end of it there was a declaration, by which he revoked all former wills. After executing the latter will, *N.* took one part of the old will in his hands, tore off the name and ſeal, and directed the perſon who had made the new will to cut off the names of the witneſſes to the old one, which he did in *N.*'s preſence. *N.* at the ſame time ſaid, that a duplicate of the former will was in the hands of *W.*, a deviſee therein. He then delivered the new will to the perſon who made it, requeſting him to take it away with him to his houſe, and keep it, for reaſons which he mentioned. Afterwards a principal deviſee in the laſt will died, ſoon after which the teſtator ſent for the laſt will, and in 1762 had this will returned him. The teſtator, before his death, ſent for an attorney to make a new will, but became ſenſeleſs before he arrived. On his death, one part of the will of 1759, and alſo the will of 1761, were found together in a paper, both cancelled. The other part of the will of 1759 was found uncancelled in the teſtator's room among other deeds and papers; how it came there did not appear; but *W.*, a deviſee therein, was in the houſe when the ſearches were made. And the queſtion was, Whether the teſtator died inteſtate, or not; that is, whether the will of 1759 was revoked? And it was held, that the will of 1759 was clearly revoked: firſt, by the new will of 1761, which was a complete, legal, and effectual will, and would have revoked the former whether it had been cancelled or not, becauſe at the end of it, there was a declaration, by which he revoked all former wills: ſecondly, becauſe the teſtator had actually cancelled the will of 1759. Burtonſhaw v. Gilbert, Cowp. 49.

M., by his will, gave particular lands, and his perſonal eſtate to be laid out in lands, to charitable uſes; and then by a codicil, reciting his will, and that he had deviſed his lands to ſuch uſes; "but that there had been an act of parliament, intituled, "the "mortmain act," and being in doubt whether the deviſe made "by him to ſuch charitable uſes would be good or not, and be"ing ſtill deſirous, as far as in him lies, to confirm his ſaid will, "nevertheleſs Attorney General v. Lloyd *et al.* 3 Atk. 552, S. C. 1 Ves. 32.

" nevertheleſs if, by the act of parliament, or by any conſtruc-
" tion of law thereupon, the eſtate is not well deviſed, and
" cannot go to thoſe uſes, then and in ſuch caſe he gave the
" lands to *B.* and his heirs." Afterwards *M.* made another co-
dicil, reciting as before, and " that *being adviſed the deviſe of his*
" *lands would be void*, and it being his intention the charity
" ſhould be continued, *and being adviſed his perſonal eſtate could be*
" *given*, he did therefore, by this codicil, give his perſonal eſtate
" to the charitable uſes before mentioned, and he did thereby
" give his real eſtate to *B.*" Between the time of making the will and the codicils, the mortmain act paſſed; and the queſtion was, Whether, upon the conſtruction of all the inſtruments, the laſt codicil was a revocation of the firſt will? which turned upon the point, whether the laſt codicil, as to its revoking the will, was put ſingly upon the point of law, whether the deviſe was valid or not under the mortmain act; or whether the teſtator, having been adviſed that his perſonal eſtate had been ſo much increaſed as to be ſufficient to ſupport the charity, (for the codicil was made a conſiderable time after the will,) taking the whole into his conſideration, *viz.* the point of law upon the ſtatute, *viz.* that the deviſe of the real eſtate would be void, the fact that he might make a good diſpoſition of his perſonal eſtate to the uſes of the charity, and that it would be ſufficient for the purpoſe, meant an actual revocation of the will as to the real eſtate in all events. And on a caſe ſent from the court of Chancery to the court of King's Bench, they certified that the real eſtates were well deviſed to *B.* by the laſt codicil; the neceſſary concluſion from which is, that it was a revocation of the will.

Willet v. Sanford, 1 Vez. 178. 186.

One made his will, deviſing the bulk of his real eſtate to three truſtees on certain truſts, and ſome particular lands to charitable uſes. He then made a codicil, which he publiſhed and declared ſhould be annexed to and be taken as part of his will; and making ſome alterations thereby in the diſpoſition of the truſt of the bulk of his eſtate, *after reciting the deviſe to the charity*, he deviſed the ſame lands, together with another piece of land, to the ſame three truſtees and two others, and their heirs, upon the ſame ſpecial truſts and confidences as in the will, and concluded with confirming *all other parts* of his former will. Upon theſe inſtruments it became a queſtion, Whether this truſt for the charity could take effect? The doubt aroſe from the circumſtance of the mortmain act having paſſed in the time that intervened between the making of the two inſtruments. If the codicil revoked the will as to the charity, it was clear that it could not take effect; becauſe the deviſe to it in the codicil, that being made after the act paſſed, was void. It was therefore contended by thoſe who oppoſed the deviſe to the charity, that by the codicil, the deviſe both as to the legal eſtate and truſt was revoked; for the whole fee, at law, was certainly altered, by the deviſe to five truſtees inſtead of two. It paſſed to different perſons in different manners; the truſtees muſt claim under the codicil; an ejectment muſt have been brought in their five names; they muſt have joined in any con-

veyance: the adding more land alſo ſhewed an intent to make a new regulation. But Lord *Hardwicke* was of opinion, that the beneficial intereſts and profits to the charity, were not revoked but confirmed by the codicil; and one ground of his lordſhip's opinion was, from the nature of the inſtrument which effected a deviſe only in the degree expreſſed, and therefore, though the codicil effected a new deviſe of the legal eſtate by giving it to the ſame truſtees and two others, and an alteration of the truſt eſtate by a variation of the deviſe of the ſurplus profits, it left the truſt for the charity exactly the ſame as under the will.

Sutton v. Sutton, Cowp. 812.

S. being ſeiſed in fee of a houſe at *Bath*, and of other freehold eſtates of the yearly value of 300*l.* and of other eſtates of the value of 500*l.* a year in remainder after the death of his father, made his will, and thereby gave all his lands in poſſeſſion, reverſion, or remainder, *except the houſe at* Bath, *upon truſt to ſell* and diſpoſe of the ſaid lands; and to place the money ariſing therefrom upon real ſecurity, and out of the intereſt and produce thereof, to pay his wife *four hundred pounds* a year, in lieu of ſo much a year which ſhe would be entitled to by their marriage-ſettlement. And he gave to his wife, *in ſatisfaction of the remaining* 50*l.* which ſhe could claim by the ſettlement, *his houſe in Bath* for her *life*, and, after her death, deviſed it to his eldeſt ſon. After reciting his wife's being *enſeint*, he gave to ſuch child, whether ſon or daughter, 3000*l.* to be paid out of the monies ariſing by the *ſale* of the lands, and to be paid at his or her age of 21. He did further by his will direct, that, when the eſtates directed by him to be ſold were actually ſold and the monies ariſing from them inveſted in the ſaid ſecurities, 100*l.* a year ſhould be given to his wife for the bringing up of his daughter *M.*, *and any after-born child:* and if his ſaid daughter, or *ſuch after-born child*, ſhould happen to die before his or her legacy ſhould become due, that then ſuch legacy ſhould ſink into the *reſiduum* for the benefit of his ſon. After ſome pecuniary legacies he gave the reſt, reſidue, and remainder of his eſtate, *&c.* to his ſon; but, in caſe he ſhould die before twenty-one without iſſue, he then gave and bequeathed the ſame reſiduary eſtate *to the child with which his wife was enſeint, if a ſon, as his own for ever; but, in caſe ſuch child ſhould prove a daughter*, then he gave the ſame reſiduary eſtate between his two daughters as tenants in common. At the time of making his will the teſtator had *a ſon* and a *daughter*, and his wife was *enſeint* with another child (a daughter) afterwards named *J. M.* After the date of the will the teſtator *ſold his houſe at Bath*, and had two daughters born, *J. M.* and *A. S.* After the ſale of the houſe in *Bath*, and the birth of his two daughters, the teſtator, in his own hand, made the *following alterations* in his will; but the making thereof was not atteſted, nor the will republiſhed. —In the deviſe to the truſtees *the exception of the houſe at Bath was ſtruck out*—In declaring the truſts of that deviſe, ſo far as related to his wife's annuity, he *interlined* the word "*fifty*," ſo that the annuity was altered to 450*l.* *The bequeſt to his wife of the houſe in*

BATH *was* STRUCK OUT, *and the remainder to his ſon.* The *recital of his wife's being enſeint, and the legacy of* 3000 *l.*, *were* STRUCK OUT, and, inſtead thereof, he inſerted theſe words, "*I* "*give to my two daughters, J. M.* and *A. S.* 2000 *l. each.*" In the direction for bringing up his daughters he made the word "daughter" *daughters*, and inſtead of the words "*after-born child*," he inſerted the names "*J. M.* and *A. S.*" In the clauſe reſpecting the lapſe of the legacies, the word "*daugh-*" "*ter*" was made *plural*, the words "*after-born child*" were STRUCK OUT, and inſtead of "*his or her*" the word "*their*" was inſerted. He alſo made alterations as to his pecuniary legacies. The *reſiduary deviſe* to the child *of which the wife was enſeint* was likewiſe STRUCK OUT, and inſtead of the word "*two*" before "DAUGHTERS" he ſubſtituted the word "THREE." The queſtion referred to the opinion of the court was, Whether, by the will of the teſtator, as *altered, obliterated*, and *interlined* by him, any, and what part, of the real eſtate therein mentioned, paſſed thereby to any perſon, and to whom? Which depended upon whether the alterations and obliterations in the will amounted to a *total revocation of it* with reſpect *to the real eſtate*. And the court, (declining to give any opinion as to the legacies to the daughters, recommending the deciſion of that point to be deferred until the ſon, then an infant, ſhould come of age,) as to the deviſe to the truſtees to ſell, were clearly of opinion it was not revoked but continued in force; and they certified accordingly.]

Vin. Abr. tit. Deviſe (R.4), pl. 3. Townſhend v. Pearce.

A. in *December* 1715 makes his will, and ſigns, ſeals, and publiſhes it in the preſence of four witneſſes, who atteſt and ſubſcribe the ſame in his preſence, and thereby gives to *H. P.* his ſon, and to his heirs and aſſigns for ever, his lands, *&c.* The 2d of *January* following, he orders one *O.* to make an alteration in his will, and interlines theſe words; "I give unto my wife *A. P.* and "her aſſigns, my lands in *W.* for her life; and after her deceaſe "to my ſon *H.* and his heirs." The will is read to the teſtator, and he approves of it with the interlineation: he puts his ſeal upon the wax in the preſence of three of the ſame witneſſes, but does not write his name *de novo*, neither do the witneſſes ſubſcribe theirs *de novo*. The queſtion was, Whether this was a good deviſe to *A. P.* for her life? The doubt was chiefly upon the 29 *Car.* 2., whether this alteration was not a revocation within the ſtatute. Every bequeſt is to continue in force until the ſame be burnt, *&c.* by the teſtator or his direction, in his preſence, or unleſs the ſame be altered by ſome other will or writing of the deviſor, ſigned in the preſence of three or four witneſſes, declaring the ſame. If the will be ſigned, it may be in any part, and *per Parker* and *Eyre*, —The putting a ſeal is a good ſigning; for, *per Parker*, Ch. J. the intention of the parties ſigning it, and the witneſſes atteſting, is only that the witneſſes may know it again. This act is fully penned, and is not to be expounded away. *Per Powis*—Here is no danger of fraud or perjury; here is a new deviſe, and not an alteration only. *Per Eyre*—Every thing is right, ſave the new ſubſcribing by the witneſſes: the caſe of *Lea* v. *Libb*, in *Shower* 68, 69. is

69. is right; nobody can ſay this new bequeſt was ſigned in the preſence of the teſtator. *Per Eyre* and *Parker*—There muſt be more than a bare revocation. It muſt be ſigned in the preſence of three witneſſes. The altering a will muſt be underſtood of a revoking, *i. e.* an alteration by revocation. The latter implies the whole will, the former of any part, otherwiſe this alteration will claſh with the former clauſe; ſo that if the teſtator revokes the whole or part, it ſhall be by will or writing, ſigned in the preſence of witneſſes, but they are not obliged to ſubſcribe. *Per Eyre*—If *H. P.* had been here found heir at law, then *A.* the leſſor of the plaintiff, might have been helped; for if this be an alteration, ſo as *H.* is not to have the lands till after *A.*'s death, ſhe will have an eſtate by operation and implication of law.

If *A.* deviſes lands to *B.* and his heirs, and afterwards mortgages the ſame lands to *J. S.* for years, or in fee, though a mortgage in fee be a total revocation at law, yet in equity it ſhall be a revocation *pro tanto* only. 1 Vern. 329. 342. 97. 141. 182. 1 Salk. 158. S. P.

So, if a man ſeiſed in fee deviſes it to *J. S.* in fee or for life, and afterwards makes a leaſe to *J. D.* for years, this, even at law, ſhall not be a revocation, but during the years; for this intent does not appear further than during the term for years. 1 Roll. Abr. 616. Montague v. Jeffries.

[So, if a teſtator deviſes an abſolute eſtate in fee to *A.*, and afterwards, by a ſubſequent deviſe, gives him only an eſtate-tail in the ſame land; it is a revocation only to the extent of the difference between an eſtate-tail and an eſtate in fee.] *Per* Lord Mansfield, Cowp. 90.

So, if a huſband poſſeſſed of a term for forty years, deviſes it to his wife, and after leaſes the land to another for twenty years, and dies; this leaſe is not any revocation of the whole eſtate; but only during the twenty years, and the wife ſhall have the reſidue by the deviſe. 1 Roll. Abr. 616. Wilcox's caſe.

But, if *A.* deviſes lands to *B.* and his heirs, and twelve years after leaſes the ſame lands to *B.* for ſixty years, to commence after his death, and delivers the deed to a ſtranger, to the uſe of *B.*, who does not deliver it to *B.* till after the death of *A.*; this is a revocation of the whole eſtate; for both eſtates are not conſiſtent nor can veſt in *B.* at the ſame time; and it was plainly the intention of the deviſor, that *B.* ſhould have the leſs eſtate only. And it was ſo adjudged, though objected, that it was the intention of *A.* that *B.* ſhould have his liberty to take by the leaſe or deviſe, *B.* not having agreed to the leaſe in the life of *A.* 1 Abr. Eq. Caſ. 410.

But, if the leaſe made to the deviſee had been to begin either *in præſenti* or *futuro*, in the life of the deviſor, it had not been a revocation, for inaſmuch as the leaſe might have determined in his life, it was conſiſtent with his will. Cro. Ja. 49. Coke v. Bullock.

So, where *A.* by will deviſed to his younger ſon a certain meſſuage for ninety-nine years, if three lives lived ſo long, yielding and paying to his ſiſter the plaintiff, 20*l.* *per ann.* until twelve years old, and thence 40*l.* *per ann.* for life: and afterwards the ſaid *A.* for 300*l.* fine demiſed the ſaid meſſuage to *J. S.* for ninety-nine years, if three lives lived ſo long, yielding and paying 50*l.* 2 Vern. 495. Lamb v. Parker. 2 Freem. 284. S. C. ſays Lord Keeper ſeemed to be

of opinion, that it was not a revocation, becauſe the three lives in the leaſe might die before the teſtator, and

50*l. per ann.* to *A.* the teſtator, his heirs and aſſigns: though it was held at the *Rolls* to be a revocation, yet on an appeal to my Lord Keeper, he decreed it to be no revocation, and that the daughter ſhould be paid her annuity; and he ſaid, that the rule is, where a ſubſequent act ſhall amount to a revocation by implication, it muſt be a neceſſary implication: and the act muſt be wholly inconſiſtent with the deviſe.

then the deviſe would take place; but referred it to the judges of B. R. by way of a caſe to determine.

2 Vern. 241. Vernon v. Jones. 2 Freem. 117. S. C. ſays, the Lords Commiſſioners Trevor, Rawlinſon, and Hutchins were of opinion, that the ſurplus

So, where *A.* deviſed lands to truſtees to pay his debts, and then to pay his wife 200*l. per ann.* for her life; and the teſtator living ſeveral years after, his debts increaſed from 2000*l.* to 10,000*l.*, for 8000*l.* whereof his ſaid truſtees were bound, and afterwards *A.* the teſtator, by deed and fine, conveyed his lands to his ſaid truſtees to ſell to pay his debts, and the ſurplus to him and his heirs: though the wife joined with him in the fine and conveyance, yet this was no revocation of the wife's 200*l. per ann.*, and ſhe was decreed the 200*l. per ann.* out of the ſurplus money after the debts paid.

being to his own right heirs, that it was ſtill in his own power, and ſhould be ſubject to his diſpoſal by the will: and the caſe of Hall and Dench was cited; where, after a deviſe of lands, the deviſor made a mortgage in fee: and adjudged, that the deviſee ſhould have the equity of redemption.——2 Freem. in Chanc. 32. S. C. ſays, the lord commiſſioners held, that neither the mortgage and fine, nor deed of truſt, ſhould be a total revocation of the will, being made for particular purpoſes, but that after debts paid, the widow ſhould have the 200*l. per ann.*

1 Abr. Eq. Caſ. 411. 2 Freem. 202. Reſolved, it was a revocation. And upon an appeal ſo held in *Dom. Proc.* by a majority of two lords only.

But in a caſe where *Edward* Earl of *Lincoln* had mortgaged the manor of *S.* to the defendant *Wynn* and his heirs for 12,000*l.*, and afterwards, by his will, in default of iſſue male of his own body, deviſed it to Sir *Fran. Clinton* (who was to ſucceed him in the honour) for his life, with remainder to his firſt and other ſons in tail male, with other remainders over; and appointed that his houſehold goods at his chief houſe at *S.* ſhould remain there as heir-looms to the next heir male, who ſhould be Earl of *Lincoln*, and made Sir *Fran. Clinton* executor: afterwards the Earl (who was very whimſical) took a fancy to one Mrs. *Calvert*, daughter to the Lord *Baltimore*, and fancied he ſhould marry her, though it was proved in the cauſe, there never was any intention of ſuch marriage in her, or in any of her relations, nor any treaty about it; and in this fancy he makes a leaſe and releaſe of thoſe premiſes to the defendant *Davenport* and *Townſhend*, and their heirs, (in conſideration of the ſaid intended marriage, as it was expreſſed,) to the uſe of himſelf and heirs, till the ſaid intended marriage took effect: then as to part in truſt for Mrs. *Calvert* and her heirs, in lieu of dower, and as to the reſt in truſt that the truſtees ſhould ſell it, to diſencumber that part limited to Mrs. *Calvert*, and the ſurplus of the money to his executors and adminiſtrators. There was no farther progreſs towards the marriage, and ſome time after the Earl died without any alteration of his will, and the honour deſcended to Sir *Fran. Clinton*, (who had but a very ſmall eſtate, if any,) who died ſoon after; and the plaintiff, his eldeſt ſon and heir, an infant of about ſeven years old,

old, brought his bill to have the redemption of the mortgage, and a conveyance of the eſtate: and the defendants *A.*, *B.*, and *C.*, who were couſins and coheirs of Earl *Edward*, brought a croſs bill, that they might redeem and have the eſtate conveyed to them. And the only queſtion was, Whether this leaſe and releaſe were a revocation of the will? It was ſaid for the plaintiff that the earl had but an equitable intereſt, the whole eſtate being before mortgaged in fee, and therefore it ought to be conſidered according to equity; and that though ſuch a leaſe and releaſe would have been a revocation of a deviſe of a legal eſtate, yet it will not be ſo here; for the reaſon the law goes upon in judging it a revocation is, becauſe the leaſe and releaſe is a conveyance of the eſtate, and ſo *ex neceſſitate rei* a revocation of the deviſe: and it is plain the law goes upon this, and not upon any ſuppoſed alteration in the perſon's will. For if a man makes a will, and thereby deviſes lands to *J. S.* and his heirs, and afterwards articles to ſell the lands to *J. D.* and his heirs, and receives the purchaſe-money, and dies before any conveyance made, theſe articles will be no revocation of his will: and yet it is as plain his mind and intention, as to thoſe lands, is altered as much as if he had actually made a conveyance to *J. D.*, and in caſe of an equitable intereſt, the leaſe and releaſe makes no alteration of the eſtate, ſo as to induce a neceſſity of adjudging it a revocation, as there is in caſe of a legal eſtate: it is plain as to his intention, that he did not intend any revocation or alteration of his will, unleſs or until that marriage ſhould take effect; for by the releaſe it is limited, that till that marriage it ſhould continue to him and his heirs, which is juſt as it was before; and that marriage having never taken effect, the eſtate continues juſt as it was. And it cannot be pretended, that this leaſe and releaſe are any expreſs revocation of his will; and the court of Chancery is ſo far from following the ſtrict rules of legal revocations, that it often relieves againſt them. And therefore, if a man deviſes *Blackacre* to *J. S.* and his heirs, and afterwards mortgages it to *J. D* and his heirs, this, in law, is a revocation of the deviſe, and yet in equity it ſhall be none farther than to let in the mortgage; and to this purpoſe were cited ſeveral caſes. And therefore, ſince the court of equity muſt interpoſe for one ſide or the other, it was concluded it ought to interpoſe for the preſent earl, and that he ought to have the redemption of the eſtate, as deviſed by the will of Earl *Edward*. For the defendant it was ſaid, that ſuch a leaſe and releaſe would have been a revocation of a deviſe of a legal eſtate, and that equitable eſtates are governed by the ſame rules that legal eſtates are; and there is no fraud or circumvention, nor other equitable circumſtances, to make the court vary from that rule in this caſe; and the will is in diſinheriſon of the heir, who is always favoured in all courts. And as to the caſes put, where mortgages have been held to be no revocation in equity, it was ſaid, the reaſon of that is, becauſe mortgages are not conſidered as conveyances of the eſtate, but only charges upon it: and my Lord Keeper was of this opinion, and decreed the plaintiff's bill

[" This " court," meaning a court of equity," has " no autho- " rity, nor " has ever " attempted " to exerciſe " an autho- " rity, to " determine " that revo- " cations of " wills are " ſubject " here to " different " rules from " thoſe that " would go- " vern at " law." By Lord Ch. Lough borough, 2 Vez. jun. 426. " With " regard to " all the " doctrine " of revoca- " tion as " applied to " legal " eſtates in " courts of " law, " courts of " equity " will apply " the ſame " doctrine " in equi- " ty." By the Maſter

of the Rolls, 2 Vez. jun 598.]

bill to be diſmiſſed, and the coheirs to have the redemption of the mortgage.

1 Abr. Eq. Ca. 412. Pollen v. Huſband.

So, where Sir *John Huſband* by will in writing, dated the 12th of *Feb.* 1708, deviſed ſeveral pecuniary and ſpecifick legacies, and then gave all the reſt of his real and perſonal eſtate, after all his debts and legacies paid, to *John Pollen*, on condition he took the name of *Huſband* upon him, and the heirs male of his body, with divers remainders over: afterwards by leaſe and releaſe, the 30th of *Aug.* 1709, Sir *John Huſband*, together with *J. S.* his truſtee, conveyed ſeveral manors and lands in the county of *Warwick* to truſtees and their heirs, to the uſe of himſelf for life, without impeachment of waſte, and that the truſtees and their heirs ſhould execute ſuch conveyance and conveyances thereof as the ſaid Sir *John* by writing under his hand and ſeal, or by his laſt will and teſtament, ſhould direct or appoint; and in 1710 Sir *John* died, without altering or revoking the ſaid will, or making any other appointment touching the ſaid real eſtate: the queſtion was, Whether this leaſe and releaſe were a revocation of the will or not; the original bill of *Pollen* being to eſtabliſh the will, and the croſs bill to ſet aſide the will, and have an account of the profits. And it was decreed, that the leaſe and releaſe were a revocation of the will.

2 Vern. 720. Clarke v. Berkley.

A. having iſſue four daughters, and no male iſſue, deviſes lands to truſtees, in truſt to permit his daughter *S.* to receive the rents and profits until her marriage or death; and in caſe ſhe married with the conſent of two of the truſtees and her mother, then to convey the premiſes to her and her heirs; but, if ſhe died before marriage, or married without ſuch conſent, then to convey to other perſons: afterwards *S.* married in the lifetime of her father, and with his conſent, and he ſettled part of thoſe lands on her and her huſband, and died. And it was held, that this ſettlement was no revocation of the will, as to the deviſe of the other lands.

Vin. Abr. tit. Deviſe (U), pl. 11. Clarke & ux. v. Lucy, & *al.* For, *per* Lord Chanc. conditions of this kind, be the conditions precedent or ſubſequent, are in nature of penalties and forfeitures; and if the ſubſtantial part and intent be perfo med. equity

So, *J. S.* having four daughters, *A.*, *B.*, *C.*, and *D.*, in 1705, by will deviſes ſeveral parcels of his eſtate ſeverally to his four daughters, and *inter alia* he deviſes to truſtees all his lands, tenements, and hereditaments in *E.* and *F.*, or either of them, or near thereto adjoining, in truſt for *A.* until her marriage or death; and in caſe ſhe married with the conſent of her truſtees, then for her and her heirs, or for ſuch perſon as ſhe ſhould appoint, *&c.* But in caſe ſhe married without conſent of her truſtees, and forfeited her eſtate, then to her other ſiſters equally among them, *&c.* In 1708 the plaintiff *Clarke* married *A.* with the conſent of *J. S.*, and he ſettles upon the marriage (his wife, who had theſe lands in jointure, joining with him,) part of theſe lands deviſed to her by his will, after the death of her mother, and alſo 7 *l. per annum* in fee-farm rent, which was doubtful if it paſſed by the will or not. In 1709 *J. S.* died without altering his will. (Note *J. S.*, in a letter to *Clarke* upon the treaty of marriage, declared what he would give him with his daughter in preſent, and that ſhe would be a better

better fortune at his death.) *Quære*, If this deviſe to *A.* in fee, upon condition of marrying with the conſent of truſtees, be diſpenſed with or performed by her marrying in *J. S.*'s lifetime, and with his conſent? And *Cowper*, C. was of opinion, that by the marriage with the conſent of the father, the condition is diſpenſed with, and the deviſe become abſolute.

ſhould ſupply ſmall defects, and favour the deviſee: and his lordſhip obſerved, that it was admitted that here was no forfeiture; and ſaid, ſhould he take away the eſtate from the firſt deviſee, when it cannot go to the deviſee over, it would deſcend to heirs at law, which certainly was never the intent of the teſtator. One queſtion in this caſe was, If the father giving and ſettling, upon *A.*'s marriage, part of the lands deviſed to her by the will precedent to the marriage, be a revocation of the whole deviſe to her, or only *pro tanto*, as was ſettled on her upon the marriage? And Lord Chancellour held, that the lands ſettled by the father, upon the marriage of *A.*, is a revocation only *pro tanto* of the lands deviſed to her, and not of the whole deviſe; for implied revocations ought to be plain and certain, and the inconſiſtency moſt apparent, which is not ſo in this caſe: for why may not the father give his daughter all theſe lands at his death, though it was not proper for him to part with them all in his life time? Though he gave part by deed, why may he not give her the reſt by will? Decreed for plaintiff the wife, for all the lands deviſed to her by will. *Ibid.* And ſee *ante*—2 Vern. 720. Clarke *v.* Berkley, *&c.*

[*B.* by will duly executed purſuant to the ſtatute of frauds, and dated in *October* 1738, gave and deviſed 800*l.* to his ſiſter *E.*, and alſo 400*l.* to his ſiſter *L.*, and other ſmall pecuniary legacies, and then gave all his real and perſonal eſtate, not otherwiſe therein diſpoſed of, after payment of his debts and legacies, to *S.* his brother, and appointed him executor. Afterwards *B.* by a ſubſequent will, dated *May* 1741, and revoking all former wills, gave and bequeathed 100*l.* to his ſiſter *L.*, and 400*l.* to his ſiſter *E.* and the reſt and reſidue of his eſtate, real and perſonal, he diſpoſed of as before. But the latter will was not executed according to the ſtatute of frauds. Lord *Hardwicke* being of opinion, that theſe legacies being to be taken originally as perſonal, becauſe although the latter words created a charge upon the land, yet they were in their primary intention perſonal; the next queſtion was, Whether the legacies given by the firſt will were revoked by the ſecond *in toto*, they being given differently and to different perſons; or, whether the legacies given by the ſecond will were to be conſidered as only modifications of the firſt, and, conſequently, as revocations of them *pro tanto* only; the conſequence of which would be, that the latter legacies would continue a charge upon the land? And Lord *Hardwicke* was of opinion, that the legacies given by the ſecond will were to be conſidered as part of the money given by the firſt, only new-modelled or qualified; and that the ſecond will, therefore, was a revocation of the firſt *pro tanto* only; and, accordingly, decreed the raiſing of the leſs ſums out of the real eſtate of the teſtator.

Brudenell *v.* Boughton, 2 Atk. 268.

B. in 1714, by leaſe and releaſe, conveyed certain eſtates in *H.* to himſelf for life, remainder to his firſt and other ſons in tail, remainder to *B.* for life, remainder to his firſt and other ſons in tail, remainder to the right heirs of *B.*, ſubject to a power of revocation by any deed or writing under his hand and ſeal, *&c.* ſo as that, at the time of ſuch revocation, he ſettled other land in *Yorkſhire* free from incumbrances to the ſame uſes. *B.* afterwards made his will in 1729, and thereby, among other things, deviſed *all* his lands in *Yorkſhire* and elſewhere to truſtees upon truſts therein mentioned. Then *B.* in

Burgoyne *v.* Fox, 1 Atk. 576.

1730, by leaſe and releaſe, intended by him as an execution of the power of revocation reſerved in the former deeds, conveyed a *diſtinct* eſtate in *Yorkſhire* to the uſes of the former ſettlement in 1714, but this eſtate was deficient in value and ſubject to a term for ſecuring children's fortunes, and, therefore, the ſettlement of it not a good execution of the power reſerved in the former deed. But the leaſe and releaſe, in 1730, being made ſubſequent to the will of 1729, was clearly held to be a revocation of the will *quoad* the deviſe of the *Yorkſhire* eſtate, as part of all the teſtator's lands, *&c.* in *Yorkſhire* mentioned to be deviſed by the will; and that eſtate therefore was not ſubject to the truſts created thereby.

Martin v. Savage, Barnard. 189. S. C. cited 1 Ves. 440.

So where a man by his will gave an eſtate in fee to one of his ſiſters, and after this made a marriage-ſettlement, wherein he limited the eſtate in ſtrict ſettlement, remainder to his own right heirs; that ſettlement was held, notwithſtanding the remainder was limited to his own right heirs, and ſo the old uſe, to be a revocation of the whole deviſe to the ſiſter.

Bennet v. Wade, 2 Atk. 325.

Again, it was held by Lord *Hardwicke*, in the caſe of *Bennet* and *Wade*, that a recovery ſuffered of land after a will made, gave a new eſtate therein to the tenant to the *præcipe*, although the limitations were to the old uſes; and, conſequently, that a will thereof made previouſly was revoked by it.

Darley v. Darley, 3 Wilſ. 6. S. C. 7 Br. P. C. 177.

Again *A.* being, under his marriage-ſettlement, tenant for life, with remainder to truſtees to preſerve contingent remainders, with remainder to his firſt and other ſons in tail, remainder to himſelf in fee, made his will, and thereby deviſed the ſettled eſtates as in his will mentioned; and then, by indenture of leaſe and releaſe, conveyed the ſame hereditaments to *B.*, his heirs and aſſigns for ever, and, afterwards, by another indenture, reciting the foregoing leaſe and releaſe, and that the ſame was to make *B.* tenant to the *præcipe*, for ſuffering a recovery, the uſes whereof were therein declared, as to the lands in queſtion, to be to himſelf and his heirs. Then a recovery was ſuffered, after which *A.* the teſtator died without republiſhing his will, and without there having been any iſſue of the marriage. The queſtion was, Whether the deeds executed and the recovery ſuffered were, under the circumſtances of this caſe, a revocation of the will? The counſel for the deviſee argued that, in this caſe, the deeds and recovery did not amount to a revocation, the ſame being executed and ſuffered by *A.* without any intention appearing upon the ſtate of the caſe to alter or revoke his will; that a recovery by tenant for life, remainder to truſtees, *&c.* was a nullity, an innocent recovery, and in this caſe nugatory, that *A.*'s eſtate for life was not deviſable; that all he could deviſe was his reverſion or remainder in fee, and that thereof he could not ſuffer a recovery; that the recovery therefore only operated on his life eſtate, which amounted to nothing. But the court of Common Pleas afterwards certified, that the deeds executed, and the recovery ſuffered, were a revocation of the will, but did not give their reaſons for this deciſion. But the ground thereof ſeems to have been that, by the recovery, *A.* drew the whole intereſt in the land into himſelf, and got one

entire

entire fee, a total new eſtate in fee which could not be defeated but by the entry of the truſtees to preſerve contingent remainders; and that his former eſtate for life, with contingent remainders, *&c.*, and remainder over in fee, were all gone, until the truſtees ſhould enter for the forfeiture, which they never did: ſo that *A.* died ſeiſed of an eſtate in fee in poſſeſſion of the lands compriſed in the ſettlement, which was a *different* eſtate from that which he had when he made the will.]

A. made his will, and thereof his brother executor, and deviſed unto his executor all his eſtate both real and perſonal, and four years afterwards he marries, and then by a codicil makes his wife his executrix. And the queſtion was, Whether the brother ſhould have the perſonal eſtate? And it was urged that he ſhould; for he does not take it as executor only, but by expreſs words of gift in the will, and it appears that there was not only a benefit intended him as executor, for even the real eſtate was deviſed to him; but it being in proof that he had not any real eſtate in the world, it was ſaid by my Lord Chancellour, that the perſonal eſtate was deſigned him only as executor: and it was thereupon decreed for the widow, the executrix. 2 Vern. 232. Wilkinſon v. ——.

If *A.* by his will deviſes all the reſidue of his perſonal eſtate to *B.* and *C.*, and makes them executors; and after, by a codicil, cancels and revokes every legacy, thing, and part relating to *B.*, and revokes his being executor: *C.* ſhall have the whole. A revocation, without a new gift, ſhall have the ſame effect as if it had been expreſsly given; and whether it be by codicil or obliteration, it is the ſame. MS. Rep. Humphries v. Taylor in Canc. Hil. 25 G. 2.

An alteration of circumſtances has been conſidered as an implied revocation.—Thus,

J. S., being a bachelor, made his will, and deviſed a legacy of 500*l.* to his brother, and other legacies to other perſons, and deviſed his real eſtate to *Eliz. Cloſe* and her heirs; and afterwards intermarried with the ſame *Eliz. Cloſe*, and died, leaving her *privement enſeint* with a ſon, without making any alteration in his will; and the main queſtion in the caſe was, Whether this alteration in the teſtator's circumſtances did, of itſelf, without more ado, amount to a revocation? Thoſe who argued for its being a revocation, relied on the caſe of one *Ayres* (*a*), in which it was reſolved by the judges, that where a man that was unmarried made a will and deviſed away his eſtate, and afterwards married and had a child, and died without making any revocation of his will, this alteration of circumſtances was, in itſelf, a revocation of the will. And a caſe was cited out of *Cicero* (*b*), where one thinking his ſon dead, deviſed his eſtate to another; yet the ſon returning, it was held he ſhould have it, becauſe it was not to be ſuppoſed he would have diſinherited him without reaſon. On the other ſide it was argued, that though alteration of circumſtances may, in ſome caſes, amount to a revocation of a will, yet it does not in this caſe; for there is nothing but what a reaſonable man might do, nothing unjuſt or unjuſtifiable. It appeared he had an intention of marrying *Eliz. Cloſe* when he made his will, though 1 Abr. Eq. Caſ. 413. Brown v. Thompſon. 1 P. Wms. 304. in a note, this reporter ſays, that this caſe was heard at the Rolls, 8 Dec. 1701, where Sir John Trevor held, that a ſubſequent marriage, and having children, was a revocation of a will of land, and diſmiſſed the bill of the legatees, claiming legacies charged on the eſtate by

though perhaps he might not know when he died that his wife was *enſeint*, or if he did, yet it is not uncommon for many who are kind to, or fond of their wives, to leave their children wholly in their power, to make them the more dutiful to her, and that he muſt know the ſon would be the wife's heir, as well as his; and would have the eſtate as ſuch, if ſhe did not diſpoſe of it from him. Lord Keeper was clearly of opinion, that alteration of circumſtances might be a revocation of a will of lands as well as of a perſonal eſtate; and that, notwithſtanding the ſtatute of frauds and perjuries, which does not extend to an implied revocation: but no ſuch alteration appears here, for no injury is done any perſon; and thoſe are provided for whom the teſtator was bound to provide for, and ſo eſtabliſhed the will.

ſuch will. And the reporter adds, that he finds in the regiſtrar's book, that Wright, Lord Keeper, in July following, reverſed the order of diſmiſſion, and decreed the payment of the legacies.

(*a*) 1 P. Wms. 304. S. C. cited by Sir John Trevor, Maſter of the Rolls, and appears to have been the caſe of Eyre v. Eyre, ſaid to be reported to Sir John, by Treby, Ch. J. and ſome eminent civilians. *Ibid.* in a note. (*b*) *Vid.* Cic. de Oratore, Cantab. Ed. p. 69, 102, &c. Dig. L. ult. de Hæred. Inſt. [Upon the principle which the Maſter of the Rolls went upon in Brown v. Thompſon, it was decided in the Exchequer, upon a will, made by one in the lifetime of a former wife who died without iſſue, whereupon he married a ſecond wife by whom he had iſſue; that the teſtator's ſecond marriage, *and having iſſue* by that marriage, was a total revocation of the will made in the lifetime of the firſt wife. Chriſtopher v. Chriſtopher, cited in 4 Burr. 2182. in Scacc. 1771. See alſo Wellington v. Wellington, 4 Burr. 2171.—The ſame queſtion occurred in the caſe of Spragge againſt Stone. In this caſe there were two wills. The firſt will was made in Jamaica in 1764, by which the whole eſtate, real and perſonal, was deviſed to a ſtranger. The teſtator married in 1765, and had iſſue in 1766 Afterwards, on the 10th of October 1766, the teſtator made another will, which was in his own hand-writing, but not duly atteſted according to the ſtatute of frauds, by which he deviſed his eſtate, real and perſonal, to his wife in truſt for his ſon. It had been decreed in the court of Chancery in Jamaica, that the marriage and birth of a child, and the ſecond will, amounted to a revocation as to the perſonalty, but not as to the real eſtate. But, on appeal to the privy council, (Parker, Chief Baron, De Grey, Chief Juſtice, and Sir Eardly Wilmot, being preſent,) the decree, as to the real eſtate, was reverſed, and it was declared, that the ſubſequent marriage and birth of a child were, in point of law, an implied revocation of the will of 1764. No notice was taken of the ſecond will in the order of reverſal. Spragge v. Stone, at the Cockpit, 20th March 1773, cited in Dougl. 35.]

1 Ld. Raym. 441. Lugg v. Lugg.

Though marriage and the having of children has been deemed a revocation of a will, yet it is only a preſumptive revocation; for if it appears by any expreſſion, or other means, to be the intent of the deviſor, that his will ſhould continue in force, the marriage will be no revocation of it.

Brady v. Cubitt, Dougl. 31.

[Thus, *J. N.* ſeiſed in fee, *inter alia*, of the eſtates in queſtion, in *June* 1770, being a widower without children, and his ſiſter *A.* being his heir at law, made his will in writing duly atteſted, and thereby deviſed the ſame eſtates to truſtees, to the intent that the Chancellour, Maſter, and Scholars of the Univerſity of *Cambridge*, and their ſucceſſors, ſhould receive an annuity thereout upon truſt to be applied as directed in a book covered with marble paper, of his own hand-writing, &c. by the will referred to; and ſubject to, and chargeable with the ſaid annuity, and the powers and remedies for recovery thereof, in truſt for his own right heirs and aſſigns for ever. *The will did not contain any deviſe of any other part of the teſtator's real eſtate.* After making this will the teſtator married, but, previous to the marriage and after making the will, he conveyed certain lands, of the annual value of 123*l.* to truſtees for the purpoſe of ſecuring to his intended wife a clear yearly ſum of 800*l.* in caſe there ſhould be no ſon of the marriage, and 600*l.* if there ſhould be a ſon, by way of

jointure

jointure and in bar of dower, with remaindet to himſelf in fee. The eſtates *deviſed by the will* were *not* compriſed in this conveyance. The teſtator had iſſue of the ſaid marriage one daughter. *After* her birth, he, continuing ſeiſed as aforeſaid, ſubſcribed his name to another paper-writing in the preſence of three witneſſes, who, at his requeſt, ſubſcribed their names thereto in his preſence and in the preſence of each other, the effect of which was as follows: *viz.* "Memorandum of what *J. N.* ſaid in the preſence "of *A.*, *B.*, and *C.* on the —— day of ——, that as his will "was made before he married a ſecond time, he had there de-"viſed his eſtate to his heir male;" and then after mentioning other circumſtances it ſtates, "that he alſo particularly deviſes, "that the college gift may be paid and diſpoſed as he has in the "ſaid will directed. The parchment book reſpecting the college "gift is to ſtand. Mr. *B.* had inſtructions for this and drew it "up." But, before the ſigning of this paper by *J. N.*, he ſtruck out this latter part of the memorandum by drawing his pen acroſs it, ſaying to the perſon who reduced it into writing, "*You may* "*draw your pen through what you have now written, for there is a* "*parchment book with the will in the hands of* B. *that mentions all* "*about it.*" Soon after this the teſtator died. And one queſtion was, Whether this will, and the deviſe therein to the charity, was revoked by the ſubſequent marriage and birth of a child? And it was held that it was not; for a ſubſequent marriage and birth of a child affording a mere preſumption, which in this caſe, as in every other, might be rebutted by every ſort of evidence, the declaration of the teſtator, as to drawing the pen through the latter part of the inſtrument laſt executed, and *referring to his will* as a ſubſiſting inſtrument, was deciſive evidence to rebut the preſumption, that the change of his circumſtances furniſhed an intent to revoke.

But it does not ſeem, that either of theſe circumſtances, *viz.* marriage and the having of children, would *ſingly* ſuffice to raiſe the preſumption of an intended revocation.

A teſtator having made his will, after ſome ſmall legacies to his collateral relations, conſtituted his wife reſiduary legatee. After the making of the will, *viz.* in 1673, his wife was brought to bed of a daughter, upon whoſe birth the teſtator added a codicil, whereby he directed that the legacies ſhould be paid, and that an annuity of 300*l. per annum* ſhould be ſecured on the *reſiduum* and paid to his daughter. The codicil and will were found together. In 1765 another daughter was born, and in 1768 a ſon, who was a poſthumous child, the teſtator being dead about ſix months before his birth. And the queſtion, on a caſe ſent out of Chancery by Lord *Camden* for the opinion of Sir *George Hay*, was, Whether the ſubſequent birth of children was a revocation of this will? And it was determined, that the ſubſequent birth of children, even in caſe of perſonalty, did not amount to a revocation.] Shepherd v. Shepherd, Dougl. 38, note (10).

A ſubſequent deviſe to a perſon incapable of taking, is a revocation of a precedent deviſe to a perſon capable. This was approved by the counſel on both ſides as good law. Thus, in a 10 Mod. 233. Roper v. Radcliffe.

Deviſe

Vin. Abr. tit. Deviſe (R. 3), p 141. Beard v. Beard, 3 Atk. 72.

Deviſe of lands to *A.*, if afterwards the deviſor deviſes the ſame lands to *B.* who was a papiſt, both deviſees are void; for though the laſt is void as a will, yet it is good as a revocation.

[*A.*, being at variance with his wife, by his will, made in 1739, and executed at a tavern, gave all his eſtate real and perſonal to his brother, and made him executor. And in 1740, *A.* by a deed poll gave and granted to his wife *all his ſubſtance* which he then had or might thereafter have. The queſtion was, Whether this will was revoked by the deed poll? *Et per* Lord Chancellour, the latter inſtrument cannot take effect as a grant or deed of gift to the wife; becauſe the law will not permit a man to make a grant or conveyance to his wife in his lifetime, neither will a court of equity ſuffer the wife to have the whole of the huſband's eſtate while he is living; for it is not in the nature of a proviſion, which is all the wife is entitled to. But then, another conſidera. tion remains, *viz.* though it cannot take effect as a grant to the wife, yet, whether it be not an act ſo inconſiſtent and repugnant to the will, that it may, though an act not ſtrictly legal, amount to a revocation? And his lordſhip ſaid, that he was of opinion it was, and declared, that the will was revoked as to all *the perſonal eſtate* by the deed poll.

Nota, The deed poll only extended to perſonal eſtate.

Arnold v. Arnold, 1 Br. Ch. Rep. 401.

M. made her will, and thereby deviſed a meſſuage in *L.* to her ſiſter for life, and after her deceaſe to truſtees to ſell the ſame, and to apply 200*l.*, part of the produce thereof, to *A.*, and other parts to other perſons, and gave the reſidue to *C.* After the making of the will, the teſtatrix ſold the eſtate for 2500*l.*, part of which was left on mortgage of the eſtate, and the remainder laid out in the purchaſe of ſtock. Then the teſtatrix died without re-publiſhing the will; and the queſtion was, Whether this ſale was a revocation of the will? And it was held that it was, for there was an abſolute diſpoſition made by the will, and, before that could take effect, another abſolute diſpoſition inconſiſtent with it.]

Vin. Abr. tit. Deviſe (Y), pl. 2. Saunders v. Hawkins.

A deviſe was made of a term carved out of an inheritance for ninety-nine years, before the ſtatute of 3 & 4 *W.* & *M.* *c.* 14. of fraudulent deviſes, in truſt to pay 14*l.* *per annum* to a grand-daughter for life; and after the making of this will, the deviſor mortgaged this land for five hundred years, (which is a revocation in law for the term, but the deviſee has an equity to redeem the mortgage,) the mortgagee aſſigns over the mortgage to the plaintiff, who was a creditor by bond to the teſtator, and the reverſion in fee deſcended to the teſtator's heir at law. *Per Cowper*, Ch. —The mortgage is a revocation *pro tanto* of the deviſe of the annuity, and ſhe muſt keep down the intereſt, or pay a third part of the redemption; but being a deviſee ſhe may redeem the mortgage without paying the bond.

Vin. Abr. tit. Deviſe (R. 6), pl. 25. Bernardiſton v. Carter.

A. deviſes land to an executor for payment of debts, and recites that a particular ſchedule of them was annexed to the will, remainder over. Afterwards he mortgages part of the ſaid lands, and pays moſt of the ſchedule debts with the money. And it was decreed, that this mortgage is not a revocation, either in all, or part,

part, and that the will ought to extend to all the debts that ſhould be owing at the time of his death, and not to the ſchedule debts only; and that the mortgage was only a ſecurity, and not an appointment how it ſhould be made. But this decree was reverſed, though without prejudice to the heir at law.

If lands are deviſed to one in fee, and afterward mortgaged to the ſame deviſee, it is a revocation *in toto*, being inconſiſtent with the deviſe; though it was agreed, if the mortgage had been to a ſtranger, it had been a revocation *quoad* the mortgage only. Decreed *per* Lord *Macclesfield*. Prec. in Chan. 514. Harkneſs v. Bayley.

J. S. by his will gives his daughter 500*l.* for her portion, and afterwards marries her to *A.*, and gives her 300*l.* for her portion in marriage, and lived four years after without revoking his will. Afterwards the huſband is a bankrupt, and the aſſignees brought a bill againſt the father's executor for the 500*l.*, or at leaſt to recover 200*l.* to make up the portion *tantamount* to the 500*l.* legacy. Lord Chancellour *Parker* with great clearneſs held, that giving a daughter a portion by will, and afterwards a portion in marriage, is by the law of all other nations, as well as *Great Britain*, a revocation of the portion given by the will; and diſmiſſed the bill with coſts. 1 P. Wms. 681. Hartop v. Whitmore. Prec. in Chan. 541. S. C. ſtates it thus: *J. S.* by will gave 300*l.* portion to *M.* his daughter, if ſhe married with her mother's conſent, but if not, then 200*l.* only: *M.* afterwards, in the lifetime of her father and mother, married without the conſent of either of them, but the father was afterwards prevailed on to give her 200*l.* and died without altering his will. *M.*'s huſband afterwards becoming a bankrupt, his aſſignees brought a bill to have the 300*l.* or at leaſt the 200*l.* given *M.* by her father's will; but the bill was diſmiſſed, for that the 200*l.* given by the father in his lifetime, was a ſatisfaction of the legacy, and a revocation of the will as to that portion; and the 300*l.* was to take place on her marrying with her mother's conſent, which could only be intended after the father's death, and conſequently the legacy never became due at all. [*Vide ſupra*, vol. iv. tit. Legacies (D).]

Teſtatrix having three daughters, *A.*, *E.*, and *M.*, by will deviſed 1000*l.* to *A.*, 800*l.* to *E.*, and 500*l.* to *M.* After this will was made, plaintiff courted *A.*, and upon a treaty of marriage, teſtatrix gave a note for 500*l.* payable within ſix months after the marriage to plaintiff, in augmentation of her daughter's portion left her by her father; and the next day the marriage was had; and upon the ſame day the teſtatrix was taken ill, and died ſix days after, without altering or making a new will; but ſhe declared, that ſhe intended that her daughter *A.* ſhould have but 1000*l.* from her, and that now ſince ſhe had given her this 500*l.* ſhe muſt alter her will; and ſent for an attorney to do it; but when he came ſhe was light-headed, and died ſoon after. And it was ſaid by the defendants, the executors, that the teſtator's aſſets were not ſufficient to pay the plaintiff the 500*l.* upon the note, and the 1000*l.* legacy, and likewiſe the legacy left to the other two daughters. And two points were made; firſt, If this 500*l.* note ſhall be taken in part of ſatisfaction of the 1000*l.* legacy? Secondly, If parol evidence ſhall be admitted to prove the intent of the teſtatrix? And *per* Lord Chancellour *Parker*—The circumſtances of teſtatrix and her family may be given in evidence to expound the will, but not any parol declarations to explain the words of the will, or to controul it: that in this caſe there is no doubt upon the words of the will; but the queſtion is, If the teſtatrix Vin. Abr. tit. Deviſe (Y. 2), pl. 10. Pepper & *Ux.* v. Winyeve & *Ux.*

teſtatrix has not advanced part of the legacy in her lifetime upon the marriage of her daughter? And the evidence is only as to the ſatisfaction; and thereupon his lordſhip admitted the evidence to be read; and directed the Maſter to ſee if there were aſſets ſufficient to pay all the legacies; and upon report the court to determine as to the *quantum* due to the plaintiff.

2 P. Wms. 328. River v. Wager. And his lordſhip thought this caſe the ſtronger, becauſe, after the marriage-articles entered into, *J. S.* had executed a codicil, confirming his will ſubject to the articles, which confirmation was a republication of his will, and as if he had written it over again, or had afterward for a valuable conſideration aſſigned over a moiety of his real and perſonal eſtate to his eldeſt daughter, by which the ſaid moiety thus diſpoſed of did no longer continue any part of the ſaid *J. S.*'s eſtate: ſo that the teſtator afterward by deviſing a moiety of his real and perſonal eſtate muſt be intended to have meant the remaining moiety only, and to have divided that moiety into moieties. *Ibid.* 334. Note; after the making of the will and codicil, the teſtator and his wife, by leaſe and releaſe and fine, mortgaged the premiſes; and it was urged, that this was a revocation of the will; but *per* Lord Chancellour, it can only be a revocation *pro tanto*. *Ibid.* 334.

J. S. deviſed to *M.* his wife ſix houſes in bar of dower, and, ſubject to his legacies, he deviſed (the reſt of) his real and perſonal eſtate to his two daughters, and their heirs, in moieties; and afterwards, in conſideration of the marriage of *A.* his eldeſt daughter with *B*, *J. S.* by marriage-articles covenanted to ſettle one moiety of his real eſtate to the uſe of himſelf for life, remainder to the uſe of the ſaid *B.* and *A.* his intended wife for their lives, remainder to the younger children of the marriage in tail general, remainder to the ſaid *B.* in fee; and alſo covenanted that he would ſtand poſſeſſed of one moiety of all ſuch perſonal eſtate as he ſhould leave at his death (ſubject only to his debts, and ſuch legacies as ſhould amount to 5000*l.*) in truſt for *B.* and his ſaid intended wife for their lives, and afterwards to be paid to their younger children. Lord Chancellour *King* held, that though this was but a covenant, and therefore at law no revocation of the will by which the teſtator had diſpoſed of his real eſtate, yet that the ſame being for a valuable conſideration, was in equity *tantamount* to a conveyance, and, conſequently, in equity a revocation of the will as to the moiety of the ſix houſes deviſed to the teſtator's wife, ſo that *B.* was entitled to one clear moiety of the real eſtate, and to an account of the rents, *&c.* thereof, from *J. S.*'s death; but as to the ſix houſes deviſed to the teſtator's wife, it being his intent that ſhe ſhould have them, the court held, that ſhe ſhould have a ſatisfaction out of the remaining moiety, and that the wife ſhould not ſuffer by the marriage-articles, there being enough out of the other moiety to ſupply and ſatisfy the deviſe of the ſix houſes to her. Therefore, as to the other moiety of the real eſtate, it was decreed, that the teſtator's widow was to have for her life ſix houſes, part thereof, and the reſidue of ſuch moiety ſubject to the wife's eſtate for life in the ſix houſes, to be divided between the two daughters equally.

Select Caſes in Chanc. 48. Lannoy v. Lannoy.

J. S. on his marriage with *F.*'s daughter, ſettled 500*l. per ann.* on her; he afterward ſurrendered ſome copyhold eſtates to the uſe of his will which he made, and gave the copyhold to his wife. Afterward *J. S.*, on the death of his wife's father, became entitled to 1500*l.* in right of his wife; then *J. S.* levied a fine, and made a new ſettlement, and increaſed her jointure 300*l. per ann.*, but never altered his will. And *per* Lord Chancellour —The ſettlement is a revocation of the will, for ſuch lands as

are

are compriſed in it; but the copyhold is not, and therefore paſſes by the will.

J. S. in 1699 leaves to *A.* 8784 *l.* in truſt, to be by her inveſted in lands, and to ſettle the ſame on herſelf for life, remainder to the heirs of *B.* A decree was had againſt *A.* to lay out the money in lands, and to ſettle the ſame according to *J. S.*'s will. *A.* purchaſes lands to the value of 3300 *l.*, and deviſes thoſe lands to *C.* (who was heir at law to *B.*) and her heirs, and gives ſeveral legacies, which could not be paid if the deviſe were not to be taken as part of ſatisfaction; and for that reaſon it was ſo decreed by Lord Chancellour *King*. Select Caſes in Chanc. 63. Gibſon v. Scudamore.

A. and *B.* were tenants in common of lands in fee. *A.* by will, dated 25 *Jan.* 1719, deviſes her moiety of the ſaid lands unto truſtees and their heirs, upon truſt to ſell the ſame for the purpoſes therein mentioned; and afterward *A.* and *B.* made partition by deed, dated 16 *May* 1722, and a fine was levied, and the uſes were declared to be, as to one moiety in ſeveralty to *A.* in fee, and as to the other moiety in ſeveralty to *B.* in fee. In 1724, *A.* died without revoking or altering her ſaid will, leaving *J. S.* her only ſon. Lord Chancellour declared, that the will was well proved, but referred it to the judges of *B. R.*, Whether the deed of 16 *May* 1722, and the fine levied purſuant thereto, was not a revocation of the will. And *Raymond*, Ch. J., *Page*, *Probyn*, and *Lee*, Juſtices, certified their opinions to be, that the will was not revoked by this deed and fine, and that *A.*'s ſhare of the land contained in this deed and fine paſſed by the will. Vin. Abr. tit. Deviſe (R. 6), pl. 30. Luther v. Kirby. 3 P. Wms. 169. by way of note cites S. C. by the name of Luther v. Kidby, and ſays, the judge's certificate appears to be ſo by the regiſtrar's book; with which Lord Chanc. King concurred, and ordered, that the ſeveral truſts in *A.*'s will ſhould be eſtabliſhed. [So, Swift v. Roberts, 3 Burr. 1490. Brydges v. Ducheſs of Chandois, 2 Vez. jun. 429.] It is added in P. Wms's report, that if *A.* deviſes lands and levies a fine, and the caption and deed of uſes are before the will, but the writ of covenant is returnable after the will, this ſeems a revocation; becauſe a fine operates as ſuch from the return of the writ of covenant, and not from the caption.——See Salk. 341. Lloyd and the Lord of Say and Seale; and yet this is an hard caſe, ſince by the caption the party conuſor does all his part, and the reſt is only the act of the clerk or his attorney, without any particular inſtructions from the party.

[But, if the conveyance, by which a partition is made, be for any other purpoſe except merely that of partition, though it be nothing more than conveying the eſtate to ſuch uſes as the party may appoint, it will operate as a revocation of a will previouſly made.

Thus, where *T.* died in 1741, ſeiſed in fee of lands which were gavelkind, leaving two ſons *R.* and *H.*, who both entered therein upon their father's death, and were each ſeiſed of an undivided moiety thereof; and, they being ſo ſeiſed, *R.* made his will, and deviſed all his lands and tenements and all his moiety to his wife: afterwards a deed of partition was made and executed by and between *R.* and *H.*, and the lands in queſtion were allotted to *R.*, and it was covenanted therein that they and their wives ſhould all join in levying a fine, (which was done,) and that the ſame, as to the lands in queſtion, ſhould enure to the uſe of *R.* and ſuch perſon and perſons, and for ſuch eſtate and eſtates, as he ſhould, by deed or will, limit, direct, or appoint: and, in default of ſuch appointment, Titner v. Titner, cited 1 Wilſ 309. & 3 Atk. 742. 745. 750. So, Brydges v. Ducheſs of Chandois, 2 Vez. jun. 429.

pointment, to the uſe of *R.* in fee: Lord Chief Juſtice *Lee* held this to be clearly a revocation of the will, and not like the caſe of a *bare* partition only unattended by a fine or conveyance to a new uſe, which would not have been a revocation.]

MS. Rep. Parſons v. Freeman, M. 2 G. 2. [3 Atk. 741. S. C. Ambl. 116. S. C. 2 Wms. 341. S. C. The introductory part of this argument is thus ſtated by Lord Loughborough in 2 Vez. jun. 431. from my Lord Hardwicke's notes: "It is admitted, that if the teſtator had been ſeiſed in fee at the date of the will, and had afterwards ſuffered a recovery, that would be a revocation; and yet the objection would have held equally here of the alteration being made only for the particular purpoſe of enabling him and his wife to diſpoſe without any other form of conveyance. There are a great variety of caſes, and nice and artificial diſtinctions, upon the favour to the heir. One rule, however, is certain; that if a man is ſeiſed in fee, and diſpoſes by will, and afterwards makes a conveyance, taking back a new eſtate, that is a revocation: ſo, if he deviſes the land, and levies a fine without any uſe declared; this is a revocation, and yet he takes back the old uſe unaltered; which is a prodigiouſly ſtrong caſe. But theſe caſes admit of limitations and diſtinctions: and therefore if a teſtator makes a conveyance for life or years, that being a particular, *partial* purpoſe, no more than will anſwer that purpoſe is revoked; the line being drawn, and the purpoſe ſpecified with a declared intent of going thus far and no farther. Theſe are the rules of law: the counſel have doubted whether they extend to equitable intereſts, without citing authorities: but I think, they hold in equity, and am of opinion, that what is a revocation at law ſhall hold in equity; as it would be very miſchievous, that the ſame ſort of conveyance ſhould not be a revocation in both caſes. Therefore, if a man having an equitable eſtate makes his will, and then executes a conveyance, and diſpoſes of it, or declares the uſes to himſelf, that will be a revocation, if it would be ſo of a legal eſtate at law. But ſtill this revocation follows the rule of law; and therefore if the conveyance be of part only, and for a particular, *partial* purpoſe, it ſhall be a revocation *pro tanto* only. Upon this principle is Vernon v. Jones; ſo. Ogle v. Cooke, that where the conveyance amounts only to a ſecurity, it is only a charge upon the land, and no revocation; and as the heir may in all thoſe caſes have the ſurplus, ſo ſhall the deviſee."]

If a man ſeiſed in fee deviſes, and then makes a conveyance by fine, feoffment, or recovery, and takes back a new eſtate, it is certainly a revocation, and ſo if he takes back the old uſe unaltered, from a preſumption that he could not have made ſuch a conveyance, without an intention to alter his will: but, if after making his will he had made a leaſe, or charged it with a ſum of money, *&c.*, it would only have been a revocation *pro tanto*. The rules are the ſame in the deviſe of a real, and of a perſonal eſtate, with regard to charges made afterward: but, if a man, having an equitable eſtate in fee, deviſes it, and then takes a conveyance of the legal eſtate, it is no revocation. The equitable eſtate will not paſs by will, but the heir at law by deſcent of the legal eſtate may become a truſtee for the deviſee, who may call for a conveyance of the eſtate. If a man contracts by articles for the purchaſe of lands, and, before a conveyance, deviſes the lands and dies; the deviſee ſhall have the lands and call for a conveyance from the vendor. If a man, ſeiſed of a legal eſtate, makes his will, and then conveys the legal eſtate to another in truſt for himſelf, it is a revocation. If in this caſe the huſband had only taken the legal eſtate by the recovery to execute it into the equitable eſtate, it would

would have been no revocation; but new uſes are appointed, and though the wife died without making any appointment, that will not alter the caſe, for here he took the fee by the recovery differently qualified, ſubject to different conditions, differently conveyed. But, if two parceners make partition, levy a fine, and declare the uſe, that will not be a revocation, becauſe it is to effectuate the partition.

[*S.* in 1733 ſurrendered copyhold tenements to the uſe of *T.* and *B.* his wife, for their lives, remainder to the heirs and aſſigns of *T.*, and they were accordingly admitted; and then *T.* ſurrendered to the uſe of his will. *B.* died, leaving iſſue by *T.*—*G.* the eldeſt, and *I.* the youngeſt ſon. In 1744, *T.* the father ſurrendered theſe tenements to the intent that the lord ſhould regrant them to the uſe of *T.* and his heirs until his marriage with *S.*, and then to the uſe of *T.* and *S.* for their reſpective lives, remainder to the heirs of their two bodies, *remainder to the right heirs of* T. No admiſſion was had by *T.* under this ſurrender. Afterwards, *viz.* in 1757, *T.* deviſed the eſtates to *S.* his wife for life, remainder to *I.* his youngeſt ſon and *M.* his wife, for their reſpective lives, and died, leaving *S.* his widow, and *G.* his eldeſt ſon and heir. In 1759, *S.* was admitted for her life on the former ſurrender made on her marriage, and then *G.* the ſon was admitted to the reverſion expectant on her deceaſe. *I.* the youngeſt ſon died; then *S.* the tenant for life died. Afterwards *M.* the widow of *I.* was admitted by virtue of the will of *T.* and the ſurrender to the uſe thereof. The queſtion was, Whether, by the ſubſequent acts, the ſurrender to the uſe of the will was at an end? It was argued that, by the ſurrender in 1744, every thing paſſed out of *T.* the deviſor, conſequently there was an end of the ſurrender to the uſe of his will in 1733; and, he never having been admitted, nor of courſe ſurrendered to the uſe of his will, in conſequence of the new limitation in 1744, nothing paſſed by the will of 1757. *Sed per curiam*, unanimouſly—The old uſe in fee granted to *T.* in 1733, to which he was then admitted, and which was ſurrendered to the uſe of his will, was not taken out of him by the new limitation and ſurrender of 1744. He had therefore no occaſion to be re-admitted to it for the purpoſe of ſurrendering to the uſe of his will, but ſhall be conſtrued to be in of his old eſtate.] Thruſtout on the dem. of Gower v. Cunningham, 2 Blackſt. Rep. 1046.

A. being ſeiſed in fee, ſettled his eſtate by leaſe and releaſe in 1712, to the uſes thereinafter ſpecified, with liberty, nevertheleſs, at his will and pleaſure to diſpoſe of, alienate, or change the ſaid eſtate, or any part thereof, for any eſtate or eſtates whatſoever, as he ſhould think fit, and to revoke all and every the uſes thereby limited, and then declares the uſes to himſelf for life, with ſeveral remainders, and a remainder over to *D.* in (fee) tail. The ſaid deed contained the following powers: firſt, a power for *A.* by any deed or writing, ſigned, ſealed, and delivered in the preſence of two or more witneſſes, to demiſe, leaſe, limit, or appoint the ſaid premiſes to any perſon whatſoever, for any term or terms whatſoever, and for ſo much yearly rent as he Lill. Pract. Conv. 390. 400. Fitzgerald v. Lord Fauconberge. Fitzgibb. Rep. 207. S. C. and as to the interlineation, Lord Ch ſaid, that the party that put it in

thought it would be of ſome uſe or other, and it could be of no uſe but to give *A.* an unlimited power over the eſtate; and as *A.*'s intention was to reſerve ſuch a power, his lordſhip ſaid he would not abridge it. *Ibid.* 223.

ſhould think fit. And that it ſhall and may be lawful to and for the ſaid *A.* at any time during his natural life, at his will and pleaſure, to grant, ſell, or demiſe the ſaid premiſes, or any part thereof; or by any deed or writing under his hand and ſeal, or by his laſt will, *&c.* in writing, ſigned, ſealed, delivered, and publiſhed in the preſence of three or more witneſſes, to revoke, repeal, and make void all and every or any the uſe and uſes, eſtate and eſtates, truſts, and limitations before raiſed, and to declare or limit the ſame, or ſuch new uſes as ſhould ſeem moſt meet to him, and then and from thenceforth, the eſtates before limited and ſo revoked, to ceaſe, *&c.*. and that the ſaid *A.* may diſpoſe of the ſame premiſes, and every part thereof, to ſuch other perſon and uſes as he ſhall think fit; any thing, *&c.* to the contrary notwithſtanding. The firſt part of this proviſo, *viz.* "to grant, ſell, or demiſe," appears inſertedby interlineation. In 1715, *A.* by leaſe and releaſe, reciting, that he was indebted as ſpecified in a ſchedule annexed, conveyed his eſtate to *W. R.* and *W. S.* and their heirs, in truſt to pay the ſaid debts by the annual profits, or mortgage or ſale of the premiſes, and after payment thereof, to pay the overplus, if any, and reconvey ſuch parts of the premiſes as ſhould remain unſold, to the ſaid *A.*, or to ſuch perſon and perſons, and to ſuch uſes, *&c.* as *A.* by any deed or writing, under his hand and ſeal, atteſted by two or more credible witneſſes, ſhould limit, *&c.* This releaſe was atteſted by two witneſſes only. *A.* died without iſſue. Lord Chancellour, aſſiſted by Lord Chief Baron *Reynolds* and the Maſter of the Rolls, was of opinion, that *A.* intended to reſerve an abſolute power over this eſtate, and either to revoke it by an expreſs revocation, or by a conveyance to different uſes, which are the two kinds of revocation, as is evident as well from the preamble which is interwoven with the conſideration of the deed, as from the proviſo: and in conſequence of that intention, it is reaſonable to ſuppoſe he meant to have a power to defeat it, without taking any notice of it, and if no power had been reſerved in the body of the deed, then would the preamble have given a general power. That a conveyance to different uſes would have been a revocation as effectual as an expreſs revocation, and that he thought any other conſtruction would be forced and unnatural. That if *A.* had ſtopped with the firſt words of the proviſo, *viz.* "to grant, ſell, or "demiſe," he had reſerved an abſolute power. Then come the words, "or by any deed or writing." *Or* is plainly a disjunctive introductory of a different ſentence, and a different power, which is plain by the words immediately following, *viz.* "And "then the uſes ſo revoked and repealed," which refer to the expreſs power of revocation That if the ſecond part of the clauſe, "or by any deed or writing," *&c.* had been dropped, and it had been "or to repeal," *&c.*, it is plain they would be diſtinct powers: and his lordſhip aſked, Why thoſe words ſhould alter the caſe? that the circumſtance of three witneſſes is only applicable to the expreſs revocation; but it neither goes to the firſt power, nor to the general power of diſpoſing at the end of the clauſe,

viz.

viz. "And that the ſaid *A.* ſhall and may diſpoſe," &c., which is as much a diſtinct power as can be, and is larger than the firſt; for by this he might give his eſtate (tail) by will. That the expreſs power of revocation could not by this conſtruction be thought nugatory, for within the firſt power he could not be reinſtated in his former eſtate without a conveyance and reconveyance; nor could he have deviſed it. But, admitting it to be ſo, he thought general intention is not to be ſuperſeded, becauſe a ſubſequent part of the deed is ſurpluſage: and that the whole legal eſtate paſſed to the truſtees by the deed of 1715. Decreed 12 *June* 1730.

Though a covenant or articles do not at law revoke a will, yet if entered into for a valuable conſideration, amounting in equity to a (*a*) conveyance, they muſt conſequently be an equitable revocation of a will, or of any writing in nature thereof. A woman's marriage is alone (*b*) a revocation of her will.

2 P. Wms. 624. Cotter v. Layer.

(*a*) See S. P. reſolved in the caſe of Sir Barnham Ryder and Sir Charles Wager. *Ibid.* 332.

(*b*) See 4 Rep. 61. [But, if the huſband die in the lifetime of the wife, then the will, it ſeems, will revive, and on her death afterwards take effect as if no marriage had intervened. Therefore, ſaith Serjeant Manwood in Brett v. Rigden, Plowd. 343. a. if a feme ſole make her will the firſt day of May and give land thereby, and afterwards, the tenth day of May, ſhe take huſband, who dies the 20th day of May, and afterwards the woman die the 30th day of May, the deviſe is good; for it does not take effect until her death, at which time ſhe was diſcovert as ſhe was at the time of making the will.—And it is obſervable, that the caſe of Forſe v. Hembling, 4 Rep. 61. wherein it was adjudged, that the will of a feme ſole was revoked by marriage, does not ſeem to impeach the caſe here put, for the reaſon given for that judgment is not only becauſe ſhe afterwards married, but alſo becauſe ſhe was covert baron at the time of her death. And it is to be noted, that it is only upon the authority of Forſe v. Hembling, that the Lord Chancellour King delivers in ſo unqualified a manner the doctrine in the text, that a woman's marriage is alone a revocation of her will.]

[By articles made in 1777, previouſly to the marriage of the Duke of *Chandois*, the duke covenanted that he would, within ſix months after the marriage, cauſe various freehold and copyhold eſtates to be well and effectually conveyed, ſo that he might be ſeiſed thereof, to the intent that, in caſe the ducheſs ſhould ſurvive him, ſhe might become entitled to dower, and alſo that he would, within twelve months after the marriage and after ſuch conveyances, ſettle the ſaid eſtates, ſubject to the dower of the ducheſs, to the uſe of himſelf for life, remainder to truſtees to preſerve contingent remainders, remainder, after the deceaſe of the duke and ducheſs, to truſtees for a term of years, to raiſe portions for younger children, and ſubject thereto and to dower, to the uſe of the firſt and other ſons in tail male, with remainder to the right heirs of the duke. The duke alſo covenanted, that in caſe the dower ſhould not be equivalent to 2000 *l. per annum*, his heirs, executors, or adminiſtrators would make good the deficiency. By his will, bearing date *Jan.* 9th, 1780, the duke confirmed the articles: and all the real eſtates, which he had by the articles agreed to ſettle, he deviſed, in caſe he ſhould die without iſſue male, or in caſe of failure of iſſue male in his wife's lifetime, to his wife for life, remainder to his daughters as tenants in common in tail, with other limitations. The duke afterward executed a ſettlement, by which he diſpoſed of the fee, and which purported to be in execution and performance of the articles; but

Brydges v. Ducheſs of Chandois, 2 Vez. jun. 417.

in truth contained many clauſes and modifications inconſiſtent both with the articles and will. Lord Chancellour *Loughborough* held, that as the ſettlement did not purſue the articles, it could not be referred to them, ſo as to form one inſtrument, and was therefore a revocation of the will.

Williams v. Owen, 2 Vez. jun. 595.

But where, by articles prior to marriage, the huſband being ſeiſed in fee, covenanted to convey his eſtates to truſtees, to the uſe of himſelf for life, remainder in truſt to ſecure an annuity to his wife in bar of dower, remainder to truſtees for years to raiſe portions, remainder to the ſons and daughters ſucceſſively in tail, remainder to his own right heirs, and afterwards made his will, and deviſed the reverſion in fee in the event of his dying without iſſue; and ſubſequent to the will executed a ſettlement in purſuance of the articles, by which he conveyed the eſtates to truſtees and their heirs, upon the truſts and to the uſes of the articles: it was holden with great clearneſs, that the will was not revoked by this ſettlement; that the ſettlement was nothing more than a mere legal execution of the articles; nothing more than giving the legal eſtate in lieu of the equitable eſtate, of which the teſtator was ſeiſed at the time of making the will; that the teſtator deviſed nothing more than the reverſion in fee; that his acquiring the legal intereſt made no difference; and that the perſon, to whom the eſtate was conveyed, was a truſtee for the purpoſes of the will.

Selwyn v. Selwyn, 1 Blackſt. Rep. 251. S. C. 2 Burr. 1131.

By deed, in 1750, *S.* was made tenant for life, remainder to his ſon in tail, and, in 1751, the father and ſon joined in a bargain and ſale to *W.* and his heirs, to make him a tenant to the *præcipe* in order to ſuffer a common recovery, the uſes of which were declared to be to *S.* the father for life, remainder to the ſon in fee-ſimple. *Trinity* term began the 7th of *June* 1751. On the 8th of *June* the ſon made a will, whereby he diſpoſed of all his real eſtate. In the ſame term a writ of entry was ſued out returnable *Quinden. Trin.*, *viz.* 16th of *June*, and the recovery was completed the ſame term. Soon afterwards the teſtator died. And a doubt ariſing as to the validity of the will, a caſe was ſent out of Chancery for the opinion of the court of King's Bench, and the queſtion was, Whether the lands in diſpute paſſed by this will made after the bargain and ſale, and after the beginning of the term, but before the return of the writ of entry? And the court of King's Bench certified that the will was valid. The foundation of which opinion ſeems to have been, that the court conſidered the whole tranſaction as one conveyance, each part whereof muſt relate to the date of the bargain and ſale, which was the principal part, and which was perfected, made abſolute, and delivered from objections, by the ſubſequent ceremonies.

So explained by Lord Mansfield, 4 Burr. 1962. & S. C. 1 Blackſt. Rep. 706.

So, in 1724, a copyhold eſtate was ſurrendered to the uſes of a marriage-ſettlement, which left, in the ſurrenderor, the reverſion in fee, and a power to deviſe the ſame by will; afterwards a ſurrender was made by him to the uſe of his will, and a will made accordingly. Then, in 1751, the ſurrenderor was called upon by the

Roe on the dem. of Noden v. Griffiths, 1 Blackſt. Rep. 605.

the ſteward to be admitted to ſome of the particular eſtates created by the original ſurrender in 1724, which was done. And the queſtion was, Whether this admittance operated as a revocation of the prior will? And the court held that it did not; becauſe the whole tranſaction might be conſidered as one and the ſame, and then the admittance in 1751 would *relate* to the ſurrender in 1724, and be prior to the will.] S. C. 4 Burr. 1952.

Tenant in tail, remainder to himſelf in fee, deviſes his lands to *A.*, and then ſuffers a recovery to the uſe of himſelf in fee, and dies without iſſue male; this is a revocation of the will. 3 P. Wms. 163. Marwood v. Turner.

A., 23d *June* 1729, made his will, and executed two duplicates thereof before three witneſſes, and made *B.* and *C.* (ſince deceaſed executors; and one of the duplicates was delivered to *B. A.* died 2d *Oct.* 1730, and about three weeks before his death he made ſeveral alterations and obliterations with his own hand, in the duplicate remaining in his own cuſtody, making a new deviſe of his real eſtate, and a new reſiduary legatee, and a new executor, entirely ſtriking out the names of the firſt deviſees, reſiduary legatee, and executors, and altered ſeveral of the former legacies, and inſerted or interlined new legacies; and ſoon after wrote another will with his own hand, agreeable in a great meaſure, but not altogether, to the will or duplicate ſo altered, with a concluſion in theſe words; "In witneſs whereof I the ſaid teſta- "tor have to each ſheet ſet my hand, and to the top, where the "ſheets are fixed together, my hand and ſeal, and to the laſt "thereof my hand and ſeal, and to a duplicate of the ſame "tenor and date, this day of 1730." But there was no ſigning or fixing together. The teſtator ſoon after began to write another will, word for word with the laſt, ſo far as it goes, but went no farther than deviſing his lands. He lived ſix days after, and was in good health, and might have finiſhed and executed both or either of the latter wills if he had thought fit. He never ſent or called upon *B.* for the duplicate of the firſt will in his hands, though *B.* lived in town. After the death of the teſtator, all the teſtamentary papers or ſchedules were found lying all in looſe and ſeparate papers upon a table in his cloſet, not ſigned or executed; and the duplicate of the firſt will was found on the ſame table, altered and obliterated (*ut ſupra*), with his name and ſeal thereto whole and uncancelled. Sentence was given in the Prerogative Court, for the duplicate of the firſt will in *B.*'s hands, and confirmed upon appeal to the delegates, *viz.* Lord *Raymond*, Ch. J., and *Probyn*, J., Dr. *Tindale*, and Dr. *Bramſton*, (who were all the delegates preſent,) after four days ſolemn hearing, and upon a commiſſion of review (granted by Lord Chancellour *King*, upon the petition of *Hyde* the executor named in the new will) was again affirmed by the opinion of all the delegates (except Dr. *Pinfold*), *viz.* of the Judges, *Reynolds*, C. B., *Page*, J., and *Comyns*, B., and two doctors of the civil law, chiefly on the reaſon, as the reporter ſays he heard, that the teſtator did not intend an inteſtacy, and by the al- Vin. Abr. tit. Deviſe (R. 2), pl. 17. Hyde v. Maſon. *F. L. Com. Dig. 451. Tit. Ant. 355.*

terations and obliterations in his own duplicate of his firſt will, he appeared only to deſign a new will, which as he never perfected, the firſt ought to ſtand; and teſtator not calling for the duplicate of the firſt will in *B.*'s hands, ſtrengthens the preſumption of his intent not abſolutely to deſtroy his firſt will, till he had perfected another, which he never did.

MSS. Rep. Mich. 1734. Lloyd & *Ux.* & *al.* v. Spillet & *al.* [3 P. Wms. 344. S. C. 2 Eq. Ca. Abr. 241. pl. 30. 776. pl. 25. S. C.]

J. S. deviſed all his real and perſonal eſtate to truſtees *A.*, *B.*, and *C.*, their heirs, executors, and adminiſtrators, in truſt to pay 15 *l. per ann.* to the plaintiffs (his two ſiſters) for their lives, and after ſeveral legacies, the ſurplus in truſt for the diſſenting miniſters at *Reading*, &c. and gave 300 *l.* to each truſtee, and 20 *l. per ann.* to each, while they took care in executing the truſt. Afterward by leaſe and releaſe of ſubſequent date to the will, the teſtator conveyed all his real eſtate unto and to the uſe of the ſaid *A.*, *B.*, and *C.*, and their heirs, with a proviſo to be void on payment of 10 *s.* And by another deed of the ſame date, the teſtator gave all his perſonal eſtate to the ſaid *A.*, *B.*, and *C.*, proviſo to be alſo void on payment of 10 *s.* But *J. S.* kept both the deeds in his own cuſtody, and ſoon after died; and the ſaid *A.*, *B.*, and *C.* obtained adminiſtration *cum teſtamento annexo* as truſtees. The truſtees for ſome years paid the 15 *l. per ann.* a-piece to each of the teſtator's ſiſters; but afterwards refuſed to continue the payment thereof, and alſo refuſed to pay any of the diſſenting miniſters; but kept the rents, &c. to their own uſe. The two ſiſters (the heirs at law) and their huſbands, brought their bill againſt the ſurviving truſtee, inſiſting that the deed of conveyance of the real eſtate, and the deed of gift of the perſonal eſtate had revoked the will, and that there was a reſulting truſt for them, as heirs at law; or at leaſt that they (the ſiſters) were entitled to their 15 *l. per ann.* annuities. The defendant inſiſted on the plaintiffs having forfeited their annuities by bringing their bill, there being a clauſe in the will, that if they (the ſiſters) diſputed the will, then they ſhould forfeit their annuities. Lord Chancellour *Talbot* decreed, that the annuities ſhould be paid to the two ſiſters, with the arrears and growing payments thereof; but the ſurplus was decreed to go to the diſſenting miniſters.

[This decree was affirmed on a re-hearing before Lord Hardwicke, 2 Atk. 148.]

MSS. Rep. Mich. 9 G. 2. Weld v. Acton, &c.

Sir *John Wobryck* by will, in *Auguſt* 1722, deviſed his eſtate to truſtees for the term of 200 years, for payment of all his debts. In *December* following he deviſed the ſame to other truſtees for 300 years, in truſt to pay ſome particular debts by ſpecialty mentioned in the deed, and all incumbrances that affected the eſtate. In *June* 1723, he died; and the queſtion was, If the deed in *December* was a total revocation of the 200 years term? And at the Rolls both terms being held to be conſiſtent, the plaintiff now brought a bill of review; and *Talbot*, Lord Chancellour, was of opinion, that the deed in *December* was intended only as a collateral ſecurity, for payment of the debts therein mentioned, and ſuch others as were a charge on the eſtate; and that Sir *John* did not depart from his former intentions of paying all his debts, but only

to

to give preference to thoſe compriſed in the 300 years term, which by law were preferred to the ſimple contract debts; and therefore he declared, that ſo much of the 200 years term ſhould be ſold as would ſatisfy the purpoſes of the deed; and afterwards the 200 years term ſhould commence.

[It has been held, upon the principle that *no actual* alteration is made in the thing deviſed, that the changing of truſtees, where the eſtate originally deviſed is only the truſt, will not amount to a revocation in law. Thus, where *A.* made his will, and deviſed that his feoffees in truſt ſhould make a leaſe to *C.* and *D.* for eighty years, at a certain rent payable to his executors; and, being afterwards reſolved to change the feoffees in truſt, cauſed them, or ſome of them, to join with him in a feoffment of the deviſed hereditaments to new truſtees and their heirs, to the uſe of *A.* and others, until *A.* limited or ordered new uſes thereof, which he never did; it was held that the feoffment was, *in equity*, no revocation of the will.

Bark v. Zouch, 1 Rep. Ch. 23. *& vide* Coles v. Hancock, 2 Ch. Rep. 109.

So, *W.* by his will deviſed all his real eſtate in *Berkſhire* to certain truſtees and their heirs, to the uſe of his firſt and ſecond ſons, *&c.* ſucceſſively in ſtrict ſettlement, with remainder to his own right heirs; and afterwards made a codicil to his will, by which, after reciting that ſince the publication thereof he had contracted for the purchaſe of certain lands, he directed the truſtees and executors in his will to pay the purchaſe-money out of the *reſiduum* of his perſonal eſtate; and that, on payment thereof, the ſaid purchaſed lands ſhould be conveyed, ſettled, and limited to the ſame uſes and on the ſame truſts, as, by his will, he had limited and declared concerning his other eſtates. Afterwards the teſtator himſelf completed the purchaſe referred to in the codicil, and took a conveyance of the purchaſed eſtates to certain truſtees, therein named, in fee, in truſt for himſelf and his heirs, ſoon after which he died. And the queſtion was, Whether the conveyance of the new purchaſed lands to the truſtees, ſubſequent to the will and codicil, was not, as to thoſe lands, a revocation? And it was decreed that this was no revocation; for, before the purchaſe completed the vendor was but a truſtee for the purchaſer, and the completion of the purchaſe was but taking the eſtate home.

Fullarton v. Watts, cited Dougl. 691. Canc. T. 14 G. 3.

G. ſeiſed of manors and freehold lands in fee, by indenture mortgaged the ſame in fee; afterwards *G.*, on the marriage of his ſon, conveyed theſe eſtates to truſtees, in truſt to ſecure an annuity to his ſon and his intended wife for and during the joint lives of himſelf and his ſon, and ſubject thereto, to himſelf for life, remainder over, the ultimate remainder to himſelf in fee. Then *G.* made his will, by which he deviſed the reverſion in fee of part of theſe lands to truſtees in fee upon certain truſts and to certain uſes not material to be ſtated, and deviſed the reverſion in fee of the other part to the ſame truſtees and their heirs, in truſt to ſell and diſpoſe thereof, and, with the money ariſing from the ſale, to pay and diſcharge all principal and intereſt due on any mortgages

Doe v. Pott. Dougl. 710.

mortgages or other incumbrances affecting theſe eſtates, and, from and after payment thereof, to apply the reſidue of ſuch purchaſe-monies in paying and diſcharging the fortunes therein before given to his younger children. Then the mortgagee, in conſideration of the mortgage-money paid in, conveyed the mortgaged eſtates compriſed in the marriage-ſettlement to the truſtees by leaſe and releaſe to the uſes and truſts therein limited, freed and diſcharged from all equity, terms, proviſoes, and conditions of redemption. Afterwards, by leaſe and releaſe, reciting the above facts, the ſame eſtates, compriſed in the marriage-ſettlement, were conveyed by the truſtees to a truſtee in truſt for *G.* in fee. Then *G.* did without having done any other act to revoke or alter his will. And one queſtion was, Whether theſe inſtruments amounted in law to a revocation? And it was contended that they did; for, at the time of the will, the legal eſtate was in the mortgagee, and, after the will, was transferred from her and conveyed to a truſtee; and, though the equitable intereſt might have remained the ſame after the conveyance to the truſtee, yet, there having been an alteration of the legal eſtate after the will, that, it was ſaid, would operate as a revocation. *Sed per curiam*, unanimouſly, *G.* at the time of the deviſe, had merely the equitable fee in him, the mortgagee was his truſtee. Then, on payment of the mortgage-money, ſhe conveyed the legal eſtate in fee to the truſtee, which was merely transferring it from one truſtee to another; and there has been no determination or caſe in which the change of a truſtee has been held to revoke a will. Therefore the court thought the will was not revoked.

Backwell v. Child, Ambl. 260.

Where one partner gave by his will to two of his partners one ninth of one twelfth of the profits reſerved to him, over and above the ſhares reſerved to them by the articles of copartnerſhip; and afterwards, on the expiration of the partnerſhip under thoſe articles, renewed it with thoſe ſame partners, and gave them a greater intereſt than they had under the former articles; Lord *Hardwicke* held, that the renewal of the articles was not a revocation of the will.]

2. In what Caſes the Court will ſet aſide a Will for Fraud.

2 P. Wms. 270. James v. Greaves.

Jekyll Lord Commiſſioner took a difference between a will and a deed gained upon a weak man, and upon a miſrepreſentation or fraud; for if a will be gained from ſuch by falſe miſrepreſentation, this is not a ſufficient reaſon to ſet it aſide in equity; as was determined in the Duke of *Newcaſtle*'s will, betwixt Lord *Thanet* and Lord *Clare*, and in the caſe of *Bodvil* and *Roberts*: but, where a deed, which is not revocable as a will is, is ſo gained from ſuch a perſon, and without any valuable conſideration, the ſame ought to be ſet aſide in equity.

[So,

[So, Lord *Hardwicke*, in the caſe of *Bennett* and *Wade*, ſaid, that, ſo far as the bill ſought to ſet aſide the will there in queſtion, it was improper; for, the court could not make a decree of that kind, but only direct an iſſue *deviſavit vel non*. Bennett v. Wade, 2 Atk. 324.

And, in the caſe of *Webb* and *Claverden*, which aroſe on a bill brought by the heir at law, charging fraud and circumvention in obtaining a will; Lord *Hardwicke* ſaid, that the court would not determine a fraud in procuring a will, without directing a trial at law, which was done accordingly.] Webb v. Claverden, *Id.* 424.

A will obtained in *extremis* and upon importunity of teſtator's wife, his hand being guided in the writing of his name, has been ſet aſide. Vin. Abr. tit Deviſe (Z. 2), pl. 7. Moneypenny v. Brown.

A will likewiſe concerning land may be good at law, as being well executed, and yet be ſet aſide in equity for fraud: As where——

A. by will had deviſed his lands to *M.* his mother in fee; *M.* was afterwards told by *J. S.* that this will would not be good, but ought to be guarded, as he called it, and that he would make another will for *A.* which he would take care ſhould be ſufficiently guarded. *J. S.* afterward drew a will, by which *A.* gave the land to *M.* for life only, remainder to *J. S.* in fee. Upon a bill to eſtabliſh the firſt will, becauſe of the ill practices uſed in obtaining the after-will, Lord Chancellour *Cowper* directed an iſſue in *Middleſex*, where the will was made, though the lands lay in *Shropſhire*, to try whether the will, by which the lands in fee were deviſed to *M.* was the laſt will of *A.* 1 P. Wms. 287, 289. Goſs v. Tracy. If *A.* had deviſed lands to *M.* in fee, and afterward *J. S.* had told *A.* and not *M.* that the will was void for want of its being well guarded; and that he would make another will for *A.* that ſhould be effectually guarded, and accordingly had made another will for *A.* whereby the eſtate had been deviſed to *M.* for life only. Remainder to *J. S.* in fee, this would be a good will in law, if atteſted purſuant to the ſtatute of frauds, but would be ſet aſide in equity for the fraud; but as to the evidence of the teſtator's being *non compos* when he made this ſecond will, that is to be tried at law. *Per* Lord Chan. *ibid.* 288. A will, though good at law, may yet be ſet aſide in equity for fraud: as if *A.* ſhould agree to give *B.* bank bills to the amount of 1000 *l.* in conſideration that *B.* would make his will, and thereby deviſe his land to *A.*, and accordingly *B.* does make his will, and *A.* gives *B.* the bank bills, which prove to be forged; this though a good will at law, ſhall nevertheleſs be avoided in equity by *A.*'s heir for a fraud. *Per* Lord Chan. *ibid.* 2 Vern. Rep. 699. See in 1 Chan. Rep. 12. 66. inſtances of a will of land being ſet aſide in equity for fraud.

[A bill was brought to ſet aſide a will for fraud, on ſuggeſtion that the teſtator was incapable of making it, by being perpetually in liquor, and particularly when he executed the will. And the defendant pleaded that the will was duly executed, and that it ought to prevail, till, upon an iſſue at law, it ſhould be found to be otherwiſe. *Per curiam*—The plea muſt be allowed; for you cannot in this court ſet aſide a will for fraud.] Anon. 3 Atk. 17.

A bill was brought to be relieved againſt a will obtained by fraud and impoſition, upon this caſe. The plaintiff's ſon had made a will in *January* 1716, and thereby deviſed all his real and perſonal eſtate to the plaintiff, his father, but falling ill ſoon after, at a great diſtance from his father, of a conſumption, of which he died, defendant perſuaded him to make a new will, ſome ſhort time before his death, whereby he deviſed all his real and Vin. Abr. tit. Deviſe (Z. 2), pl. 11. Bransby v. Keridge, &c. [1 P. Wms. 548. S. C. cited. But this decree of Lord

and perſonal eſtate to defendant (being his kinſman) upon truſt to pay his debts and legacies; but ſays nothing of the *reſiduum*; but there was a general clauſe of revoking all former wills, *&c.* There were ſeveral witneſſes to prove an impoſition and contrivance, and falſe ſuggeſtion to induce the teſtator to make this new will, ſufficient to ſatisfy the court that it was unfairly obtained, but the will was regularly ſigned, ſealed, and publiſhed, according to the ſtatute of 29 *Car.* 2. and ſo a good will at law. Lord Ch. J. *Parker*, having taken time to conſider of it, decreed defendant to account for the perſonal eſtate, having juſt allowances, *&c.*, and to convey the real eſtate to plaintiff, ſubject to the payment of teſtator's debts, as a truſtee for the plaintiff.

Parker was afterwards reverſed by the lords. 3 Bro. P. C. 358.; and ſo, it ſeems, was another of his decrees of a like kind in Andrews v. Powys. 8 Vin. Abr. pag. 548. 11 Vin. Abr. pag. 59 and 66.

For Lord Hardwicke in Barnſley v. Powell, 1 Ves. 287. ſays, "*It is certainly now "ſettled by the Lords in* Bransby *v.* Keridge, *that this court cannot ſet aſide a will of perſonal eſtate for "fraud, nor will I infringe on what is laid down there, and in* Powys *v.* Andrews, *and in the caſe of "Mr.* Hawkins's *will*;" and in Bennett v. Wade, Lord Hardwicke ſpeaks of the caſe of Andrews v. Powys in like terms. But, where a will was both of real and perſonal eſtate; and as to the former it had been found by the jury to be forged, and the plaintiff's conſent to probate had been procured by fraud; Lord Hardwicke, upon the ground of this fraud, and not upon any ſuppoſition of a right to examine the validity of the will in contradiction to the probate, relieved againſt the will, and ordered the defendants to conſent to a revocation of the probate, and intimated, that if this ſhould not be conſented to, he ſhould go further and make the executors truſtees. Barnſley v. Powell, *ubi ſupra*. So too, in Sheffield v. Ducheſs of Buckingham, 1 Atk. 630. Lord Hardwicke granted an injunction to reſtrain the ducheſs from further controverting the will of her huſband, but he founded this injunction on an admiſſion of the will by the ducheſs in a former ſuit, in which it was agreed to be well proved; and he admitted, that *in an adverſary way the court of Chancery or a court of law could not determine on the validity of a probate.* See Mr. Hargrave's learned argument *on the effect of ſentences of courts eccleſiaſtical in caſes of marriage.*]

2 P. Wms. 286. Stephenton v. Gardiner. And *per cur.* the ſpiritual court has juriſdiction of fraud relating to a

A bill was likewiſe brought to ſet aſide a will of a perſonal eſtate, and to ſtay the probate, upon a ſuggeſtion of its being obtained by fraud; and the defendant demurred to the juriſdiction of Chancery, whereupon an injunction was moved for, inſiſting that the demurrer confeſſed the fraud, and that fraud was cognizable in equity as well as in the ſpiritual court; but the injunction was denied.

will of perſonal eſtate, and can examine the parties by way of allegation touching the ſame, and if the will was read falſely to teſtatrix, then it was not her will. *Ibid.*

3 P. Wms. 93. Harris v. Ingledew. A will was

Where a bill is brought to prove a will of lands, the ſanity of the teſtator muſt be proved; but it is otherwiſe in caſe of a deed of truſt to ſell for payment of debts.

ſet aſide after forty years poſſeſſion under it, upon account of the inſanity of the deviſor, and although in prejudice of a purchaſer. Vin. Abr. tit. Deviſe (Z. 2), p. 169. Squire v. Perſhall.

Vin. Abr. tit. Deviſe (H. 6), pl. 7. Burk v. Morgan.

A will hath relation only to the teſtator's death, and not to the making; for till his death he is maſter of his own will: and therefore the will of a papiſt in *Ireland* was held to be avoided by a ſubſequent ſtatute made in that kingdom, which enacts, that the lands of papiſts there ſhall not be deviſable, but deſcend in gavelkind.

3. Where Fraud in obtaining a Will is examinable.

It has been ſaid, that wills (of perſonal eſtates only) though gained by fraud, if proved in the ſpiritual court, are not to be controverted in equity. Thus where—

A. made

A. made his will, and thereby gave the plaintiff the greateſt part of his perſonal eſtate, to the value of 5000*l.*, as was proved in the caſe; but one *B.* his maid-ſervant had, in his ſickneſs, prevailed on him (as was alleged) to make another will, and to marry her a week before his death, when he lay in his ſick bed, at ſix of the clock at night, though it was really proved by two miniſters, that ſhe was, a year before, actually married to the defendant *M.* and was then his wife; and that *M.* procured the licence for the marriage of *A.* to *B.* And this will being ſet up by *M.* executor to *B.*, though it appeared there was as groſs practice as could be, in gaining the will, the teſtator being *non compos*, both at the time of making this will, and alſo at the time of his ſuppoſed marriage; and that in his health he knew that *M.* and *B.* were married; and that *B.* ſuppreſſed the firſt will: yet that will ſo ſet up, being proved in the Prerogative Court, and the matter in queſtion being purely relating to the perſonal eſtate, the Lord Chancellour was of opinion, that whilſt that probate ſtood, this matter was not examinable in Chancery; and though the fraud was fully proved, and was opened to him, he would not hear any proofs read, but diſmiſſed the bill. 2 Vern. 8 & 9. Archer v. Moſſe.

So, where an executor proved a will of a perſonal eſtate, wherein one of the legacies was forged; it was decreed, that the executor had no remedy in equity; but ought to have proved the will, with a ſpecial reſervation as to that legacy. 1 P. Wms. 388. Plume v. Beal.

But though wills (of perſonal eſtates only) gained by fraud, and proved in the ſpiritual court, are not to be controverted in equity, yet if the party claiming under ſuch will comes for any aid in equity he ſhall not have it. 2 Vern. 76. Nelſon v. Oldfield.

It has been determined likewiſe, that the courts of equity can hold plea concerning a legacy, and likewiſe concerning the deviſe of the *reſiduum*, which is but a legacy: and they may in notorious caſes decree a legatee, who has obtained a legacy by fraud, to be a truſtee for another: as if the drawer of the will ſhould inſert his own name inſtead of the name of a legatee. 1 Str. 673. Marriot v. Marriot.

But it has been decreed in the Houſe of Lords, that a will of a real eſtate could not be ſet aſide in a court of equity for fraud or impoſition, but muſt firſt be tried at law on *deviſavit vel non*, being matter proper for a jury to inquire into. 1 Abr. Eq. Ca. 406. Bramſby v. Kerridge.

[The caſes on "Election," for which the reader has been referred to this title, will be found in the Appendix under title "Election."]

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APPENDIX.

Abatement.

(A) Foreign Plea *.

A (*a*) FOREIGN plea is when the defendant pleads ſuch plea as carries the cauſe out of the court wherein it is laid, by ſhewing that the matter alleged is not as to its trial within the juriſdiction of that court. 2 Lil. Pr. Reg. 374. Carth. 402.

(*a*) Muſt be ingroſſed on parchment, and ſigned by counſel. 2 Lil. Reg. 374.

As this plea is merely dilatory, and ouſts the court of its juriſdiction, it was holden, even before the ſtatute of 4 & 5 *Anne*, *c.* 16. that it muſt be on oath, and (*b*) before imparlance; and if the defendant refuſe to make oath of the truth of his plea, the plaintiff may ſign judgment as upon a *nihil dicit*. Lit. Rep. 236. Style, 225. 435. Sand. 97. (*b*) Vent. 180.

If a defendant in a corporation court plead a foreign plea, which is collateral; as, in debt upon a bond, if he plead a releaſe made in a place out of the juriſdiction of the court, it need not be received without oath: but, if in covenant, or debt for money to be paid at another place, he plead payment accordingly, or covenants performed in the place limited, which was out of their juriſdiction, it ought to be received without oath. Hetl. 126. Lit Rep. 236. S. C. *verbatim*.

If there be a cauſe removed from *Canterbury* into *B. R.* by *habeas corpus*, and the plaintiff declare here upon a demiſe in *London* of a houſe in *Canterbury*; if the defendant plead an entry and *ouſter* in *Canterbury*, ſo that this cannot be tried here; this is not a foreign plea, becauſe it ariſes naturally upon the caſe: ſo, if matter ariſe within two counties, and the plaintiff lay it in one, it is not a foreign plea for the defendant to plead any matter in the other. Paſch. 26. Car. 2. in B. R. Browne— Mod. 118. S. C.

In real actions in (*c*) *London* if a (*d*) foreign plea be pleaded, it ſhall be ſent into the Common Pleas to be tried; but otherwiſe it is in perſonal actions. 3 H. 4. 12. (*c*) How foreign pleas in Wales ſhall be tried, *vide* the ſtatute 34 & 35 H. 8. c. 26. (*d*) This is within the equity of the ſtatute of Glouc. c. 12. which *vide* expounded 2 Inſt. 324-5. which extends to real actions only wherein vouther lies, and not to perſonal. 2 Leon. 37. Sand. 98.

Ancient

* The whole of the matter reſpecting *Foreign Pleas* is part of the original work, and is the only part of it which is to be found in the Appendix. It was omitted by accident when the ſheets under this title were ſent to the preſs.

5 Mod. 335. Ancient demeſne, and all pleas of privilege, are pleas to the juriſdiction, but not foreign.

Stile, 225. Dudney v. Collyer. If a perſon be ſued in an inferior court on an obligation conditioned to pay money out of the juriſdiction of ſuch court, and the defendant plead payment according to the condition; this is not ſuch a foreign plea as need be on oath.

So, if in covenant brought in *London* for payment of a certain ſum of money on the return of a ſhip, the defendant plead, that the ſhip returned to ſuch a place in *Cornwall*; and thereupon the plaintiff demur; this plea is not good; for the matter being tranſitory, the defendant cannot oblige the plaintiff to change his action, but muſt plead to it in ſuch place as he has laid it; and had the matter been local, then it would have amounted to a foreign plea, which muſt have been put in on oath.

Sid. 234. Collins v. Sutton; but *vide* Mod. 81.

Vent. 180. St. Aubin v. Cox. But, where a prohibition was prayed for to the court of the *Compter* in *Wood-ſtreet*, *London*, to an action of debt there commenced, for that the defendant had pleaded before any imparlance, that the cauſe of action did ariſe at a place out of their juriſdiction, and offered to have ſworn his plea, and they refuſed to accept this plea; upon this matter a prohibition was granted; for (*a*) inferior courts have not cognizance of tranſitory things which ariſe in places out of their juriſdiction: but then it is not ſufficient to ſurmiſe ſuch matter for a prohibition; but a plea to that effect muſt be tendered in the inferior court, and that before imparlance, and it muſt be on oath, and then, if refuſed, a prohibition ſhall be granted, or upon ſuch refuſal a bill of exception may be made.

(*a*) For this *vide* title Courts, letter (D).

Carth. 402. 3 Mod. 335. S. C. Chumley v. Broom. In debt brought in *B. R.* the plaintiff laid the *viſne* in ſuch a place within the county palatine of *Cheſter*, which county was alſo in the margin of the declaration: the defendant without imparling pleaded by attorney, that he is, and at the time of the action brought was, reſident at the ſaid place within the ſaid county; and ſo prayed judgment, if the court of *B. R.* ought to hold plea of this matter. The plaintiff taking this to be a foreign plea rejected it, as not being on oath, and ſigned judgment: but *per Holt*, C. J.—A foreign plea is where the action is carried out of the county where it is laid, which in this caſe was not done; ſo that this is only a plea to the juriſdiction of the court, which is never ſworn; ſo the judgment was ſet aſide.

6 Mod. 146. Sparks v. Wood. In debt brought in *London*, a prohibition was moved for, and ruled *niſi*, upon ſuggeſtion, that the defendant had tendered for plea below, that the cauſe aroſe out of their juriſdiction, and offered to make oath of the truth of his plea; and it was ſhewn, that he tendered his plea after the court was up; whereas it ſhould be *in propriâ perſonâ*, and in court; and though an *affidavit* was offered in *B. R.* of the truth of his plea; and one *Turner*'s caſe was quoted, where a prohibition had been granted upon ſuch an *affidavit* here above without oath of it below; yet *per Powell*, *Gould*, and *Powis*, *abſente Holt*, the rule was diſcharged; for in all pleas that ouſt a court of juriſdiction, whether inferior or ſuperior, there muſt be oath in that very court of the truth of the plea.

If one be ſued in an inferior court for a matter out of the juriſdiction, the defendant may either have a prohibition from one of the law courts of *Weſtminſter-hall*; or, in regard this may happen in a vacation, when only the Chancery is open, he may move the court for a prohibition: but then it muſt appear by oath made, that the fact aroſe out of the juriſdiction, and that the defendant tendered a foreign plea before imparlance, which was refuſed. And if a prohibition has been granted out of Chancery *improvidè*, and without theſe circumſtances attending it, the court will grant a *ſuperſedeas*. 1 P. Wms. 476. pl. 135.

If it appear on the face of the declaration, that the matter is out of the juriſdiction of the court, then a prohibition will be granted without oath of having tendered the foreign plea. And in theſe caſes equity imitates (*a*) the common law. *Id.* 477. (*a*) In a motion for a prohibition to an eccleſiaſtical court, as to more than appears on the face of the libel, there muſt be an affidavit of the truth of the ſuggeſtion. 2 Salk. 549.

On a rule to ſhew cauſe why an attachment ſhould not be granted againſt the mayor of *Marlborough* for refuſing to accept the defendant's plea in his court, it was holden that it was not ſufficient for a defendant in a court below to bring his plea into court, and offer to make oath of the truth of it, but that he muſt tender his plea with an affidavit annexed of the truth thereof, and that this muſt be done before a general imparlance, but he may pray a ſpecial imparlance, and then come at the next court and plead. It was alſo holden, that the proper way of proceeding was not by attachment, but that a prohibition ſhould be moved for. And ſo, in the principal caſe, the rule for an attachment was diſcharged. Hil. 12 G. 2. in B. R. Vokens v. Cull.

(B) Of Abatement by reaſon of Coverture.

IF the plaintiff take huſband after ſuing out the writ, and before declaration, the defendant cannot give the coverture in evidence under the general iſſue, but muſt plead it in abatement. Morgan v. Painter, 6 Term Rep. 265.

(C) Dilatory Pleas, how reſtrained.

IF a plea in abatement be pleaded after a general imparlance, the plaintiff may either demur to it generally, or he may treat it as a nullity, and ſign judgment as for want of a plea. For ſuch a plea can only be received after a ſpecial imparlance, which muſt be ſtated on the record. Buddle v. Wilſon, 6 Term Rep. 369. Doughty v. Laſcelles, 4 Term Rep. 520.

If one of two part-owners of a chattel ſue alone for a tort, and the defendant do not plead in abatement, the other part-owner may afterwards ſue alone, and the defendant cannot plead the joint-ownerſhip in abatement to ſuch action. Sedgworth v. Overend, 7 Term Rep. 279.

A declaration is only well filed from the time of notice, whether it be a declaration in chief or *de bene eſſe*; and therefore the defendant has four days after notice in which to plead in abatement. Hutchinſon v. Brown, 7 Term Rep. 293.

(D) Of the Manner of pleading in Abatement.

Herries v. Jamieſon, 5 Term Rep. 553.

IF a plea in abatement profeſs to anſwer the whole declaration, and yet in truth anſwer only part of it, it will be bad. Thus, on a writ in debt for 1066*l.*, the plaintiff declared for 1000*l.* borrowed by the defendant of the plaintiff, and in a ſecond count for 66*l.* for intereſt of money lent by the plaintiff to the defendant. The defendant pleaded in abatement of the writ, that "*the "ſaid ſum of money in the ſaid writ mentioned, and thereby ſuppoſed "to be borrowed of the plaintiff*," was borrowed by the defendant and others, and not by the defendant ſeparately. The plea was demurred to, becauſe it anſwered only one of the cauſes of action, *viz.* that mentioned in the firſt count, and the court for that reaſon held it bad.

Actions on the Caſe.

(A) Againſt whom ſuch Action lies.

Schinotti v. Bumſted, 6 Term Rep. 646.

AN action on the caſe will lie againſt the commiſſioners of the lottery for not adjudging a prize to the perſon entitled to receive it.

Blake v. La yon, *Id.* 222.

It will lie againſt a perſon who receives or continues to employ the ſervant of another after notice, though he did not originally entice him away.

Stone v. Cartwright, *Id.* 411.

An action cannot be maintained in this form, or indeed in any other, againſt a ſteward, manager, or agent, for damage done by the negligence of thoſe employed by him in the ſervice of his principal; but the remedy in ſuch caſe is againſt the principal or thoſe immediately employed. If indeed it ſhould appear in evidence, that the acts whence the damage aroſe were particularly ordered by the agent, that would vary the caſe.

Adam v. Richards, 2 H. Bl. 573.

Although on the ſale of a horſe there is an *expreſs* warranty by the ſeller, that the horſe is ſound, free from vice, *&c.* yet, if it is accompanied with an undertaking on the part of the ſeller to take the horſe again, and pay back the purchaſe-money, if *on trial* he ſhall be found to have any of the defects mentioned in the warranty, the buyer muſt return the horſe as ſoon as he diſcovers any of thoſe defects, elſe he cannot maintain an action upon the warranty. For the term *trial* in ſuch caſe means a *reaſonable* trial.

Affidavit.

(A) The taking and filing of Affidavits.

AN affidavit on a motion for leave to file a criminal information ought not to be entitled; and if it is, it cannot be read. But the affidavits produced on ſhewing cauſe againſt the rule may or may not be entitled: and all affidavits made after the rule is made abſolute muſt be entitled.

Rex v. Robinſon, cited in Rex v. Cole, 6 Term Rep. 642. Rex v. Harriſon, *Id.* 60.

The courts of this country will take notice of affidavits ſworn before foreign judicatures, provided they are properly authenticated to them. Where the affidavit is taken before one of the judges of the ſuperior courts in *Ireland*, an affidavit that the ſignature is in his hand-writing has been admitted as a ſufficient authentication of it. But with reſpect to ordinary magiſtrates, it is uſual to require the atteſtation of a notary publick. In a late caſe, however (*a*), the court of King's Bench received an affidavit, purporting to be ſworn before the high bailiff and chief magiſtrate of the diſtrict of *Dougkas* in the *Iſle of Man*, upon oath made here before them, that the deponent believed the ſignature to be of the proper hand-writing of ſuch magiſtrate.

Ex parte Worſley, 2 H. Bl. 275.

(*a*) Dalmer v. Barnard, 7 Term Rep. 251-2.

Agreements.

(A) Of Agreements which are good in Law, and will be decreed in Specie in Equity.

IN the caſe of *Lucas* v. *Commerford* alluded to in the preceding part (*b*) of this work, Lord *Thurlowe* declared his opinion, that a decree for ſpecifick performance could not be made on a covenant to build, by reaſon of its uncertainty. But this poſition, it has been ſaid in a later caſe (*c*), admits this qualification: if the tranſaction and agreement be in its nature defined, perhaps there would not be much difficulty to decree a ſpecifick performance: but, if it be looſe and undefined, and it be not expreſſed diſtinctly what the building is, ſo that the court can deſcribe it as a ſubject for the report of the maſter, the juriſdiction cannot apply.

(*b*) Vol. i. pag. 107.

(*c*) Moſely v. Virgin. 3 Vez. jun. 184.

It is no objection to a ſpecifick performance of an agreement for a leaſe, that the party means to uſe the eſtate for another purpoſe than that which has been ſtipulated, and that he has entered into an agreement with a third perſon, which, if executed,

Williams v. Cheney, *Id.* 659.

will not be a fulfilment of the prior contract, and occaſion a forfeiture, provided he offers to take it under the conditions agreed upon.

(B) Of parol Agreements, or ſuch as may be ſaid to be within the Statute of Frauds and Perjuries.

Cooke v. Tombs, Anſtr. 420.

TO a bill for a ſpecifick performance of an agreement for the ſale of certain freehold premiſes and ſtock in trade, principally conſiſting of ſtock and timber for ſhip-building, and ſome houſes, the defendant pleaded the ſtatute of frauds. It appeared, that, pending the negociation, the defendant delivered to the plaintiff a particular of the premiſes and property to be ſold, and the terms or conditions of the ſale, all in his own hand-writing, and ſigned by him, when it was agreed, that the plaintiff ſhould have till a certain day to conſider of the purchaſe, as he objected to the price. It was afterwards agreed, that the purchaſe ſhould take place at a reduced price; and verbal inſtructions for a conveyance were given by both parties together to an attorney, to whom the defendant delivered the particular, as inſtructions for the deed, which was prepared, read over, and approved by the parties. The court of Exchequer held, that theſe circumſtances were not ſufficient to take the agreement out of the ſtatute: that the particular was not made out, as evidence of any agreement, but merely as a liſt or catalogue of the matters for ſale, to enable the purchaſer to form a proper eſtimate of their value: that it was delivered into the attorney's hands for the ſame purpoſe: and was ſigned merely to authenticate it as ſuch liſt: that it was delivered in as the foundation of a ſale at a higher price; and could be no evidence of the terms of the ſecond contract, or even of its exiſtence; ſince with the price, the parcels alſo may have been varied: that the inſtructing an attorney to draw conveyances, and his doing ſo, is no part performance of a contract: to take the caſe out of the ſtatute, there muſt be a part execution of the ſubſtance of the agreement itſelf: that the agreement being void as to the land, muſt be void alſo as to the perſonal property, which was to be ſold with it; it is one entire contract, and the whole muſt ſtand or fall together: that it could never be the intention of the parties, that the ſtock ſhould be ſold apart from the premiſes, as moſt of it was of little comparative value ſeparately; and the agreement being for one entire ſum, they could not ſever it.—As the bill, however, charged, that a correſpondence took place, from which, if produced, the agreement might be proved; the plea was ordered to ſtand for an anſwer, with liberty to except as to that particular.

Lea v. Barber, Anſtr. 425. n. S. P.

Tawney v. Crowtner. 3 Br. Ch. Rep. 161. 318.

Chater v. Becket, 7 Term Rep. 201.

A parol promiſe to pay the debt of another, and alſo to do ſomething elſe, is void *in toto*; for that part which relates to the debt of another is void within the ſtatute, and the contract being entire, the plaintiff cannot ſeparate it, and recover on part only.

Aliens.

(A) Of pleading Alienage.

ALIEN enemy is pleadable in equity as well to a bill for discovery as to a bill for relief: and such a plea stating that this nation was at war with the *French* government, and that the plaintiffs were *Frenchmen*, *aliens*, and *enemies* of the king, was adjudged to be good in point of form, though it was objected, that it ought to state the plaintiffs to have been born out of the liegeance of the king, and within the liegeance of a state at war with this country. Daubigny v. Davallon, Anstr. 462.

Amendment and Jeofail.

(A) Of Amendments at Common Law.

IN penal actions the court will give leave to amend, notwithstanding the time for bringing a new action has elapsed, provided there have been no *unnecessary* delay, and the amendment prayed for be not to introduce a new substantive cause of action. Cross v. Kaye, 6 Term Rep. 513. Maddock v. Hammett, 7 Term Rep. 55. Goff v. Popplewell, 2 Term Rep. 707. Steele v. Sowerby, 6 Term Rep. 171.

After a party has once amended on a demurrer, the court will not give him leave to amend again on a second demurrer. Kinder v. Paris, 2 H. Bl. 561.

(B) What Defects may be amended or aided after Verdict.

IN an action on the statute of usury, a verdict was given for the plaintiff, and taken on one of the counts in the declaration, the other counts being found for the defendant. It was moved in arrest of judgment, because the *christian* name of one of the persons mentioned in that count (rightly named, in that count, before) was mistaken in the issue roll, which had been carried in, whereby the count was rendered absurd and bad. The court gave leave to file a right bill, (the proceedings being by bill,) and afterwards amended the issue roll by the bill. The *nisi prius* roll was right.—This was done as an amendment at common law. Gardner v. Brown, B. R. Tr. 15 G. 3. Jacob's Law Dict. by Tomlins, tit. Amendment.

Wilder v. Handy, 2 Str. 1151. Marſhall v. Riggs, *Id.* 1162. Tomlinſon v. Blackſmith, 7 Term Rep. 130.

A declaration in treſpaſs running by recital "Whereas," &c. may be amended after verdict, provided the bill be filed right, the time of filing which, by the way, the court will not inquire into. So, where the damages have been laid by miſtake in an action upon contract at a ſmaller ſum than the amount of the ſeveral ſums mentioned in the body of the declaration, the court have given leave to amend the declaration by increaſing the damages, according to the truth of the caſe as found by the jury. In this caſe, however, the former verdict muſt be ſet aſide, and a new trial had to enable the defendant to make his defence to the demand ſo enlarged.

(C) In what Caſes and at what Time Amendments may be made where the Crown is concerned.

Rex v. Holland, 4 Term Rep. 457.

AN information filed by the Attorney-General againſt an *Eaſt India* delinquent, under the 24 & 26 G. 3. to which the defendant demurred, was amended in the King's Bench on the motion of the Attorney-General.

Attorney-General v. Henderſon, Anſtr. 714.

By the practice of the court of Exchequer, the Attorney-General may, at any time, amend a revenue information as of courſe.

(D) Of Amendments in Equity.

Freeland v. Johnſon, Anſtr. 276.

ON a bill to ſet aſide an agreement and releaſe, ſtating circumſtances of impoſition and equitable dureſs in obtaining them; the defendant pleaded to the whole, the agreement and releaſe. There was no anſwer, nor was the fraud or dureſs denied in the plea. The court refuſed leave to amend, and overruled the plea.

Tennant v. Willmore, *Id.* 362.

On a motion to amend an anſwer after replication put in, upon affidavit that the defendant was informed and believed he had a good defence, (*viz.* a modus, the bill being for an account of tythes,) and had not inſerted it in his anſwer, not being able, at the time of putting in his anſwer, to ſet forth the modus with proper preciſion; it was objected, and ſo ruled by the court of Exchequer, that the practice in that court is to give leave to put in a ſupplemental anſwer, not to amend the former, for the purpoſe of keeping them diſtinct: but that even that is allowed only where new matter ariſes, or a ſufficient reaſon is given for its not being inſerted in the firſt anſwer. The reaſon why the court inſiſt upon a ſupplemental anſwer, and will not allow the former anſwer to be amended, is to avoid the danger of perjury.

Harris v. Daubeny, *Id.* 717.

Annuity and Rent-Charge.

(A) Of Life Annuities as affected by Stat. 17 G. 3. c. 26.

WHERE the *whole* of an annuity is aſſigned, it is not neceſſary to enrol a memorial of the aſſignment; for in ſuch caſe the object of the ſtatute, which was the protection of the grantor, is fully complied with by the having enrolled a memorial of all the original ſecurities. Dixon v. Bird, 2 H. Bl. 317. Bromley v. Greathead, B. R. Hil. 34 G. 3. Hunt on Annuities, 188.

It is requiſite that not only *every* deed executed by the immediate grantor of the annuity ſhould be mentioned in the memorial, but that every other deed or aſſurance, though it be but a collateral ſecurity given by a third perſon, ſhould be equally ſet forth in the memorial: therefore, a bond entered into by ſureties for better ſecuring an annuity that had been previouſly granted, though the bond was made to bear even date with the deeds, was holden by the court neceſſary to be regiſtered. Roſher v. Hurdis, 5 Term Rep. 678.

Every part of the contract which can affect the nature or value of the annuity ſhould be ſet forth in the memorial; as, where a ſpecial agreement and covenant was indorſed on the deed to enable the grantor to redeem at a ſtated price, and this indorſement was not taken notice of in the memorial, the court upon that ground held that the deeds were void. And it is not merely becauſe the indorſement may be conſidered as a diſtinct and ſeparate inſtrument, that this is required; for if the power of redemption be contained in the body of the deed itſelf, it is equally neceſſary that it ſhould be mentioned in the memorial. Sawyer v. Bunce, Hunt on Annuit. 74. Steadman v. Purchaſe, 6 Term Rep. 737. Harris v. Stapleton, 7 Term Rep. 205.

The memorial muſt diſtinctly ſtate the names of the witneſſes to all the deeds: to ſtate that all the inſtruments were atteſted by *A. B.* of, &c., *C. D.* of, &c., *or one of them*, is not ſufficient. Hart v. Lovelace, 6 Term Rep 471.

In one caſe it was ſaid by the court of King's Bench, that the legiſlature did not mean to require the parties to mention in the memorial all the truſts that were a lien on the eſtate independently on the annuity, but only thoſe truſts which were created in conſequence of the annuity being granted. However, in a ſubſequent caſe (*a*), it has been holden, by that ſame court, that if a deed, by which an annuity is granted or ſecured, contain other truſts, than thoſe which affect the annuity, they, as well as thoſe which do affect the annuity, muſt be ſet forth in the memorial, elſe the deed will be a nullity. Toldervy v. Allan, 5 Term Rep. 480. (*a*) Denn v. Dolmer, *H.* 641. *Vide* Plowd. on Uſury, &c. 369, &c.

The memorial ſtated, that the conſideration-money (700 *l.*) was paid by a promiſſory note drawn by *Hamerſley*, and payable at *Hamerſley, Morland, and Co.'s, and which ſaid ſum ſo ſecured has been* Berry v. Bentley, 6 Term Rep. 690.

Vide Plowd. on Annuit. 377.

ſince paid. It was objected, that the memorial did not ſet forth when the note was payable, whether immediately or at a diſtant day; for, if at a diſtant day, it was not worth 700 *l.* by reaſon of the diſcount. In anſwer to this it was ſtated in an affidavit, that it was a banker's check payable immediately. But the court ſaid, that the memorial ſhould contain every thing neceſſary to ſhew, that the tranſaction was fair, and that the conſideration-money had been paid: and they thought, that this caſe was decided by that of *Rumball* v. *Murray*.

Watts v. Millard, 5 Term Rep. 598.

Where the memorial ſet forth as the conſideration of granting the annuity the payment of 180 *l.* by the grantee to the grantor, whereas in fact he only paid him 130 *l.*, and retained, with the grantor's conſent, 50 *l.* as a debt due from the grantor to a perſon, who was the attorney of both parties in the tranſaction; it was declared defective from not ſpecifically ſtating this retention of the 50 *l.* as one of the terms of the contract, and making a part of the conſideration.

Id. ibid. Ince v. Everard, 6 Term Rep. 545.

Annuity deeds will not be ſet aſide on account of mere clerical miſtakes in the memorial: as, where the chriſtian name of the witneſs to one of the deeds is omitted; or, if in ſtating the aſſignment of a term of 61 years, it ſet forth a term of 62 years; or, if after reciting the true conſideration, *viz.* 280 *l.*, it ſtate afterwards, "which ſum of 250 *l.* was paid;" or if it omit to ſtate the nominal conſideration for the deed, or, that the annuity was payable for the portion of time from the laſt quarter-day to the death of the annuitant.

Hammond v. Foſter, 5 Term Rep. 635.

An annuity granted by *A.* to *B.* which was duly regiſtered, was redeemed by virtue of a clauſe of redemption in the deeds, when the deeds were delivered up to the grantor uncancelled, and he and the attorney for the grantee agreed, that if at any future time he, the grantor, ſhould wiſh to borrow money on the ſame terms, thoſe deeds ſhould be given as a ſecurity. On a ſubſequent application by the grantor, the attorney advanced the ſame money on having the ſame deeds delivered to him. But this regrant of the annuity not being regiſtered, the court ſet aſide the annuity, and ordered the deeds to be cancelled.

Dalmer v. Barnard, 7 Term Rep. 248.

If the conſideration-money be paid by an agent on behalf of the principal, it muſt be ſo ſtated in the deed; if it be ſtated to be paid by the principal, the deed is void within the third ſection of the act.

Crawfurd v. Caines, 2 H. Bl. 458. *Vide* Plowd. on Annuit. 425, &c. and Garrood v. Saunders, 6 Term Rep. 404. as to the power of the courts to interfere merely on the three firſt ſections of the act.

A fine levied of a rent-charge aſſigned by way of annuity will not give the court of Common Pleas juriſdiction to ſet aſide the annuity on account of a defective memorial, if there be neither a judgment, nor a warrant of attorney to enter up a judgment in that court.

Hart v. Lovelace,

Where the validity of an annuity under this act has been once before a court of competent juriſdiction, and there decided, another

ther court will not entertain an application as to the validity of the ſame annuity upon the ſame grounds. 6 Term Rep. 471.

Where an annuity was granted in conſideration of the grantee reſigning his ſituation, as maſter of an academy, in favour of the grantor, it was holden not neceſſary to regiſter it, though at the time of the grant the grantee agreed to aſſign over to the grantor his houſehold furniture, &c., at an appraiſed value, and if it ſhould not be convenient to the grantor to raiſe money to pay for them, to lend him a ſum of money, to be repaid with intereſt: for the annuity was not granted in conſideration of money paid to the grantor, but of reſigning the grantee's ſituation in favour of the grantor; and the loan of money, which was to be in the option of the grantor afterwards, was no part of the conſideration of the annuity. Hutton v. Lewis, 5 Term Rep. 639.

A., who was tenant for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail remainder to himſelf in fee, ſuffered a recovery together with *B.* his only ſon, and declared the uſes to ſuch perſon and for ſuch eſtate, &c. as they ſhould jointly appoint: they jointly granted an annuity, and appointed and granted the lands to *C.* for a term of years in truſt for the grantee. It was adjudged, that this caſe came within the exception of the act. Halſey v. Hales, 7 Term Rep. 194.

Where *A.*, who was entitled for life to the dividends in certain ſtock ſtanding in the names of truſtees, granted an annuity payable out of the dividends, and empowered thoſe truſtees to pay the grantee, it was holden, that this annuity was not within the exception of the act, and muſt be regiſtered; for the eighth ſection, which excepts annuities ſecured by the transfer of ſtock, only extends to thoſe caſes where an actual transfer of the ſtock is made for the purpoſe of ſecuring the annuity. Hudſon v. Skinner, 6 Term Rep 596.

Arbitrament and Award.

(A) The Submiſſion.

THERE is no authority given to the court by the ſtat. 9 & 10 *W.* 3. *c.* 15. to make a parol ſubmiſſion to an award a rule of court. Anſell v. Evans, 7 Term Rep. 1.

(B) The Award itſelf.

AN award that the defendant ſhould pay to the plaintiff ſuch a ſum of money unleſs within twenty-one days (which, in fact, was after the time limited for making the award) the defendant ſhould Pedley v. Goddard, 7 Term Rep. 73.

ſhould exonerate himſelf by affidavit from certain payments and receipts, in which caſe he was only to pay a certain other leſs ſum, was holden to be illegal and void, becauſe uncertain and inconcluſive.

(C) Of compelling Performance of an Award.

Hutchiſon v. Hodgſon, Anſtr. 361.

ALL matters in difference in law and equity being referred to arbitration, and made a rule of the court of King's Bench, the award directed, that all ſuits between the parties ſhould be diſcontinued; and thereupon the defendant in equity moved that the bill might be diſmiſſed. But the motion was refuſed; for the court ſaid, they could not act upon the award: if the plaintiff proceeded in his bill, the way was to move for an attachment in the court of which the ſubmiſſion to arbitration is made a rule: ſo, if he refuſed to diſmiſs his bill, if that were the meaning of the award.

(D) Of the Pleadings in Awards.

Pope v. Biſh, Anſtr. 59. Edmunſon v. Hartley, *Id.* 97. (*a*) Butcher v. Cole, before Sir L. Kenyon, at the Rolls, 26th June 1786, cited Anſtr. 99.

IT has been ruled in the court of Exchequer, that to a bill impeaching an award, it is proper to plead the award itſelf nakedly: that the denial of the circumſtances which are alleged to impeach it ſhould be only in the anſwer. This practice, however, ſeems to prevail only (*a*) in that court. And even in that court, a plea of the award alone, unaccompanied with any anſwer, where the bill charged that the award had been obtained by a miſrepreſentation of facts, has been over-ruled (*b*).

(*b*) Gartſide v. Gartſide, Anſtr. 735.

(E) In what Caſes, when, and in what Manner Awards may be relieved againſt.

Pedley v. Goddard, 7 Term Rep. 73. Holland v. Brooks, 6 Term Rep. 161.

IT ſeems now to be ſettled, that the ſound conſtruction of the act of 9 & 10 *W.* 3. *c.* 15. is, that if a motion be made to ſet aſide an award for *extrinſick* matter, it muſt be made within the time limited by the act, that is, before the end of the next term: but that an application for an attachment for not performing an award may be reſiſted at any time *for defects appearing on the face of the award itſelf.*

Preſton v. Eaſtwood, 7 Term Rep. 95.

If an award be made on an improper ſtamp, and no application be made to enforce it, the court will not ſet it aſide.

Aſſumpſit.

(A) In what Caſes an *Aſſumpſit* is the proper Form of Action.

WHERE a perſon, ſuppoſing himſelf to be the legal repreſentative of leſſee for years, ſold the term, and delivered the leaſe to the vendee, but without any aſſignment or formal conveyance, ſaying only, that the premiſes were his, and that if any thing happened, he would ſee the vendee righted; and the vendee was afterwards ouſted upon an ejectment brought by the rightful adminiſtrator of the leſſee; it was holden, that as the whole paſſed by parol, and proceeded on a miſapprehenſion of both parties that the vendor was the legal repreſentative of the leſſee, the vendee might recover back from him the money he had paid in an action for money had and received. Cripps v. Reade, 6 Term Rep. 606.

Where money has been paid under the compulſion of legal proceſs, it cannot be recovered back in an action for money had and received, though it be afterwards diſcovered not to have been due. Marriott v. Hampton, 7 Term Rep. 269.

(B) What is a ſufficient Conſideration to create an *Aſſumpſit*.

AN accord executory is no conſideration for a promiſe; for as it would be no bar, if pleaded, ſo no remedy can lie for it. Lynn v. Bruce, 2 H. Bl. 217.

A breach of truſt, it ſeems, may be the ground of an aſſumpſit. Smith v. Johnſon, 5 Term Rep. 602. *Sed vide Ex parte* Aſpey, 3 Br. Ch. Rep. 265.

The mere relation of landlord and tenant is a ſufficient conſideration for the tenant's promiſe to manage a farm in a huſband-like manner. Powley v. Walker, 5 Term Rep. 373.

(C) Where the Promiſe ſhall be void, the Conſideration being againſt Law.

WHERE the vendor of goods abroad packed them up by order of the buyer in a particular manner for ſmuggling them into this country, and knew at the time that they were to be ſmuggled, he was not allowed to recover the value of them againſt the buyer, although he was not concerned in the riſk of importing the goods into this country. And the court diſtinguiſhed this Waymell v. Reed, 5 Term Rep. 599.

caſe from that of *Holman* v. *Johnſon*, *Cowp.* 341: for there, the ſeller did not aſſiſt the buyer in the ſmuggling; he merely ſold the goods in the common courſe of trade. But here the ſeller not only knew the uſe intended to be made of the goods, but actually aſſiſted in the act of ſmuggling by packing the goods up in a manner the moſt convenient for that purpoſe. And if he undertook to deliver the goods in that manner, knowing the uſe intended to be made of them, he was offending againſt the laws of this country in the very contract itſelf.

Booth v. Hodgſon, 6 Term Rep. 405. Mitcheli v. Cockburne, 2 H. Bl. 379.

A contract which ariſes wholly and *immediately* out of an illegal tranſaction, is no foundation for an action: as where *A.*, *B.*, and *C.* became partners in inſuring ſhips, contrary to the ſtatute of 6 *G.* 1. *c.* 18. § 12. (*vide* vol. iv.) and it was agreed, that the policies ſhould be under-written in the name of *A.* only, and ſeveral policies were ſo effected, and the premiums received by *C.* and *D.* as brokers; it was holden, that *A.* could not maintain an action to recover theſe premiums from *C.* and *D.*

6 Term Rep. 70.

It ſeems, that a ſpeculative intereſt may afford a ground for an aſſumpſit; for even gambling in the funds was not conſidered to be illegal till the *ſtat.* 7 *G.* 2. *c.* 8. before which ſeveral contracts on ſtock-jobbing tranſactions were enforced in courts of juſtice.

(D) What may be pleaded as a good Diſcharge and Performance of the Promiſe.

Seddon v. Tutop, 6 Term Rep. 608.

THE plaintiff in a former action declared on a promiſſory note, and for goods ſold; but upon executing a writ of inquiry after judgment by default, he gave no evidence upon the count for goods ſold, and took his damages for the amount of the promiſſory note only. It was therefore ruled, that the judgment in that action was no bar to his recovery in a ſubſequent action for the goods ſold: for the recovery in the former action was only *primâ facie* evidence that the demand had been inquired into; it was not concluſive.

Reeve v. Farmer, 4 Term Rep. 146-7.

So, it hath been holden, that an award made on a reference of all matters in difference between the parties, is no bar to any cauſe of action which the plaintiff had againſt the defendant at the time of the reference, if the plaintiff can prove that the ſubject-matter of the action was not inquired into before the arbitrator.

Attachment.

(A) In what Caſes an Attachment is to be granted.

THE court of King's Bench cannot grant an attachment againſt a peer of the realm for not paying a ſum of money awarded, even though the defendant conſent on condition that the attachment ſhall lie in the office a certain time. Walker v. Earl Groſvenor, 7 Term Rep. 171.

Although a plaintiff diſcontinue under the common rule on payment of coſts, yet he is not liable to an attachment for non-payment. Stokes v. Woodeſon, 7 Term Rep. 6.

If an attorney required to anſwer the matters of an affidavit, ſwear in his exculpation to an incredible ſtory, the court will grant an attachment againſt him, though he poſitively deny the mal practices imputed to him. In the matter of Croſſley, 6 Term Rep. 701.

Attorney.

(A) Of an Attorney's Fees and Diſburſements, and the Remedy for the Recovery of them.

IF *any part* of an attorney's bill be for buſineſs done in the court, the bill muſt be delivered a month before the action is brought, otherwiſe the plaintiff cannot recover. And charges "for drawing and engroſſing an affidavit of debt in order to hold "a party to bail; paid for ſwearing," *&c.* have been conſidered as buſineſs done in court. Winter v. Payne, 6 Term Rep. 645.

To maintain an action by one attorney againſt another, for buſineſs done by the plaintiff for the defendant, before the defendant became an attorney, it is not neceſſary for the plaintiff to leave his bill ſigned with the defendant, purſuant to the directions of the ſtat. 2 *G.* 2. *c.* 23. § 23. for the ſtat. 12 *G.* 2. *c.* 13, applies to the caſe of both parties being attornies when the action is brought. Ford v. Maxwell, 2 H. Bl. 589.

An attorney's bill had been referred to the prothonotary by a judge's order, and on the taxation more than one-ſixth part was taken off. But the deduction was occaſioned, not by any overcharges of particular *items*, but by the whole of the expences of defending two actions for one *B.* being diſallowed; which White v. Milner, 2 H. Bl. 357.

It

it was ſtated the defendant had undertaken to pay to the plaintiff, but which the prothonotary, and afterwards the court, upon reading the affidavits, thought he had not undertaken to pay. On motion that the attorney might pay the coſts of the taxation, the court held, that the ſtatute of *G.* 2. was applicable only where an attorney made exorbitant charges on his client, in the particulars of his bill, and the foundation of the demand was not denied, but only the amount of it: that in the preſent caſe, the plaintiff's charges for defending *B.* were not objectionable, provided he could have proved that the defendant was liable to pay them, and the other *items* of the bill were not reduced one-ſixth.

Webb v. Stone, Anſtr. 260.

A ſolicitor delivered in a bill of coſts including an *item*, which, though fairly due, could not be allowed on taxation. He delivered a ſecond bill without that *item*. On referring this bill for taxation leſs than a ſixth part was taken off. The court would not give coſts on either ſide.

Murphy v. Cunningham, Anſtr. 271.

Leave was granted by the court of Exchequer to ſet off coſts in a ſuit in the Common Pleas, for which the plaintiff in the Exchequer (though not himſelf the party in the ſuit) had retained the defendant as the attorney, againſt the judgment in the Exchequer.

Piſtor v. Dunbar, *Id.* 186.

Where ſeveral bills of coſts have been delivered in, ſettled, and paid, in the courſe of a long cauſe, and a receipt in full given, a client ſhall not be permitted at the end of the cauſe to refer them for taxation.

Mitchell v. Oldfield, 4 Term Rep. 123. Morland v. Hammerſley, 2 H. Bl. 441. n. Randle v. Fuller, 6 Term Rep. 456. Gabbett v. Chaytor, Anſtr. 229. Smith v. Brockleſby, *Id.* 61.

It ſhould ſeem from the current of authorities in the court of King's Bench, that the equitable right of ſetting off in one action the ſum recovered in another, is always ſubject to the attorney's lien for his bill. And the ſame opinion ſeems to prevail in the Exchequer. However the contrary hath been ruled both in the court of Chancery (*a*) and in the court of Common Pleas. For (*b*) where *A.* had obtained a verdict againſt *B.* for a ſmall ſum, and *B.* had previouſly recovered judgment againſt *A.* for a larger ſum, and had taken him in execution, the court of Common Pleas permitted the ſum recovered by *A.*, and the coſts to be deducted from the amount of *B.*'s judgment, and ſatisfaction to be entered for ſo much, notwithſtanding *A.* was inſolvent, and had no means of paying his attorney's bill, but by the ſum for which he obtained the verdict.

(*a*) Barton v. Ethering'on, cited by Buller, J. in 2 H. Bl. 441. (*b*) Vaughan v. Davies, 2 H. Bl. 440.

Read v. Dupper, 6 TermRep. 361.

If the defendant's attorney pay to the plaintiff the debt and coſts recovered, after notice from the plaintiff's attorney not to do ſo till his bill has been firſt ſatisfied, the former is liable to pay to the latter the amount of his lien on ſuch debt and coſts of the ſuit.

Yea v. Yea, Anſtr. 589.

Where a ſolicitor has been guilty of great delay in bringing in his bills, the court will not give him the coſts of taxation, although leſs than one-ſixth is taken off.

(B) Of the Privileges which an Attorney hath.

AN attorney cannot ſue an attorney by attachment of privilege, and hold him to bail: if he do, the defendant may plead his privilege in abatement, or the court will ſtay the proceedings without coſts. Barber v. Palmer, 6 Term Rep. 524.

A bill may be filed againſt an attorney in the vacation, and in ſuch caſe the day of filing it may be inſerted in the memorandum. Waghorne v. Fields, 5 Term Rep. 173. Dodſworth v. Bowen, *Id.* 325.

An attorney (defendant) is entitled to only four days notice to plead, though he reſide more than twenty miles from *London*. Mann v. Fletcher, *Id.* 369.

The privilege does not neceſſarily attach upon a perſon's inveſting himſelf with the character of attorney, but he muſt be a practiſing attorney. The rule of court in 1654 confines the privilege to attornies who have practiſed within a year. In order to preſerve the privilege the party therefore muſt continue to act as ſuch; for the very foundation of it is a preſumption that an attorney is already in court attending his duty, and therefore the iſſuing of proceſs merely to bring him there is nugatory. That reaſon conſequently does not apply to an attorney who is not practiſing at the time. Brooke v. Bryant, 7 Term Rep. 25.

An attorney is not liable to be aſſeſſed in the poor rates in reſpect of the profits of his profeſſion. Rex v. Startifant, 7 Term Rep. 63.

(C) Of Offences and Miſbehaviour for which he is puniſhable.

THE *ſtat.* 25 *G.* 3. *c.* 80. which impoſes a penalty upon attornies proſecuting or defending without a certificate a ſuit *in any court holding pleas, where the debt or damage ſhall amount to forty ſhillings or more*, does not extend to the ſheriff's court, though an attorney proſecute a ſuit there by virtue of a writ of juſticies for more than forty ſhillings. Croſs v. Kaye, 6 Term Rep. 663.

Bail in Civil Cauſes.

(A) In what Caſes ſpecial or common Bail is required.

Stinton v. Hughes, 6 Term Rep. 13.

AN affidavit to hold to bail for ſtipulated damages for not performing an agreement muſt ſtate a breach of the agreement.

Hatfield v. Linguard, 6 Term Rep. 217.

An affidavit to hold to bail, "that the defendant was indebted "to the plaintiff in 1000 *l.* under an agreement in writing, where- "by the defendant undertook to pay the plaintiff the balance of "accounts, *&c. which balance is ſtill due and unpaid*," without ſtating that the balance was 1000 *l.*, was holden to be defective: for a defendant cannot be holden to bail for a penalty, but only for the ſum ſecured by the penalty.

Spalding v. Mure, 6 Term Rep. 363. De la Cour v. Read, 2 H. Bl. 278.

If the declaration vary from the affidavit to hold to bail, the defendant is entitled to be diſcharged on a common appearance. But, if the plaintiff afterwards obtain judgment in that action, he is not thereby precluded from holding the defendant to bail in an action upon the judgment.

Dean and Chapter of Exeter v. Seagell, 6 Term Rep. 688.

Two cauſes of action ſhall in no inſtance be included in one affidavit to hold to bail: therefore, where an affidavit ſtated two ſums of money to be due from the defendant to two plaintiffs, the court ſet aſide the proceedings, though only one writ was ſued out upon it.

Brander v. Robſon, 6 Term Rep. 336.

Bail to the ſheriff cannot be holden to bail.

Houſin v. Barron, 6 Term Rep. 218.

Although it be generally true that a defendant cannot be holden to bail twice for the ſame cauſe; yet if he be diſcharged out of cuſtody the firſt time for ſome act for which the plaintiff is not anſwerable; as, for inſtance, an alteration in the warrant to arreſt by the ſheriff's officer without the plaintiff's knowledge, the defendant may in ſuch caſe be again holden to bail for the ſame cauſe of action.

Lumley v. Fitz, Tr. 37 G. 3. B. R.

The *Engliſh* notice to appear muſt be added to all common proceſs, where the defendant *is not* holden to bail, whether the cauſe of action do or do not amount to ten pounds.

(B) Where Bail ſhall be ſaid to be put in regularly.

OF the four days allowed in the court of Common Pleas to perfect bail after an exception, the firſt is reckoned inclusively and the laſt excluſively. And in that court, where a writ is returnable on the firſt return of a term in a country cauſe, the defendant has eight days after the *quarto die poſt* to put in bail. 2 H. Bl. 35. *Id.* 276.

A clerk to an attorney, though *not articled*, cannot be bail to the action. Corniſh v. Roſs, 2 H. Bl. 350

Bail are not put in regularly, unleſs the name of the proper county be inſerted in the bail-piece. Smith v. Miller, 7 Term Rep. 96.

(C) Of the Proceedings againſt the Bail, and what Matters they may plead in their Diſcharge.

IF the principal die after the return of the *capias ad ſatisfaciendum* and before it is filed, the bail are fixed, and the court will not ſtay the filing of the return in their favour. Rawlinſon v. Gunſton, 6 Term Rep. 284.

If a defendant (an alien) be ſent out of the kingdom under the alien bill, 33 *G.* 3. *c.* 4. the court will permit the bail to enter an *exoneretur* on the bail-piece, unleſs they are indemnified, or have money in their hands belonging to the defendant ſufficient to anſwer the plaintiff's demand. But if the bail will defend the action, they are not entitled to have an *exoneretur* entered upon giving up the money depoſited with them, without paying the coſts likewiſe. Merrick v. Vaucher, 6 Term Rep. 50. Coles v. De Haynes, *Id.* 52. 246.

Where the defendant is under ſentence of tranſportation, the court will permit an *exoneretur* to be entered on the bail-piece. An application for a *habeas corpus* to bring up a defendant under ſentence of tranſportation, who was on board a ſhip in the river *Thames* juſt ready to ſail, in order that he might be ſurrendered in diſcharge of his bail, has indeed been rejected; but that was merely on account of the inconvenience of bringing up the defendant at that period. And where a defendant was confined under a charge of felony, the court felt no difficulty in granting a *habeas corpus* to bring him up for this purpoſe, though it was urged that the bail were indemnified. But the bail are not at liberty to make ſuch an application till they have juſtified. Wood v. Mitchell, 6 Term Rep. 247. Fowler v. Dunn, 4 Burr. 2034. Sharp v. Sheriff, 7 Term Rep. 226.

(D) Within what Time the Bail muſt render the Principal.

2 Ld. Raym. 721. Imp. Pr. K. B. 448. 2 H. Bl. 317. 593. Fiſher v. Branſcombe, Tr. 37 G. 3. B. R.

IN the King's Bench, if an action be brought on the recognizance, whether the recognizance be taken in that court or in the Common Pleas, the bail have eight entire days in full term, next after the return of the writ, in which they may render the principal, and if there be but four days in the term next after the return, then four days in the following term. But in the court of Common Pleas the bail have in ſuch caſe only till the *quarto die poſt*; and this time they have, though the defendant be ſued by attachment of privilege. In both courts, where the bail are ſued by *ſcire facias*, and the proceedings are by original, they have till the *quarto die poſt* of the return of the firſt *ſcire facias*, if *ſcire feci* be returned, or, if *nihil* be returned, till the *quarto die poſt* of the return of the ſecond *ſcire facias*, to render the principal. Where the proceedings are by bill in *B. R.*, the time for rendering is the return-day of the *ſcire facias*; and in all theſe caſes it is abſolutely neceſſary that the return be made *ſedente curiâ*.

(E) Of the Bail-Bond.

Jackſon v. Hunter, 6 Term Rep. 71.

A Bail-bond given to the ſheriff of the county of *Durham* under a writ iſſued immediately from the court of King's Bench to him, is not void, though the count palatine may interpoſe and claim his privilege.

Owen v. Nail, 6 Term Rep. 702.

Where a ſheriff, under an original writ *in a plea of treſpaſs on the caſe on promiſes*, took a bail-bond conditioned for the defendant's appearance *in a plea of treſpaſs*, the bond was holden good: for if the cauſe of action be inſerted in the condition, it may be rejected as ſurpluſage; all that it is neceſſary to ſtate being the names of the parties, and the time and place of the defendant's appearance.

Jones v. Lander, 6 Term Rep. 753. Stamper v. Milbourne, 7 Term Rep. 122.

If the defendant, who has given a bail-bond, ſurrender himſelf to the ſheriff before the return of the writ, the bail-bond may be given up, and it will be conſidered as if no ſuch bond had been given; and of courſe, no action can be maintained againſt the ſheriff for not aſſigning it.

Vide 1 Str. 60 Nolan's edit. notes.

What is ſaid in the former part of this work under this diviſion of the ſubject, that an under-ſheriff's clerk cannot aſſign a bail-bond, ſeemeth not to be law.

Bankrupt.

(A) Of the Commiſſion of Bankrupt; and herein of the Creditors who may obtain it, and what they are to do previouſly thereto.

WHERE a creditor of a bankrupt to the amount of 112*l.* previous to the bankruptcy, but after notice of an act of bankruptcy having been committed, received 50*l.*, it was holden, that he was not thereby precluded from taking out a commiſſion; for this payment could not be retained, and conſequently the original debt remained in force. Mann v. Shepherd, 6 Term Rep. 79.

A creditor cannot preſent a petition to prove a debt until he has gone before the commiſſioners, and his petition ought to ſtate what paſſed before the commiſſioners. *Ex parte* Wright, 2 Vez. jun. 41.

A defendant at law having lain two months in priſon was made a bankrupt, and diſcharged under a *ſuperſedeas*, the plaintiff not having proceeded for two terms: the plaintiff then proved his debt under the commiſſion, but before a dividend took the bankrupt in execution in a freſh action. Lord Chancellour diſmiſſed a petition of the bankrupt to releaſe him, ſaying, that he could not bar the creditor of his legal remedy. *Ex parte* Callow, 3 Vez. jun. 1.

A. became bound as a ſurety with *B.* to *C.* on the 10th of *Auguſt* 1778, conditioned for payment in ſix months. On the 1ſt of *March* 1780, he became bound with *B.* to *D.* conditioned for payment in ſix months. On the 4th of *March* 1780, *B.* became bound to *A.* conditioned for payment of the two former bonds, and alſo to indemnify *A.* againſt thoſe bonds. The money ſecured by the ſecond bond not being paid on the day when it became due, it was holden, that the laſt bond was thereby forfeited, though *A.* was not called upon to pay the money in the ſecond bond until afterwards, and that he might prove it under a commiſſion of bankrupt that iſſued againſt *B.* after the forfeiture and before payment. Hodgſon v. Bell, 7 Term Rep. 97.

If a commiſſion be taken out fraudulently or maliciouſly, the Lord Chancellour may, under the ſtat. 5 *Geo.* 2. *c.* 30. either order a ſpecifick ſum to be paid by the petitioning creditor to the bankrupt, by way of damages, or aſſign the bond to the latter to enable him to recover the whole penalty of it. And the aſſignment of the bond is concluſive evidence of the fraud or malice, ſo that it is not neceſſary to ſtate in the declaration that the commiſſion was fraudulently or maliciouſly ſued out. Smith v. Broomhead, 7 Term Rep. 300.

(B) Of the Commiſſioners, their Duty, and the Power they may exerciſe over the Bankrupt, or others, in diſcovering the Bankrupt's Eſtate.

Ex parte Nowlan, 6 Term Rep. 118.

IF upon the examination of a bankrupt, touching the diſpoſition of his property, he ſwears to an account of it, which appears to be incredible, the commiſſioners may commit him to priſon.

(C) Of the Aſſignees, and Nature of their Truſt.

Purdon v. Dean, 2 Ves. jun. 607. Oſwell v. Probert, *Id.* 680.

WHERE the aſſignees are not entitled to the poſſeſſion of a bankrupt's wife's property without the aid of a court of equity, they muſt make a proviſion for her out of it, whether ſuch property be real or perſonal. And if the whole fund be attainable in equity only, the wife's equity extends to the whole, nor will a ſettlement before marriage of part of it to her ſeparate uſe bar her of it.

(D) Of the Creditors, who are ſuch; and herein of proving their Debts.

Ex parte Wright, 2 Ves. jun. 9.

A Creditor three years and a half after having received a dividend, refunded the dividend, brought an action againſt the bankrupt, and held him to bail. The bankrupt thereupon petitioned that the proceedings might be ſtayed: but the court diſmiſſed his petition, the action being after the bankruptcy, and the bail therefore not being ſurpriſed: they ſaid, that the length of time made againſt the bankrupt, for he ought to have procured his certificate: that the caſe, therefore, muſt be determined on the general rule, that a creditor refunding a dividend may proceed at law. A motion being made for coſts upon this diſmiſſal, Lord Commiſſioner *Eyre* ſaid, he never knew an inſtance of coſts being given on an application to put a party to his election.

(E) Of the Bankrupt's Eſtate and Effects to which the Commiſſioners or Aſſignees are entitled, when it ſhall be ſaid to be veſted in them; and herein of fraudulent Diſpoſitions by the Bankrupt, and of the Actions the Aſſignees may bring for the Recovery thereof.

2 H. Bl. 462, 3. Smith v. Coffin, *Ibid.*

IT is ſaid in the caſe of *Drake* v. Mayor of *Exeter*, (*ſupra*, vol. i. p. 413. 438. cited alſo in 2 *Vern.* 97.) that a covenant for the renewal of a leaſe, of which a profit may be made, does not paſs by the aſſignment. But the authority of that caſe has been ſince doubted, for a covenant to renew a leaſe runs with the land.

The

The *right* to bring a *real* action paſſeth to the aſſignees by the uſual words of the deed of aſſignment. Smith v. Coffins. *Ibid.*

The aſſignees are entitled to recover from the winner money loſt at play by the bankrupt before his bankruptcy in an action of debt upon the ſtat. 9 *Ann. c.* 14. for the money is part of the bankrupt's eſtate; the ſtatute gives an action to the party grieved, and therefore veſts an intereſt in him. Brandon v. Pate, 2 Bl. 308. Brandon v. Sands, 2 Vez. jun. 514.

A commiſſion of bankrupt veſts all rights and all poſſibilities of the bankrupt in the aſſignees; in which reſpect it differs from an execution, which paſſes only what the ſheriff ſeizes. Hence, two commiſſions of bankrupt for the ſame purpoſe cannot ſubſiſt together: for the ſecond will be ſuperſeded, unleſs there be ſome ſpecial circumſtances, as, conſent, fraud, or laches in the creditors under the firſt. Indeed, if the aſſignees under the ſecond will pay the creditors under the firſt twenty ſhillings in the pound, and all the coſts, in that caſe the firſt will be inſtantly ſuperſeded. *Ex parte* Brown, 2 Vez. jun. 67.

Where a ſoap-maker, who had incurred a forfeiture for concealing ſoap contrary to the ſtat. of 1 *Geo.* 2. *ſt.* 2. *c.* 36. became a bankrupt, and a proviſional aſſignment of his eſtate was made, after which the ſoap was condemned, and the bankrupt convicted, whereupon a warrant iſſued to levy the penalty on his goods generally, it was holden, that the warrant was bad, and could not juſtify a ſeizure of the ſoap in the hands of the aſſignees. Auſtin v. Whitehead, 6 Term Rep. 436.

Where a ſale of goods has been completed by actual delivery to the buyer, who afterwards becomes inſolvent before they are paid for; he cannot reſcind the contract, and return the goods with the conſent of the ſeller, ſo as to give the ſeller a preference to his other creditors. Barnes v. Freeland, 6 Term Rep. 80.

Where a creditor, knowing his debtor to be in diſtreſſed circumſtances, and unable to pay his debt, applied to him in the firſt inſtance, about two months before his bankruptcy, for a ſecurity, and took part of his ſtock in trade for that purpoſe; it was holden, that this was not an undue preference, though the creditor did not threaten to ſue the debtor in caſe of refuſal. Smith v. Payne, *Id.* 152.

Where an inſolvent debtor, not two months before his bankruptcy, at the very time when an execution was in his houſe, upon being applied to by a creditor, who was wholly ignorant of his ſituation, gave him by way of ſecurity for his debt a letter of attorney to receive debts, Lord Chancellour inclined to think the tranſaction fair, but permitted the aſſignees to bring an action. *Ex parte* Scudamore, 3 Vez. jun. 85.

If after a ſecret act of bankruptcy, the bankrupt pay money to a carrier for the carriage of goods, the aſſignees may recover it back in an action of *aſſumpſit*. Bradley v. Clark, 5 Term Rep. 197.

So, where a defendant againſt whom a verdict had been recovered afterwards committed a ſecret act of bankruptcy, and the plaintiff in the action not knowing of the bankruptcy, inſtead of entering up judgment and ſuing out execution, took a bill drawn by the defendant on a third perſon at a diſtant period for the amount of the ſum recovered, which bill was afterwards paid; it Pinkerton v. Marſhall, 2 H. Bl. 334.

was holden, that this payment was not protected by the 19 *G.* 2. *c.* 32. and that the plaintiff was liable to refund to the aſſignees the money he had ſo received.

Philips v. Hunter, 2 H. Bl. 402.

A., *B.*, and *C.*, being partners in trade in *England*, *A.* and *B.* reſide in *England*, and *C.* goes to a foreign country for the purpoſe of managing the concerns of the houſe in that country. *D.* is alſo reſident in *England*, where a debt is contracted by *D.* to *A.*, *B.*, and *C.* *D.* becomes inſolvent, and *C.* knowing that *D.* has ſtopped payment, and that a commiſſion of bankrupt has in fact iſſued againſt him, attaches in the name of himſelf and partners a debt due to *D.* in the foreign country by legal proceſs, and obtains payment of it under the judgment of a court of juſtice of that country. It was holden, that the aſſignees of *D.* had a right to recover the money ſo received by *C.* in an action againſt *A.*, *B.*, and *C.* for money had and received to the uſe of the aſſignees.

Manton v. Moore, 7 Term Rep. 67.

A. having contracted with a canal company to build locks and bridges on the canal as their engineer, purchaſed timber and other materials for that purpoſe, which he laid on the company's premiſes on the banks of the canal; and on the company's advancing money to him, they took a bill of ſale of theſe goods, and a ſymbolical delivery of them by a halfpenny: they afterwards took out execution upon a judgment confeſſed by *A.*; and the ſheriff ſeized theſe goods, and *A.* became a bankrupt. It was holden, that *A.* had not ſuch a poſſeſſion of the goods as would enable his aſſignees to take them within the 11 *Ja.* 1. *c.* 19. § 11. for the beſt delivery was given which the nature of the goods would admit of, they being before on the company's premiſes. It was holden alſo, that the bill of ſale was no act of bankruptcy in *A.*

Gordon v. Eaſt India Company, 7 Term Rep. 228.

Where *A.*, a trader and an officer in the *Eaſt India* Company's ſervice, aſſigned his privilege (being a right to ſhip goods from the *Eaſt Indies* to *England*) to *B.* for a valuable conſideration, and in order to evade the bye-laws of the *Eaſt India* Company, which prohibit ſuch aſſignment, the goods were ſhipped, entered, warehouſed, and ſold by the company in *A.*'s name, and the proceeds carried to his account, but *A.* became a bankrupt before he received thoſe proceeds from the company; it was holden, that the aſſignees were entitled to recover the amount in an action for money had and received againſt the *Eaſt India* Company, this being ſuch a poſſeſſion of "goods and chattels" as falls within the 21 *Ja.* 1. *c.* 19. § 11.

Collins v. Forbes, 3 Term Rep. 316.

The commiſſioners of the Victualling-office having occaſion to erect a ſtage at *W.* for the purpoſe of rolling their barrels on board the ſhipping, publiſhed an advertiſement for carpenters to deliver in propoſals for doing the work. *Forbes* and his partners were diſpoſed to undertake the buſineſs, and to deliver in their propoſal, but inaſmuch as they were general merchants, and not carpenters, and as there might have been difficulties in making the contract in their own name, *Kent*, who was a carpenter, agreed with *Forbes* and Company to make the contract in his name; and

and he was to have one fourth of the clear profits, and a guinea *per* week for his ſuperintendence, and *Forbes* and Co. were to ſupply the timber, and to have the reſidue of the profits. The contract was accordingly made between the commiſſioners and *Kent*, and *Forbes* was one of *Kent*'s ſureties, which would not have been allowed (as *Forbes* himſelf knew), according to the uſual mode of government contracts, had he been known to have any concern in the contract, which *Kent* declared he had not. The timber was bought by *Forbes* and Company, and ſhipped by them in their own name to be ſent to the yard at *W.*, where it was delivered as for *Kent*'s uſe, and received by the king's officers as ſuch; and they ſwore they ſhould not have received it on account of any other perſon; but that they ſhould not have permitted even *Kent* to diſpoſe of it in any other manner than for the work contracted for, except ſuch parts of it as were found unfit for the intended purpoſe, becauſe they conſidered it as delivered for the purpoſe of the contract. *Kent* had informed the agent victualler that *Forbes* was the real contractor, but that was a ſecret between thoſe perſons. Before the work was finiſhed *Kent* became a bankrupt, and *Forbes* thereupon getting poſſeſſion of the timber; the aſſignees brought an action of trover to recover it, on a ſuppoſition that the bankrupt's creditors were entitled to it under the ſtat. of 21 *Ja.* 1. *c.* 19. But the court held, that though the bankrupt had the *poſſeſſion* of the property, and the *apparent diſpoſition* of it, yet, as there was no fraud in the caſe, either actual or conſtructive, and as the *real property* was in *Forbes*, the ſtatute did not operate upon it: that there never was any ſale of the timber to *Kent*, nor any *general delivery ſo as to give him the abſolute diſpoſition of it*; for it appeared that the ſtorekeepers in the yard would not have permitted even *Kent* to have ſold it to any other perſon, unleſs any part of it had been unfit to be uſed in performing the contract, as they conſidered it was delivered only for the purpoſe of the contract. Therefore there was no danger that *Kent*'s creditors would be induced to truſt him on the credit of that property, or as ſuppoſing it liable to their debts.

Upon this caſe being cited in Gordon v. Eaſt-India Company, Lawrence, J. ſaid, "I was "by no "means ſa- "tisfied "with the "deciſion: "it ſtruck "me, that "when the "timber "was deli- "vered to

"the officers of government in Kent's name, and for his uſe, he had the poſſeſſion, and order, and diſ- "poſition of it: but the court proceeded on this ground, that the bankrupt had only the poſſeſſion of the "goods for a ſpecial purpoſe, and had not the order and diſpoſition of them." 7 Term Rep. 237.

An agreement was entered into between *A.* and *B.* that *B.* ſhould purchaſe of *A.* all the light gold coin which he could ſend at a ſtated price, and that *A.* ſhould from time to time draw upon *B.* for the money due upon ſuch ſale; and that *B.* ſhould alſo from time to time accept other bills drawn by *A.* for his convenience, to cover which *A.* ſhould remit value to *B.* After they had acted under this agreement for ſome time, *B.* became bankrupt, being under acceptances to a great amount; and *A.* (not knowing of the bankruptcy) ſent a parcel of light gold and bills, to enable *B.* to diſcharge the acceptances, which parcel was taken by *B.*'s aſſignees. *A.* himſelf afterwards diſcharged the

Tooke v. Hollingworth, 5 Term Rep. 215. 2 H. Bl. 501.

acceptances. As the gold and bills ſent after the bankruptcy were ſent for the particular purpoſe of paying the acceptances, and that purpoſe was not anſwered; the property in them, it was holden, remained in *A.* and he might recover from the aſſignees the amount of them.

Nixon v. Jenkins, 2 H. Bl. 135.

If the aſſignees bring an action of trover for the recovery of goods colluſively ſold on the eve of a bankruptcy, they muſt prove a demand and refuſal; for in ſuch caſe, at the time of making the ſale, the parties are competent to contract; the taking of the goods is not unlawful, though the tranſaction is liable to be impeached by the aſſignees.

Clarke v. Capron, 2 Vez. jun. 666.

If after by judgment by default in an action for a dividend, the aſſignees file a bill for a diſcovery, and to have the proof of the debt expunged, a demurrer to the bill will be allowed, the regular courſe in ſuch caſe being by petition.

(F) Of ſetting off Debts due to or from the Bankrupt.

Dickſon v. Evans, 6 Term Rep. 57.

IN an action by the aſſignees the defendant cannot ſet off caſh notes, iſſued by the bankrupt, payable to *bearer*, bearing date before the bankruptcy, unleſs he ſhew that ſuch notes came to his hands before the bankruptcy: but, if they be made payable to *the defendant himſelf*, that will be reaſonable evidence of their having come to his hands at the time they bear date.

Ex parte Quinten, 3 Vez. jun. 248.

Where there was a ſeparate commiſſion of bankrupt againſt one partner, and the other partner paid all the joint debts; a debtor to the partnerſhip, who was alſo a ſeparate creditor of the bankrupt, was allowed to ſet off againſt the bankrupt's ſhare of the joint debt, and to prove the reſidue under the commiſſion, the ſolvent partner conſenting to receive his ſhare.

(G) How the Bankrupt is to demean himſelf.

Ex parte Shaw, 2 Vez. jun. 40.

IF after two petitions diſmiſſed a bankrupt preſents a third for the ſame purpoſe, it will be diſmiſſed with coſts; and if not able to pay them, he muſt be committed. But it is not competent, it ſeems, to the court to make an order to reſtrain him from preſenting any more petitions.

(H) Of the Overplus of the Bankrupt's Eſtate, and the Allowances to be made him; and herein of his Diſcharge and Certificate.

Ex parte Mills, *Id.* 295.

IF there be a ſurplus coming to a bankrupt, the creditors ſhall have intereſt out of it, wherever it is apparent, either upon the face of the ſecurity or by evidence, that there was a contract for it.

A bank-

A bankrupt cannot call upon his aſſignees for his allowance under the ſtat. of 5 *G.* 2. *c.* 30. § 7. (his eſtate paying 10*s.* in the pound,) if his certificate be not allowed before payment of the dividends. Groome v. Potts, 6 Term Rep. 548.

If a judgment be recovered againſt a party, before he becomes bankrupt, and it be revived by *ſcire facias* after the bankruptcy, the coſts of the *ſcire facias* relate back to the judgment, and may be proved under the commiſſion. So, if a writ of error be brought after the bankruptcy to reverſe a judgment obtained before, and the judgment be affirmed, the coſts of the writ of error refer to the judgment. In either caſe therefore the certificate diſcharges the bankrupt as well from the coſts as the judgment. Phillips v. Brown, *Id.* 281.

A. draws a bill of exchange upon *B.* payable to the order of *A.*, which *B.* accepts, and *B.* draws a bill upon *A.* payable to the order of *B.*, which *B.* accepts, for their mutual accommodation. Both bills are payable at the ſame time, are of the ſame date, and for the ſame ſum. Theſe bills are mutual engagements, conſtituting on each part a debt, the one being a conſideration for the other: they are not mutually given as an indemnity, which is in its nature conditional, but create an abſolute debt from the beginning, ſo that if either party becomes bankrupt, the bill accepted by him may be proved under his commiſſion, and being ſo provable is neceſſarily barred by the certificate. Rolfe v. Caſlon, 2 H. Bl. 570.

The court of Common Pleas have refuſed to diſcharge a defendant, who was holden to bail for a debt contracted *in this country*, out of cuſtody, on a common appearance, upon an affidavit of his having become a bankrupt in *Ireland*, and there obtained his certificate. In ſuch caſe, they ſaid, he muſt at leaſt plead the certificate. But a general plea of bankruptcy, referring to an *Iriſh* act of parliament, and concluding to the country in a mode ſimilar to that given by *ſtat.* 5 *G.* 2. *c.* 30. § 7. to bankrupts in *England*, they held to be clearly bad. Quin v. Keefe, 2 H. Bl. 553. In a late caſe in the Exchequer, a motion to diſcharge a defendant out of cuſtody on the ground of a bankruptcy and certificate in Ireland was rejected, becauſe the affidavit did not ſtate the effect of the certificate by the laws of Ireland. Anon. Anſtr. 80. In this caſe it does not appear whether the debt was contracted in this country or in Ireland.

A certificated bankrupt is not a competent witneſs to prove the debt of the petitioning creditor, or any other fact neceſſary to ſupport the commiſſion. Chapman v. Gardner, 2 H. Bl. 279.

But, where the aſſignees ſigned the certificate, and got a releaſe from the bankrupt, in order to produce him as a witneſs to prove a debt to his eſtate; this was admitted to be a fair tranſaction. Selby v. Crew, Anſtr. 504.

The certificate, though ſigned, yet, till allowed, operates as nothing. Where, therefore, a lottery-ticket was given to the bankrupt by a creditor who had ſigned his certificate, as a mark of his approbation of his conduct, and the ticket was drawn a conſiderable prize before the allowance of the certificate, it was claimed and ſhared by the creditors at large. 7 Term Rep. 297.

If an uncertificated bankrupt bring an action, the benefit of which, if he ſucceeds, muſt accrue to his aſſignees, the court will compel him to give ſecurity for the coſts. Webb v. Ward, 7 Term Rep. 296.

Whether

Fowler v. Down, E. 37 G. 3. C. B.

Whether an uncertificated bankrupt can maintain any action for property acquired ſubſequent to his bankruptcy, whether any one but the aſſignees may diſpute his title, is a point upon which the opinions of the courts of *Weſtminſter-Hall* are not ſettled. The court of Common Pleas have lately determined in favour of his competency to maintain ſuch action. But the queſtion is ſtill pending in the court of King's Bench.

Baron and Feme.

(A) Of a Wife's Contracts for Neceſſaries, and how far the Huſband is bound by ſuch Contracts.

Govier v. Hancock, 6 Term Rep. 603. (a) Gilchriſt v. Brown, 4 Term Rep. 766.

IF a wife commit adultery, the huſband is diſcharged from all obligation to provide her afterwards with neceſſaries, even though it ſhould appear that ſhe was provoked to the commiſſion of the crime by the adultery of the huſband himſelf, and his having cauſeleſsly turned her out of doors. And yet in ſuch caſe the wife cannot be ſued as a feme ſole (*a*), unleſs ſhe have a ſeparate eſtate. The conſequence is, that no one will give her credit, and ſhe muſt ſtarve.

(B) Where they muſt be jointly ſued.

Hutchinſon v. Hewſon, Tr. 37 G. 3. B. R.

AN *aſſumpſit* againſt the huſband alone for a debt due from the wife before marriage cannot be ſupported.

(C) Where the Wife ſhall be conſidered as a Feme Sole; and herein of her ſeparate Eſtate.

Anon, 2 Vez. jun. 332.

A Wife will not be permitted to put in an anſwer as a feme ſole, ſeparately from her huſband, on the ground of his being a priſoner in the King's Bench.

Clayton v. Adams, 6 Term Rep. 604.

In *aſſumpſit* againſt *A.* as executor of *B.*, the defendant pleaded that *B.* was covert of *C.*: the plaintiff replied, that *B.* lived apart from *C.* and carried on a ſeparate trade; that the credit was given to her, and the promiſes made by her; and that after her death *A.*, as her executor, poſſeſſed himſelf of her effects, more than ſufficient to ſatisfy the plaintiff's demand. To this replication there was a demurrer, againſt which it was argued by the plaintiff's counſel, that as it was admitted on the record, that the defendant poſſeſſed himſelf of *B.*'s effects, he was liable as her executor to the plaintiff's demand: that in *Norton* v. *Turvill*, (1 *P. Wms.* 144.) it was holden, that the ſeparate eſtate of a feme covert was liable for the diſcharge of her bond debt: that in *Hulme* v. *Tenant*, (1 *Br. Ch. Rep.* 16.) Lord *Thurlowe* ſaid, that the engagements

gagements of the wife ſhould operate on her perſonal property. But by Lord *Kenyon*—To the equity caſes that have been cited I fully ſubſcribe: but they cannot govern us in a court of law. A court of equity can mould intereſts differently from a court of law; and can give relief in caſes where a court of law cannot. In order to enable the plaintiff to recover in this action, he ſhould have ſhewn that the feme covert, when alive, might have been ſued, and that the defendant was poſſeſſed of that property in reſpect of which ſhe might have been liable: but it does not appear that this could have been the ſeparate property of the wife. And the probate of the will of the wife was abſolutely void. We cannot determine that an action might have been maintained againſt this feme covert, without alſo ſaying that ſhe might have been taken in execution: but that would operate as a divorce between huſband and wife. In a late caſe (*a*), the Lord Chancellour ſaid, that if the huſband and wife be ſeparated by deed or ſentence, an action may be brought againſt the wife alone. I take it for granted that the doctrine there laid down was correct, as far as it applied to that particular caſe; but I doubt extremely the generality of that rule; according to that a wife might be taken from her huſband, though the ſeparation by deed was only temporary. *We muſt not by any whimſical conceits, ſuppoſed to be adapted to the varying faſhions of the times, overturn the eſtabliſhed law of the land: it deſcended to us as a ſacred charge, and it is our duty to preſerve it.* And if any one propoſition in the law can be more clear than another, it is this, that an action cannot be brought againſt a feme covert, except by the cuſtom of *London*. A court of law cannot get at the property of the wife, if ſhe have any. But courts of equity make their decrees ſo as to arrive at the juſtice of the caſe without violating the rules of law; to effect which they follow the property of a feme covert in the hands of her truſtees. And I particularly remember when the caſe of *Hulme* v. *Tenant* firſt came before Lord *Bathurſt*, he inſiſted that the truſtees ſhould be made parties to the bill before he would give any relief.

(*a*) Duke of Bolton v. Williams, 2 Vez. jun. 146.

The rule, that a feme covert is to be conſidered as a feme ſole as to her ſeparate property, does not extend to tranſactions with her huſband. In *Paulet* v. *Delaval*, (2 *Vez.* 663.) the only caſe in the court of Chancery according to Lord Chancellour *Loughborough*, where the queſtion aroſe directly upon a gift between huſband and wife, Lord *Hardwicke* indeed eſtabliſhed the gift; but under circumſtances that marked very ſtrongly how much of aid he required to eſtabliſh a conveyance by a married woman of her ſeparate property in favour of her huſband: in that caſe, his Lordſhip relied mainly upon confirmation, when ſhe was ſole, and upon acts done after her huſband's death, when ſhe was under no controul. Nor will the court eſtabliſh ſuch a conveyance without the actual preſence of the wife in court, where the truſtees put the parties to file a bill. It muſt appear to be done by the wife deliberately, and with full knowledge of all the circumſtances. The

Milnes v. Buſk, 2 Vez. jun. 488.

Edmunds v. Townſhend, Anſtr. 93.

exact amount of the property, therefore, muſt be aſcertained, before her conſent to the diſpoſal of it can be admitted.

Guiſe v. Small, Anſtr. 277.

Money was veſted in truſtees, in truſt for the huſband and wife ſucceſſively for life, remainder to the children, and in failure of children, to ſuch perſon as the wife ſhould appoint. The huſband being in diſtreſs, the wife executed a deed, by which ſhe conveyed all her intereſt in this money to the plaintiff, and executed her power of appointment in his favour. A bill was filed, to have the conſent of the wife taken to this conveyance, and the aſſignment and appointment eſtabliſhed; ſubject to the claims of the huſband and wife for life, and the claims of the children. The court doubted, if they could eſtabliſh a conveyance of money which may never be in the wife's diſpoſal: but upon conſideration ordered the money to be paid into court for the contingent truſts of the ſettlement; and upon taking the conſent of the wife in court, decreed that the conveyance ſhould be eſtabliſhed.

Hardwick v. Mynd, Anſtr. 274.

Where money is declared to be due to a feme covert, the court will not, on motion, direct it to be paid to the truſtees in her marriage ſettlement, till it is reported by the maſter that there is a ſettlement.

Sawer v. Shute, Anſtr. 63.

The plaintiff having come into court to obtain money found by the report of the Deputy Remembrancer to be due to his wife, upon the diſtribution of an inteſtate's effects, the court took into conſideration, whether they ſhould order the money recovered to be ſettled on the wife or paid to the huſband. Upon reference to the Maſter, he certified, that by the laws of *Pruſſia*, of which the plaintiff and his wife were inhabitants, the whole perſonalty of the huſband and wife is, during the coverture, at the abſolute diſpoſal of the huſband; but on the death of either is divided between the ſurvivor and the heirs of the deceaſed. The wife made no application to the court, either to have it ſettled or otherwiſe. The court ordered the money to be paid to the huſband, obſerving, that it would be very difficult to direct any way by which it could be ſettled, ſo as not to be liable to be defeated by the laws of *Pruſſia*.

Baſtards.

How Baſtards are to be provided for; and herein of the Duty and Power of Juſtices of the Peace.

Rex v. Price, 6 Term Rep. 147.

IF a perſon be bound by a recognizance by one magiſtrate under 6 *Geo.* 2. *c.* 31. to appear at the next ſeſſions, and perform ſuch order as ſhall there be made upon him under 18 *Eliz.*

c. 3. reſpecting baſtards, the ſeſſions can only make an order of baſtardy on him, but cannot order him alſo to give ſecurity for the performance of that order.

Bigamy.

BY *ſt.* 35 *G.* 3. *c.* 67. perſons convicted of bigamy are ſubjected to the penalties of grand larceny.

Bills of Sale.

IF the certificate of regiſtry be not accurately recited in the bill of ſale of a ſhip, the conveyance is *void*, and not *voidable* only; and the objection may be made by any third perſon, though the vendor and vendee treat the conveyance as valid. Weſterdell v. Dale, Tr. 37 G. 3. B. R.

Bridges.

IF a bridge uſed for carriages, though formerly adequate to the purpoſes intended, be not now of ſufficient width to meet the publick exigencies, owing to the increaſed width of carriages, the burden of widening it muſt be borne by thoſe who are bound to repair the bridge. Rex. v. Inhabitants of Cumberland, 6 Term Rep. 194.

Bye-Laws.

WHERE a charter provided that the election of ſenior bailiff ſhould be made by a majority of a ſelect body, it was holden, that a bye-law givng a caſting vote to the preſiding officer in caſe of an equality of voices was bad, as contrary to the conſtitution of the charter. Rex v. Ginever, 6 Term Rep. 732.

Carriers.

Buddle v. Wilſon, 6 Term Rep. 369.

TO an action on the cuſtom of the realm for not ſafely carrying goods, the defendant may plead in abatement, that his partners ought alſo to have been ſued; for the declaration upon the cuſtom of the realm, is the ſame in effect with the declaration in *aſſumpſit*. In the old forms it is, the defendant *ſuſcepit*, &c. which ſhews that it is *ex contractu*.

Certiorari.

(A) Of the diſcretionary Power of the Court of King's Bench in granting or denying it.

Rex v. Jackſon, 6 Term Rep. 145.

IF the defendant, who has been convicted on an indictment in an inferior juriſdiction, remove the record into the King's Bench by *certiorari* between verdict and judgment, with a view to making objections in arreſt of judgment, a *procedendo* will be immediately awarded. If he is adviſed that the record is erroneous, he muſt remove it after judgment by writ of error.

(B) Where by Act of Parliament the Court of King's Bench is reſtrained from granting a *Certiorari*.

Rex v. Inhabitants of Cumberland, 6 Term Rep. 194.

AN indictment for not repairing a bridge may be removed by *certiorari* at the inſtance of the proſecutor, notwithſtanding the general words of 1 *Ann. c.* 18. § 5. that no ſuch indictment ſhall be removed by *certiorari*.

Rex v. Inhabitants of Seton, Tr. 37 G. 3. B. R.

A *certiorari* to remove the record of an indictment at the quarter-ſeſſions for a miſdemeanour *ſerved after judgment*, was quaſhed *quia improvidè emanavit*; though it was iſſued before verdict.

(C) Where the Defendant who has applied for it ſhall be liable to Coſts.

Rex v. Williamſon, 7 Term Rep. 32.

THE proſecutor of an indictment for ſtopping a common footway, who has uſed it for ſome years before it was ſtopped, is a party grieved within the meaning of the 5 & 6 *W. & M. c.* 11. § 3. and as ſuch entitled to coſts.

Charitable Uſes and Mortmain.

Of the Conſtruction of Charitable Gifts and Donations, and how far favoured in Equity.

A Court of equity will not decree execution of a truſt of a charity in a manner different from that intended, except ſo far as they ſee, that the intention cannot be executed literally, but another mode may be adopted conſiſtent with the donor's general intention, ſo as to execute it, though not in mode, in ſubſtance. If the mode becomes impoſſible by ſubſequent circumſtances, the general object is not to be defeated, if it can be attained. Where the purpoſe was to build a church in the pariſh of *A.* (*a*), and the pariſh would not let the church be built, it was adjudged that it could not be built any where elſe, and the intention muſt totally fail. So, where a perſonal bequeſt was attached to a void charity (*b*), it was holden, that it muſt fail with its principal. But, where a teſtator directed bread to be diſtributed among poor perſons attending divine ſervice (*c*), and chanting his verſion of the pſalms, though that verſion could not be chanted, becauſe not authorized; yet the bequeſt of the bread was eſtabliſhed, that being the teſtator's general object, and the chanting of the pſalms only acceſſary. So, where there are two purpoſes in a charitable donation, and by the neglect or obſtinacy of the perſons who are to adminiſter the charity, one of them is prevented from taking effect, that ſhall not defeat the other. Therefore, where upon a truſt for the vicars of *P.* (*d*), provided they were preſented at the recommendation of the truſtees, the truſtees neglected to recommend, and the Chancellour, the living being in the preſentation of the crown, preſented; it was holden, that the vicar was entitled to the benefit of the truſt.

By the Maſter of the Rolls, 2 Vez. jun. 387-8.

(*a*) Attorney General v. Biſhop of Oxford, 1 Br. Ch. Rep. 444.

(*b*) Attorney-General v. Golding, 2 Br. Ch. Rep. 428. Attorney-General v. Whitchurch, 3 Vez. jun. 141.

(*c*) Brantham v. Eaſt Burgold, 2 Vez. jun. 388.

(*d*) Attorney-General v. Boultbee, 2 Vez. jun. 380.

Churchwardens.

What Actions may be brought by or againſt them.

CHURCHWARDENS *de facto* may maintain an action againſt a former churchwarden for money received by him for the uſe of the pariſh, though the validity of the election of the plaintiffs to the office be doubtful, and though they be not the immediate ſucceſſors of the defendant.

Turner v. Baynes, 2 H. Bl. 559.

Commitment.

What ought to be the Form of the Commitment.

Rex v. Cooper, 6 Term Rep. 509.

A Commitment in execution by a magiſtrate ought to ſtate that the party was *convicted*: if it only ſet forth that he was *charged* on oath with the offence, it is inſufficient.

Common.

(A) Of the Remedies the Law gives the Commoner.

Cooper v. Marſhall, 2 Will. 51. 1 Burr. 259. S. C. Sadgrove v. Kirby, 6 Term Rep. 483.

IF the lord of the manor make a hedge round the common, or do any act that entirely excludes the commoner from exerciſing his right, the latter may do whatever is neceſſary to let himſelf into the common: but, if the commoner can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that caſe his remedy is by an action on the caſe, or by an aſſize, and he cannot aſſert his right by any act of his own. If therefore his right be abridged by coney-boroughs, he cannot touch the ſoil to fill them up: ſo, if trees be planted to an exceſs, he cannot cut them down.

(B) Of Approvement and Incloſure.

Shakeſpear v. Peppin, 6 Term Rep. 741.

THE lord of a manor, or his grantee, may incloſe and approve part of a common againſt tenants having common of paſture, notwithſtanding they have alſo ſome other right on the common, as a right to dig for ſand, *&c.* if he leave ſufficient common of paſture.

Conſtable.

IF a diſtrict be ſeparated from the county at large, and made a county of itſelf by charter, the office of conſtable, it ſhould ſeem, by the common law, but certainly by the ſtatute of *Wincheſter* (13 *E.* 1. *ſt.* 2. *c.* 6.), is incident to ſuch a creation. *Per* Lord Kenyon, 6 Term Rep. 232.

Note, An additional authority that the office of conſtable was prior to the ſtatute of *Wincheſter*.

Copyhold.

(A) In what reſpects Copyholds partake of the Nature of Freehold Lands.

THE lord cannot make a grant of a copyhold to *his own wife*; for the grant is immediate, and the wife can only take from the huſband by the intervention of a third perſon. 2 Wilſ. 254. Firebraſs and Symmes v. Pennant.

There may be a *ſpecial* occupant of a copyhold, as to *A.* and his heirs during the life of *B.* 2 Blackſt. Rep. 1148. Doe v. Martin. 2 Term Rep. 746. Mardiner v. Elliott.

If a perſon being tenant in tail of a copyhold, ſuffer a recovery in the lord's court, the fee acquired by ſuch recovery ſhall follow the deſcent of the entail. 5 Term Rep. 104. Crow v. Baldwere.

(B) Of ſuch Statutes as may be ſaid to extend to Copyholds.

AS to the ſtatutes relative to recuſancy, ſee *ſtat.* 31 *G.* 3. *c.* 32.

The *ſtat.* 14 *G.* 2. *c.* 20. § 9. is expreſsly confined to caſes where there is *no ſpecial occupant*. Now, as we have ſeen, there can be *no general occupant* of a copyhold; of conſequence that ſtatute cannot poſſibly extend to copyhold property. See Ambl. 151.

The *ſtat.* 31 *Eliz.* *c.* 7. of cottages is repealed by that of 15 *G.* 3. *c.* 22.

Though the appointment of a guardian by a father under the *ſtat.* 12 *Car.* 2. *c.* 24. as to the copyhold property of his child, would not be good where the cuſtom of the manor gives the guardian- Watk. n. clxxii. to Gilb. Ten. p. 476-7.

guardianſhip to the lord; yet it ſhould ſeem to be good againſt the guardian in ſoccage, who would be entitled to the cuſtody of the copyholds, if the cuſtom had not veſted the guardianſhip in another. And in both caſes the appointment would be good, perhaps, as to the *perſon* of the child.

(C) Of ſuch general Cuſtoms as may be ſaid to relate to all Copyhold Eſtates.

IN 2 *Veſ.* 679. it is ſaid to have been expreſsly denied by Lord *Hardwicke*, that a ſurrender can be by attorney out of court; yet *quære* as to the ſtatement there given. It is there ſaid, that to ſurrender by attorney out of court would be for an attorney to make an attorney; but this only applies when the ſurrender is made out of court to *tenants* or the *bailiff*, &c. who are as it were attornies or meſne perſons themſelves; and it is acknowledged, that there muſt be a ſpecial cuſtom to ſurrender into their hands by attorney. But it does not apply to ſurrenders made out of court by attorney to the *lord* or *ſteward*; and, indeed, it appears from unqueſtionable authority, that a perſon may ſurrender to the lord or ſteward by attorney out of court *communi jure*.

(D) Of particular Cuſtoms that are good and peculiar only to ſome Copyholds.

3 P. Wms. 229. Chaplin v. Chaplin, 2 Atk. 525. Godwin v. Winſmore.

IT ſeems to be the better opinion, that the widow of *ceſtui que truſt* of a copyhold eſtate ſhall *not* have freebench.

1 P. Wms. 62. Ld. Raym. 1028. 1 Salk. 243.

The caſe of Sir *John Savage* in 3 *Leon.* 208. has been denied to be law.

(E) Of Surrenders, Preſentments, and Admittances: And herein,

1. Of the Neceſſity of a Surrender, &c.

See 1 P. Wms. 61 Watts v. Bulias. Preced. Chanc. 477. Furſaker & Robinſon. 1 Vez. 121. Allen v. Poulter. 3 Bro. Chan. Rep. 251. Chapman & Gibſon.

IT does not appear to be abſolutely ſettled, whether a ſurrender ſhall be ſupplied in favour of a grandchild or not. It was determined in the caſe of *Kettle* and *Townſend* in the Lords, that it ſhould *not* be ſupplied, but the doctrine has been ſtrongly controverted.

1 H. Blackſt. 461. Roe v. Lowe, and Watk. n. lxxxii. to Gilb. Ten. 428.

Though an equity in copyholds may be deviſed without a ſurrender, yet that equity muſt be ſuch as would have been deviſable if of freehold property. If the equity be in tail, the entail muſt firſt be docked.

A deviſe of copyholds to a charitable uſe ſeems to be within the ſtat. 9 *Geo.* 2. *c.* 36. Attorney-General v. Lord Weymouth & *al.* in Canc. Hil. 16 G. 2. MS.

(F) What Perſons may Surrender.

AN infant truſtee or mortgagee may ſurrender by order of a court of equity, by virtue of the ſtat. 7 *Ann. cap.* 19. See 7 Term Rep. 103. Doe v. Morgan.

(G) Of the Power and Authority of the Lord, &c.

THE caſe of *Melwich* and *Luther*, in which it was ſaid, that the grantee of the freehold of the copyholds of a manor may hold a cuſtomary court and make grants by copy, does not ſeem to be law. Cro. Eliz. 103, 104. 443.

(H) Of Fines payable by Copyholders: And herein,

1ſt, Where a Fine ſhall be ſaid to be due, &c.

THOUGH if one joint-tenant die, the ſurvivor ſhall have all without any new admittance or fine; yet it is otherwiſe as to coparceners and tenants in common. Calth. 64. Co. Copyh. ſ. 56. Watk. n. clxxiv. to Gilb. Ten. 478.

2d, Of the Certainty and Reaſonableneſs of the Fine.

It ſeems to be now ſettled, that in caſes where the lord is compellable to admit, and the heirs of the perſon admitted are alſo ſubject to fines on the devolution of the eſtate, a fine muſt not exceed two years improved value of the lands without deducting land-tax, &c. except quit-rents. But, where the admiſſion is not compulſory, as in voluntary grants; or in caſes of copyholds for lives where there is no right of renewal; or where in caſes of inheritance the fine is only payable on the admiſſion of the *purchaſer*, whoſe heirs are *not* finable; an arbitrary fine will *not* be reſtricted, but may exceed the two years value. See Watk. n. ciii & civ. to Gilb. Ten. 443, 444. and Anſtr. 659. Wharton v. King.

(I) Of the Extinguiſhment of the Copyhold.

IT ſeems now to be ſettled, that by the acceptance of a feoffment or other conveyance of the freehold by a copyholder ſeiſed in tail, the entail will be deſtroyed even as to the iſſue. 3 P. Wms. 9. Dunn & Green. 1 Bro. Chan. Rep. 515. Wynne v. Cookes. 2 Vez. jun. 524. Chaloner v. Marſhall. And ſee 1 Vern. 393. 458. Parker v. Turner.

The caſe of *Melwich* and *Luther* relative to the power of a grantee of the freehold of the copyholds of a manor to hold courts does not ſeem to be law. *Supra.*

(K) Forfeiture in the Copyholder's taking upon him to diſpoſe of his Copyhold, &c.

Gilb. Ten. 255. & Watk. n. cxviii. p. 451.

THE making a bargain and ſale, though it be enrolled, does not ſeem to be a cauſe of forfeiture of a copyhold.

Harg. n. (3) to Co. Litt. 59. a.

Nor the executing a deed of feoffment with a letter of attorney to deliver ſeiſin; for it does not appear to be a forfeiture until livery be actually given.

(L) What Perſons ſhall be excuſed from a Forfeiture.

THE ſtat. 9 *Geo.* 2. *c.* 29. is expreſsly confined to infants and femes covert taking *by deſcent or by ſurrender to the uſe of a laſt will.*

Corporations.

Rex v. Miller, 6 Term Rep. 268.

WHERE the conſtitution of a corporation is ſettled by act of parliament, it cannot be altered by the acceptance of a charter from the crown.

Rex v. Hoyte, 6 Term Rep. 430.

A charter may give a power of election to a leſs number than the majority of a definite body; and in a preſcriptive corporation a uſage to this effect is evidence of ſuch a charter; ſo that in either caſe a perſon is well elected by a majority of the ſubſiſting members, as diſtinguiſhed from a majority of the full body.

Coſts.

(A) Of Actions of Treſpaſs where the Right of Freehold or Inheritance may come in queſtion, or where the Treſpaſs is wilful and malicious.

Reynold v. Edwards, 6 Term Rep. 11.

IF it appear on the trial, that the treſpaſs, however ſmall, was committed *after notice*, and the jury give leſs than forty ſhillings damages, the judge is bound under the ſtat. of 8 & 9 *W.* 3. *c.* 11.

c. 11. § 4. to certify that the treſpaſs was wilful and malicious, in order to entitle the plaintiff to his full coſts.

If in treſpaſs for throwing ſtones, &c. at the plaintiff's windows belonging to his dwelling-houſe, and breaking the glaſs, &c. the plaintiff recover leſs than forty ſhillings, he is not entitled to any more coſts than damages, unleſs the judge certify that the title to the houſe came in queſtion. Adlam v. Greenaway, 6 Term Rep. 281.

So, in an action of treſpaſs for meſne profits; for this action is founded wholly upon title. Doe v. Davis, *Id.* 593.

Where, in an action of treſpaſs *quare clauſum fregit*, a ſpecial plea is pleaded, and the iſſue is found for the plaintiff, he is entitled to full coſts, though the damages be under forty ſhillings, and the judge do not certify. Redridge v. Palmer, 2 H. Bl. 2; Comer v. Baker, *Id.* 341.

(B) Of Actions of Aſſault and Battery.

IF to an action for an aſſault and battery the defendant plead the general iſſue and a juſtification to the whole, and the plaintiff obtain a verdict with damages under forty ſhillings, he is entitled to full coſts, the battery being admitted on the record. Smith v. Edge, 6 Term Rep. 562.

(C) Where the Coſts ſhall be doubled.

THE court of Exchequer-chamber is bound to allow double coſts to the defendant in error, on the affirmance of a judgment of the court of King's Bench. Shepherd v. Mackreth, 2 H. Bl. 284.

(D) Of awarding the Defendant his Coſts.

IF the defendant pay into court a ſum under forty ſhillings, which the plaintiff accepts; he is not therefore liable to coſts, as ſuing for a ſum under forty ſhillings. Cadwallader v. Batley, Anſtr. 627.

It is only where there is judgment in favour of the defendant, that judgment for coſts can be given. The ſtat. of *W.* 3. gives him coſts, and the 4th *Ja.* 1. *c.* 3. ſays expreſsly, that where the plaintiff, "if judgment ſhould be given for him, would be "entitled to coſts," (for which there never can be a judgment for him, it muſt be for the debt and damages, to which coſts are added,) the defendant, if he prevails, takes his judgment for the coſts. *Per* Lord Loughborough, 2 Vez. jun. 316.

(E) What Perſons are entitled to, or exempted from the Payment of Coſts.

ALTHOUGH it appears (*a*) to be ſettled that executors and adminiſtrators ſhall pay the coſts of a *non pros*, yet it hath been holden (*b*), that they are not liable to coſts on a judgment as in caſe of a nonſuit, under the ſtat. 14 *Geo.* 2. *c.* 17. (*a*) Vol. 2. p. 48. & Higgs v. Warry, 6 Term Rep. 277.

(*b*) Booth v. Holt, 2 H. Bl.

Rex v. Corum. Anstr. 50.

In an action in the name of the crown upon a bond under the post-horse act, the court cannot give costs against the crown, although the farmer of the duties is the real party.

Creswell v. Hoghton, 6 Term Rep. 355. Tyte v. Glode, 7 Term Rep. 267.

A party grieved who recovers damages against the sheriff under the 23 *H.* 6. *c.* 9. for not taking bail, is also entitled to costs. So, under the stat. 29 *Eliz.* *c.* 4. against the sheriff for taking more than the fee allowed by the statute on levying under an execution against the plaintiff.

Rex v. Inhabitants of Cheederton, 5 Term Rep. 272. Rex v. Inhabitants of Clifton, 6 Term Rep. 344.

It is provided by stat. 13 *Geo.* 3. *c.* 78. § 64. that "it shall and "may be lawful for the court, before whom any indictment "shall be tried for not repairing highways, to award costs to the "prosecutor to be paid by the persons so indicted or presented; "if it appear to the court that the defence made to such indict-"ment or presentment was frivolous." Under this statute the judge at *nisi prius* only hath power to award costs: if he omit to do it, the court of King's Bench cannot supply the defect. But a certificate from the judge that the defence was frivolous is sufficient to entitle the prosecutor to his costs, though it do not *expressly* award costs.

Broke v. Willet, 2 H. Bl. 435.

Where the plaintiff in replevin pleads several pleas in bar of an avowry, on which issues are joined, and one of them, which establishes his right of action, is found for him, and the others are found for the defendant, and the judge does not certify under stat. 4 *Ann.* *c.* 16. the defendant is entitled to the costs, not only of the pleadings which form that issue which is found for him, but also of the trial of that issue.

(F) Of Costs in the several Steps and Proceedings of a Cause.

Vide supra, vol. 2. 57.

Beckman v. Legrainge, Anstr. 359.

WITH respect to requiring security for costs from a foreigner (plaintiff) there seemeth to be still a difference of practice in the different courts of *Westminster-hall*. We have seen that the courts of Common Pleas and King's Bench will oblige a foreigner *resident abroad* to give security for the costs. But the court of Exchequer have refused to insist upon such security, not indeed because they thought the rule in itself improper, but because there was no precedent in that court to warrant it, and therefore to adopt it in the particular case before them would be to give it a retrospective operation, and consequently would be unjust.

Michel v. Paraski, 2 H. Bl. 593.

The court of Common Pleas have considered the agreeing to take short notice of trial as a waiver of the defendant's opportunity to make an application for such security.

Barker v. Hargreaves, 6 Term Rep. 597. (*a*) Carr. v. Shaw, *Id.* 496.

But, where the plaintiff had become bankrupt and left the kingdom, the court of King's Bench required security, though the parties were at issue, and the plaintiff had given notice of trial for the sittings after the term in which the application was made. And that court has holden (*a*), that if a non-resident foreigner

foreigner sue two defendants, and one of them put in bail, that one may require security for costs from the plaintiff, without putting in bail for the other defendant.

The party succeeding on a second trial, which was granted because a special case reserved on the first was imperfectly stated, is not entitled to the costs of the first trial. But (*b*), where the defendant in such a case gave the plaintiff a *cognovit* without going to trial a second time, it was holden, that he was liable to pay the costs of the former trial. Smith v. Haile, 6 Term Rep. 71. (*b*) Booth v. Atherton, *Id.* 144.

Where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial. Lickbarrow v. Mason, 6 Term Rep. 131.

By a rule of the court of King's Bench, the issue money shall remain to be taxed as part of the costs in the cause. Hil. 35 G. 3.

(G) Costs, how assessed or taxed.

AN inclosure act directed, that the parties who were dissatisfied with the determination of the commissioners might bring actions to try their rights, and that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff, and if against such determination, then by the proprietors at large. An action being brought by a proprietor, who claimed nine distinct rights, and recovered for three only, it was holden, that he should have his costs only on those issues that were found for him, and that on the others the defendant should have his costs. Braithwaite v. Bradford, 6 Term Rep. 599.

Covenant.

(A) Of express Covenants.

EXPRESS covenants are obligatory upon the covenantor in every event, and in every state and condition of the thing which is the subject of the covenant. And herein they differ from those which are implied by operation of law: for when the law creates a duty, and the party is disabled to perform it without any default in him, the law will excuse him: but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding an accident by inevitable necessity. Hence, a lessee who covenants generally to pay rent, or to repair, is bound to the performance of his covenant, Bullock v. Dommitt, 6 Term Rep. 650.

Brecknock, &c. Navigation Co. v. Pritchard, *Id.* 750.

nant, notwithſtanding the premiſes may be deſtroyed by an accidental fire. So, on a covenant to build a bridge in a ſubſtantial manner, and to keep it in repair during a certain time, the party is bound to rebuild the bridge though broken down by an extraordinary flood.

Hare v. Groves, Anſtr. 687.

And with reſpect to *expreſs* covenants equity follows the law, and where no equitable circumſtances ariſe, will not relieve from them, on account of the deſtruction of the value of the ſubject by a ſubſequent accident. In equity, therefore, as well as at law, a tenant covenanting to repair, damage by fire only excepted, continues liable to the payment of the rent, notwithſtanding the premiſes are deſtroyed by fire: for the equity of the parties is equal, and therefore the rule of law muſt prevail.

(B) Where an Action of Covenant is the proper Remedy.

Griffiths v. Brome, 6 Term Rep. 66.

WHERE the leſſor reſerved in a leaſe a right to enter and cut timber, making reaſonable ſatisfaction to the leſſee for any damage occaſioned thereby; it was holden, that covenant would not lie by the leſſee for a wrongful act of cutting down by a third perſon, without the conſent or authority of the leſſor, though ſuch act were afterwards countenanced by the leſſor.

(C) Where the Aſſignee ſhall be bound by the Covenant of the Aſſignor.

Tatem v. Chaplin, 2 H. Bl. 133.

A Covenant in a leaſe, that the leſſee, his executors and adminiſtrators, *ſhall conſtantly reſide upon the demiſed premiſes, during the demiſe*, is binding upon the aſſignee of the leſſee, though he be not named; for it is *quodam modo* annexed and appurtenant to the thing demiſed.

Brewer v. Hill, Anſtr. 413.

A leſſee of tythes covenanted for himſelf and his aſſigns with the owner of lands in the pariſh not to take tythes in kind from him or his tenants, but to accept a reaſonable compoſition not exceeding 3*s.* 6*d.* *per* acre. An under-leſſee is not an aſſignee within the meaning of this covenant, for this covenant, not being made with the leſſor, does not run with the tythes, but is merely perſonal.

(D) Where the principal and all auxiliary Covenants ſhall be ſaid to be void and extinguiſhed.

Guppy v. Jennings, Anſtr. 256.

IF an indenture of apprenticeſhip be void as contrary to the ſtatute of 5 *Eliz.*, all covenants entered into by a third perſon for ſecuring the performance of that indenture are void alſo.

(E) Of the Pleadings.

A. In consideration of 250 *l.* paid by *B.*, and of the farther sum of 250 *l.* to be paid, *&c.*, covenanted, that he would, with all possible expedition, instruct *B.* in a certain mode of bleaching linen, for which he had obtained a patent; and *B.* covenanted, that he would on or before a certain day, or sooner, if *A.* should before that time have instructed him, *&c.* pay the farther sum of 250 *l.* It was holden, that *A.* might sue *B.* for the 250 *l.* without averring that he had taught *B.* the mode of bleaching linen, *&c.*, the covenants of the parties being independent covenants. Campbell v. Jones, 6 Term Rep. 570.

In a lease for seven years containing the usual covenants, that the lessee should pay the rent, keep the premises in repair, *&c.* there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months previous notice; and that then from and after the expiration of that notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void. To an action brought for the non-payment of the rent, the defendant pleaded as to the rent for part of the time, nothing in arrear; and as to the residue, that before the end of the first three years, he, under the above proviso, gave notice to the lessor of his intention to quit, which notice was accepted, and that at the expiration of the notice he gave up the possession. As to the first part of the plea, the plaintiff took issue, which was found for the defendant; and as to the other part he replied, that the defendant did not pay all rent and arrears of rent and duties on the tenant's part to be paid, *&c.* and perform all the covenants in the indenture on his part according to the proviso, until the expiration of the first three years. On demurrer to this part of the replication, it was holden, that the payment of rent and performance of the other covenants are conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months notice, expiring with the first three years, was not sufficient for that purpose. Porter v. Shephard, 6 Term Rep. 665.

A. covenants to build a house for *B.* and finish it on or before a certain day, in consideration of a sum of money which *B.* covenants to pay *A.* by instalments as the building shall proceed. The finishing of the house is not a condition precedent to the paying of the money, but the covenants are independent. *A.* therefore may maintain an action against *B.* for the whole sum, though the building be not finished by the time appointed. Terry v. Duntze, 2 H. Bl. 389.

By articles of co-partnership the plaintiff agreed to take the defendant as a partner, and to give him half the interest in the lease of the house, to commence *from* and *after* the 29th of *September*. The defendant covenanted to pay 300 *l.* *on* or *before* that day, as a premium to be admitted as a partner. Upon non-payment of the money at the day, the plaintiff may sue, averring his readiness to take the defendant as partner, without executing or tendering articles of co-partnership, or a conveyance of the lease. Walker v. Harris, Anstr. 249.

In

Ludwell v. Newman, 6 Term Rep. 458.

In covenant for quiet enjoyment the declaration ſtated, that before the demiſe to the plaintiff the defendant had made a demiſe to another perſon, which was then ſubſiſting; that in order to get into poſſeſſion, the plaintiff brought an ejectment, but was nonſuited, on account of that prior demiſe; and that he had never been in poſſeſſion. The defendant pleaded, that for the firſt half year of the plaintiff's term, the plaintiff might have enjoyed, &c. but that for non-payment of the rent for twenty-one days after that half year, the defendant had a right to re-enter according to a proviſo in the leaſe, and that he did re-enter, &c. This plea was holden to be bad, as being no anſwer to the plaintiff's demand.

Court of Parliament.

(A) Of the Original and Antiquity of Parliaments.

1 Reeves's Hiſt. 209. This proviſion is omitted in Henry the Third's charter.

IN King *John*'s great charter it is declared, that no ſcutage or aid ſhall be levied on the ſubject *niſi per commune concilium regni noſtri*, except in the three caſes in which a feudal lord was entitled to the aſſiſtance of his vaſſal; namely, on marriage of his daughter, on making his ſon a knight, and to redeem his perſon from captivity; a reſtriction that was declared by the charter to hold good, not only between the king and his tenants, but between every lord and his tenants. In order to aſſemble the *commune concilium regni* to aſſeſs ſuch ſcutages and aids, the king engaged to ſummon all archbiſhops, biſhops, abbots, earls, and greater barons, *ſigillatim per literas; et præterea*, ſays he, *faciemus ſummoneri in generali per vicecomites, et ballivos noſtros, omnes illos quì de nobis tenent in capite;* a paſſage, that ſeems, beyond all controverſy, to point out the conſtituent members of the great council of the kingdom in thoſe days.

(B) Of the Perſons of whom it conſiſts.

BY the 12 & 13 *W.* 3. *c.* 2. commonly called the Act of Succeſſion, it is provided, "That, after the acceſſion of the "houſe of *Hanover*, no perſon born out of the king's dominions, "except of *Engliſh* parents, (although he be naturalized,) ſhall be "capable of being a member of either houſe of parliament." And by 1 *G.* 1. *ſt.* 2. *c.* 4. "No bill for naturalization ſhall be ex-"hibited without ſuch a prohibitory clauſe."

It ſhould ſeem, as if, by this law, all the de-

By the act of 4 *Ann. c.* 4. the iſſue of the body of the Princeſs *Sophia*, and all perſons lineally deſcending from her, born, "or "hereafter to be born," are declared to be, and ſhall be, to all intents

intents and purpoſes, deemed natural-born ſubjects of this kingdom.

ſcendants of that princeſs (which deſcription would include the houſes of Pruſſia, Denmark, and Orange) are natural-born ſubjects of this realm. See Lord Somers's letter to the Elector of Hanover, dated the 12th of April 1706, and publiſhed in Macpherſon's State Papers, page 33. vol. 2. Accordingly, no bill was paſſed for naturalizing the Princeſs of Wales in 1795, or the Princeſs of Pruſſia, when married to the Duke of York in 1793.

By an act paſſed by the parliament of *Scotland* for ſettling the manner of electing the ſixteen peers, which is inſerted in the act of union, 5 *Ann. c.* 8. *art.* 25. § 12., thoſe who are elected of the ſixteen peers muſt be twenty-one years of age complete. But there is no legiſlative enactment on this ſubject reſpecting other peers. Minors indeed are excluded from ſitting as peers of *Great Britain* when they come to their honours by creation or deſcent; but that is merely by a ſtanding order of the Houſe made the 22d of *May* 1685.

On the 21ſt of October 1667, a writ of ſummons was iſſued to the the Earl of Mulgrave, he being then under age; wherefore the

Houſe of Lords, by the recommendation of the committee of privileges, referred theſe two queſtions to the judges, "Whether a minor may ſit in quality of a judge in any court of juſtice, by the law of "England, and give judgment? 2. Whether a judgment may by law be excepted againſt by writ of "error or otherwiſe, wherein any one that ſat as a judge and gave his judgment was a minor?" To the firſt of theſe queſtions the Lord Chief Juſtice reported on the 6th of November following, that it was the unanimous opinion of all the judges, "That by the law of England, in the ordinary courts of "juſtice, no minor can ſit, or give any judgment as a judge." On the 14th of December, the Houſe ordered the committee of privileges to prepare "a declaration," reſpecting both the time paſt and to come, which may prevent the inconvenience of minors ſitting in the Houſe. This declaration was reported on the 18th December, "That, according to the law of the realm and the ancient conſtitution "of parliament, minors ought not to ſit or vote in parliament;" and the Houſe agreed to it. The committee then recommended, "That a declaratory bill be prepared to remedy this inconvenience for "the future, without any retroſpect, and to confirm all that hath already paſſed." The Houſe ordered this latter part of the report to be laid aſide. 2 Hatſ. Prec. 10. notes.

(C) Of the Manner of their Summons and aſſembling.

IT doth not appear by the firſt record of ſummons now extant, *an.* 49 *H.* 3. by what warrant the Lord Chancellour cauſed the writs of ſummons to be made. The king was then a priſoner to Montfort. But ſurely none but the king can ſummon the parliament (*a*). And this is the reaſon that *Hen.* IV having taken his liege lord King *Rich* II. priſoner on the 20th day of *Aug. an.* 23. cauſed the writs of ſummons for the parliament, wherein he obtained the crown, to bear date the 19th day of the ſame month, and the warrant to be *per ipſum regem et concilium*, and himſelf to be ſummoned by the name of *Henry* Duke of *Lancaſter*.

Elſynge, 28, 9.

(*a*) Though it be very clear, that no parliament can be legally aſſembled, but by the authority of the crown, yet there are two inſtances

of a parliament being called and ſitting, and being acknowledged as ſuch without being originally ſummoned by writs iſſued by order of the king. The firſt was that of the Convention Parliament, which met on the 25th of April 1660, and ſat till the 29th of December in that year, and was then diſſolved. This parliament was ſummoned by writs iſſued under the direction of an ordinance paſſed on the 16th of March 165, by the remainder of the Houſe of Commons that had been called by Charles the Firſt, on the 3d of November 1640. The ordinance was entitled, "A bill for diſſolving the parliament begun "and holden at Weſtminſter on the 3d of November 1640, and for the calling and holding a parliament "at Weſtminſter, on the 25th day of April 1660." It was, however, thought adviſable, afterwards, when the legal government was re-eſtabliſhed, to paſs an act of parliament to remove all diſputes concerning the aſſembling and ſitting of this parliament; and it was accordingly declared and enacted by 12 Car. 2. c. 1. "That the parliament begun and holden at Weſtminſter on the 3d of November 1640 is fully "diſſolved and determined, and that the Lords and Commons now ſitting at Weſtminſter, in this preſent

" ſent parliament, are the two houſes of parliament, to all intents, conſtructions, and purpoſes whatſo-" ever, notwithſtanding any want of the king's writ of ſummons, or any other defect." But notwithſtanding this expreſs declaration by act of parliament, it appears that doubts were ſtill entertained, whether the parliament of 1640 was legally diſſolved. For, on the 24th of May 1661, the judges were ordered to attend the Houſe of Lords, to give their opinion upon this queſtion; and on the 6th of June, the judges having attended, and having given an unanimous opinion, " That the ſaid parliament begun " on the 3d of November 1640 is now determined;" the Lords ordered the Attorney-General to prepare a particular bill for declaring this to be the law; and a clauſe for this purpoſe was inſerted in an act which paſſed in the 13th of Cha. 2. c. 1. entitled, " An act for the ſafety and preſervation of his Majeſty's " perſon and government againſt treaſonable and ſeditious practices and attempts." 2 Hatſ. Prec. 280. It is remarkable, that ſuch a proviſion ſhould be inſerted in a *temporary* law.—The other inſtance of a parliament, ſummoned by writs, not iſſued by the king's authority, is the Convention Parliament, which met on the 22d of January 1688, and which was elected by virtue of letters written by the Prince of Orange, in conſequence of the addreſs of the Lords Spiritual and Temporal, and of thoſe members of the Houſe of Commons that had ſerved in any of the parliaments during the reign of Charles the Second, who together with the alde men, and ſeveral of the common council of London, had aſſembled at St. James's on the 26th of December, at the deſire of the Prince of Orange. Theſe letters were directed to the Lords Spiritual and Temporal, and to the ſeveral counties, univerſities, cities, boroughs, and cinque ports, for calling a convention to meet on the 22d of January. After ſettling the crown on the Prince and Princeſs of Orange, an act was immediately paſſed, as in the former inſtance, for removing and preventing all queſtions and diſputes concerning the aſſembling and ſitting of this preſent parliament, by which " this " convention is declared to be the two houſes of parliament to all intents and purpoſes whatſoever, notwithſtanding any want of writ of ſummons or other defect;—and that this act, and all other acts to " which the royal aſſent ſhall be given, before the next prorogation, ſhall be underſtood, taken, and adjudged in law to commence upon the 13th day of February, on which day their Majeſties, at the requeſt and by the advice of the Lords and Commons, did accept the crown and royal dignity of the " King and Queen of England, France, and Ireland, and the dominions and territories thereunto belonging." Notwithſtanding this ſtatute, it was thought adviſable, on the meeting of the next parliament, elected by virtue of writs iſſued by King William and Queen Mary, to paſs another act, " For " recognizing their Majeſties, and for avoiding all queſtions touching the acts made in the parliament " aſſembled at Weſtminſter the 13th of February 1688." This act, the 2d of W. & M. ſt. 1. c. 1. *enacts*, " That all and ſingular the acts made in the ſaid parliament, were and are laws and ſtatutes of this " kingdom. See, in the Lords Journal of the 5th of April 1690, a very curious proteſt on the ſubject of this bill, touching the validity of the laſt parliament, and the objection which had been made to the want of writs of ſummons. 2 Hatſ. Prec. 281-2.

Id. ibid. The warrant hath been divers; ſometime *per breve de privato ſigillo*; but moſt commonly *per ipſum regem*, or *per ipſum regem et concilium.*

If the king hath been abſent out of the land, and a *cuſtos* appointed (as the manner is) the writ bears *teſte* by the *cuſtos*, and the warrant is *per ipſum regem, et dominum cuſtodem, et concilium, prout an.* 13 E. 3. *Teſte* Edwardo *duce* Cornubiæ, *&c. cuſtode* Angliæ. *Per ipſum regem, et dominum cuſtodem, et concilium. An.* 20 E. 3. *conſimile. An.* 9 H. 5. *Teſte* Johanne *duce* Bedford, *cuſtode* Angliæ, *Per ipſum regem et concilium. An.* 9 H. 6. The king being in Paris, *teſte* Humfrido *duce* Gloceſtriæ, *cuſtode* Angliæ. *Per breve de privato ſigillo.* But, if the king be within the land, though within age, and a protector appointed him, he alone is *teſtis* to the writ, and the warrant is *per ipſum regem; prout an.* 1 H. 6. and ſometimes *per ipſum regem et concilium.*

By the act of 7th & 8th of *W.* 3. *c.* 25. § 1. " When any new " parliament ſhall be ſummoned or called, there ſhall be *forty* " days between the *teſte* and return of the writs of ſummons." But by the 22d article of the treaty of union, it is reſolved, " That ſuch time ſhall not be leſs than *fifty* days after the date of " the royal proclamation iſſued for that purpoſe." From that time to the preſent, though no poſitive law has been made on the ſubject, *fifty* days have always been allowed between the *teſte* and return of the writs of ſummons.

Formerly,

Formerly, the parliament, when prorogued, could not be convened before the expiration of the time to which they were prorogued. But by the 26th of *G.* 3. *c.* 107. §95, 96, 97. (*a*), the king is empowered to call out the militia, and ſummon parliament upon fourteen days notice, in all caſes of actual invaſion, or upon imminent danger thereof, and in all caſes of rebellion and inſurrection, which notice by an act of this ſeſſion (37 *G.* 3.) is declared to be ſufficient in any caſe.

(*a*) This conſtitutional ſafeguard was firſt given by the ſtatute of 16 G. 3. c. 3.; which ſtatute was only temporary, for ſeven years, and was ſuffered to expire, ſo that the country was deprived of it for three years.

By the 5th of *Eliz.* *c.* 1. § 16. all members, before they come into the parliament-houſe, are to take the oath of ſupremacy before the Lord Steward for the time being, or his deputy or deputies, for that time to be appointed.

By the 7th of *Ja.* 1. *c.* 6. § 8. the oath of allegiance is, in like manner, ordered to be taken by members before they come into the houſe.

By the 30th of *Cha.* 2. *ſt.* 2. every member is to take the oath of allegiance and ſupremacy, and make and ſubſcribe the declaration againſt tranſubſtantiation, between the hours of nine in the morning and four in the afternoon, a peer at the table in the middle of the Houſe of Peers, and whilſt a full houſe of peers is there, with their Speaker in his place; and a member of the Houſe of Commons, at the table in the middle of that houſe, whilſt a full houſe is duly ſitting, with the Speaker in the chair.

By the 13th of *W.* 3. *c.* 6. § 10. every member is to take the oath of abjuration "at the table," in the ſame manner, and between the ſame hours, as he takes the oaths of allegiance and ſupremacy by the 30th of *Cha.* 2.

At the beginning of the parliament which met in the year 1780, there was ſome debate in the Houſe of Lords, whether any lord might, notwithſtanding the limitation of time expreſſed in this and the preceding act, be admitted to take the oaths, and ſign the declaration *after four o'clock*; and the Lords determined that he might.—The Houſe of Commons, by their uniform practice, have always determined differently. Nor does this determination of the Lords ſeem to be conſiſtent with an order of their lordſhips, "That lords who come to take the oaths be preſent for that "purpoſe at the firſt ſitting of the houſe; otherwiſe to withdraw from the debates for that day." 2 Hatſ. Prec. 82.

By the 33d of *G.* 2. *c.* 20. every member (except as is therein excepted) is, before he preſumes to vote in the Houſe of Commons, to take the oath of his being qualified, and to deliver in his qualification at the table.

Notwithſtanding all theſe laws which are introductory to a member's taking his ſeat in the houſe, a perſon when returned, is, though he ſhould not have taken his ſeat, to all intents a member, except as to the right of voting, and is entitled to the ſame privileges as any other member of the houſe. Inſomuch that upon the 13th of April 1719, the Houſe determined "That Sir Joſeph Jekyll was capable of being choſen of a committee of ſecreſy, though he had not "been ſworn at the clerk's table." 2 Hatſ. Prec. 83. note.

(D) Of Elections.

1. Of the Electors and their Qualifications.

FROM the time the clergy have waived the right of taxing themſelves, which was ſoon after the Reſtoration, they have voted in the election of members of the Houſe of Commons by virtue of

of their eccleſiaſtical freeholds. This was done at firſt without any particular law for the purpoſe: but there are two acts of parliament ſince paſſed which ſuppoſe it to be now *a right*, viz. 10 *Anne*, *c.* 23. & 18 *G.* 2. *c.* 18.

2. Of the Elected, and their Qualifications.

THE notion, that the clergy are ineligible ſeems now to be almoſt entirely done away. We have ſeen that it has been expreſsly determined by the Houſe in Mr. *Ruſhworth*'s caſe, that a deacon is eligible. But there is a difference, it has been ſaid, between perſons in prieſt's or in deacon's orders; the firſt is an indelible character, the other not. But there ſeems to be no foundation for this difference: the character of a deacon is equally indelible with that of a prieſt, as appears from the 76th canon.

2 Hatſ. Prec. 68. At a *general* election, *whilſt the writs are executing together in all parts of the kingdom*, it has been uſual for the

A perſon elected and returned a member of the Houſe of Commons, is not eligible for any other place, unleſs by the acceptance of an office, or ſome other act, he vacates his former ſeat. One reaſon, among others, for this is, that, though a member is elected by the freeholders of a county, or the electors of a particular borough, he becomes, when elected, the repreſentative of the whole commonalty of *Great Britain*, and is therefore already the legal repreſentative of the county or borough, whoſe ſeat is at that time vacant.

ſame perſon to be elected for two or more different places, and, when the Houſe meets, for ſuch perſon to make his election for which place he will ſerve. But, when a perſon is elected, and the indenture of return is executed, and actually *returned* into the Crown-office, from that inſtant he becomes in law a member of the Houſe of Commons, and is not eligible for any other place. See Lord Althorpe's caſe, March 1782.

(*a*) Vol. 1. 123.

It is ſtated in the preceding part of this work (*a*), that perſons outlawed in civil actions, or in execution, are ineligible. This poſition is queſtionable, and Mr. *Hatſell*'s opinion is, that it ſhould ſeem from the reſult of the caſes upon the ſubject, that a perſon is eligible, though an outlaw, or in execution, at the time of his election. At the ſame time it muſt be confeſſed, that the point is not clearly eſtabliſhed.

The eldeſt ſons of peereſſes in their own right, and of biſhops, as lords of parliament, are within the exception of the qualification act of the 9th of *Anne*, *c.* 5.

General Carpenter's caſe, July 7th, 1715.

Ambaſſadors, and miniſters employed abroad, are eligible. The commiſſaries appointed in 1714 to treat with the commiſſaries of *France*, and the commiſſioners appointed in 1778 to treat with the *Americans*, were conſidered as falling within this deſcription.

Mr. Roſe's caſe, June 1788.

The clerk of the parliaments has been elected, and admitted to ſit as a member of the Houſe of Commons.

2 Hatſ. Prec. 58.

The ſtatute of 6 *Anne*, *c.* 7. which incapacitates any perſon from being elected, or ſitting as a member of the Houſe of Commons, who ſhall accept of an office of profit under the crown, created ſince the year 1705, excepts from its operation any member, being an officer in the army or navy, who ſhall receive any new or other commiſſion in thoſe ſervices. When Admiral

Boſcawen

Boſcawen was appointed general of marines in 1759, there was a doubt, whether the marines being to ſerve at land as well as at ſea, and being regimented, he, being only a ſea-officer, would not vacate his ſeat by ſuch acceptance; the part of the appointment which concerned the land ſervice being to him, a mere naval officer, a new appointment, and not a promotion in the navy. But upon conſideration and conſultation with the law-officers of the crown, and after inſpection of the ſeveral documents and acts relating to the matter, it was determined, though with much doubt, that he ſhould not vacate his ſeat.

It is provided by the 18th of *G.* 3. *c.* 59. § 4. and the 33d of *G.* 3. *c.* 36. That the ſeats of members returned to ſerve in parliament ſhall not be vacated by the acceptance of a commiſſion in any corps of fencible men in *Scotland*, or in any corps to be raiſed in *Great Britain*, in which the officers ſhall not be entitled to half-pay, or to rank in the army after their actual ſervice.

In 1774, Mr. *Maitland* was elected for the burghs of *North Berwick*, &c.; upon which a petition was preſented againſt that election, ſtating that Mr. *Maitland* was ineligible from his holding the office of clerk of the pipe in the Exchequer, which was alleged to be a new office created ſince the 25th of *October* 1705. But it was determined, that though the particular office under the name of the *Clerk of the Pipe* did not exiſt at the time of the Union, yet becauſe the functions of that office had been always executed in *Scotland*, though by an officer under another name, this was not a *new office* within the meaning and ſpirit of the act of Queen *Anne*, and that therefore Mr. *Maitland* was eligible. 2 Hatſ. Prec. 56. 2 Dougl. Elect. Caſ. 423. In June 1785, upon the third reading of "the bill "for better "examining and "auditing "the public ac-

"counts," a doubt ſuggeſted by Mr. Fox, Whether the commiſſioners who were to be appointed under the authority of that bill would come within the meaning of theſe words of the ſtatute of Queen Anne, as holding a *new office*, and by that be diſqualified from being eligible or ſitting in the Houſe of Commons; or, whether they would be conſidered as executing only the *old office* of auditor of the impreſt, from which the then preſent auditors were removed by that bill. Mr. Pitt, Chancellour of the Exchequer, ſeemed to think from ſome words in the bill, that it was a new office, and therefore no clauſe was neceſſary ſpecifically to exclude theſe commiſſioners from the houſe, and the Speaker was of the ſame opinion. But upon conſidering Mr. Maitland's caſe, and it being intended that theſe commiſſioners ſhould not be eligible, Mr. Pitt was induced to conſent to the inſertion of a clauſe, declaring directly, that they ſhould be incapable of being elected, or ſitting as members.

3. Of the Duty of returning Officers, and the Remedies againſt them; and of the Mode of proceeding upon Complaints of undue Elections.

In order to prevent unneceſſary delays in the execution of writs for the election of members for *Scotland*, it is provided by 35 *G.* 3. *c.* 65. that the ſheriff or ſteward depute or ſubſtitute of any county or ſtewartry ſhall, within ſix days after receipt of the writ, direct the notices required by law to be given as to the time and place of election, and that the day of election ſhall not be ſooner than ſix, or later than fifteen days after the day of publication at the church doors.

The act alſo directs, that no other perſon but the ſheriff or ſteward depute, or his ſubſtitute, ſhall receive or execute the writ; and that if any principal or high ſheriff or ſteward, or any other

other perſon ſhall interfere in the execution of the writ, he ſhall forfeit a thouſand pounds, and be incapacitated from ever bearing or executing any office or place of truſt under the crown. The act likewiſe impoſes a penalty of five hundred pounds upon ſheriffs or ſtewards deputes, or their ſubſtitutes, neglecting or refuſing to perform their duty.

It is provided by 36 *G.* 3. *c.* 59. That if after counting the Houſe according to the directions of the 10th of *G.* 3. *c.* 16. there be leſs than one hundred members preſent, or if the forty-nine members, not ſet aſide nor excuſed, cannot be completed, the Houſe may (after the order for taking the petition into conſideration ſhall have been adjourned to a particular hour on the following day as in that act is directed) proceed upon any order of the day for the call of the Houſe that may have been previouſly fixed for that day, or direct that it be adjourned, and act therein as is uſual in ſuch caſes: and in caſe no order of the day for a call of the Houſe ſhall have been previouſly fixed for that day, then the Houſe may order that the Houſe be called over on ſuch future day as they ſhall appoint, and may make all neceſſary orders relating thereto, and in any caſe may make ſuch further orders as to them ſhall ſeem expedient for enforcing the attendance of members on the buſineſs of the Houſe; and the Houſe ſhall then adjourn to the ſame day to which ſuch order or orders ſhall be adjourned, and ſo from time to time, as occaſion ſhall require; and in caſe no ſuch proceedings with reſpect to the call of the Houſe, or the above matters, ſhall take place, or, if in the courſe of thoſe proceedings the Houſe ſhall be adjourned for want of members, the Houſe ſhall be taken to be adjourned to the ſame day to which ſuch order or orders ſhall have been adjourned. But if ſuch forty-nine members cannot be completed, the Houſe ſhall not proceed to any of the above matters until the door is unlocked, and the parties, their counſel and agents, are withdrawn from the bar. Nor ſhall the Houſe proceed to any other buſineſs (other than ſuch as may be expreſsly allowed by any act of parliament) until there be a due attendance of members, except calling over the Houſe, adjourning ſuch call, or ordering a call on a future day, and making orders relative thereto, or other orders for enforcing the attendance of members on the buſineſs of the Houſe.

(E) Of the Method of paſſing Bills.

THE form of giving the royal aſſent to bills has been for a conſiderable time paſt by the clerk of the Houſe of Lords, either the king preſent, or in the preſence of commiſſioners authoriſed by him. There have been inſtances (*a*) of bills being paſſed by letters patent. In the ſtatute of the 33d of *Henry* the Eighth, *c.* 21. (*b*) intitled, "Queen *Catherine* and her complices "attainted of high treaſon," it is declared, § 3. "That the king's "royal aſſent, by his letters patent under the great ſeal, and "ſigned with his hand, and declared and notified in his abſence to "the Lords Spiritual and Temporal, and to the Commons aſſembled

(*a*) Lords Journ. 22 March 1620. 11 July 1625.

(*b*) Raſt. Stat. tit. Parliament, § 18.

" bled together in the High Houſe, is and ever was of as good " ſtrength and force as though the king's perſon had been there " perſonally preſent, and had aſſented openly and publickly to the " ſame." And in § 4. it is enacted, " That this royal aſſent and " all other royal aſſents hereafter to be ſo given by the kings of " this realm, and notified as is aforeſaid, ſhall be taken and re- " puted good and effectual to all intents and purpoſes without " doubt or ambiguity; any cuſtom or uſe to the contrary not- " withſtanding."

One of the grounds alleged for the reverſal of the attainder of the Duke of *Norfolk* in the reign of *Henry* the Eighth was, that the king had *not ſigned* the letters patent for giving the royal aſſent to the act with his own hand, but that his ſtamp had been ſet to them by one *William Clerk*. And the queſtion of the validity of the act upon this ground was brought and argued before all the judges at Serjeants' Inn, by the perſons who had purchaſed the lands of the attainted duke; but it does not appear that the judges gave any opinion upon it. 3 Parl. Hiſt. 298. Dyer, 93.

All the commiſſions and letters patent for giving the royal aſſent to bills agreed upon by both Houſes, recite, " Whereas we " have ſeen and perfectly underſtood an act agreed upon by " you (*a*), our loving ſubjects the Lords Spiritual and Temporal " and the Commons in this our preſent parliament aſſembled, and " indorſed by you, as hath been accuſtomed," *&c. &c.* This recital, ſaith Mr. *Hatſell*, which ſhews the neceſſity of the bill being communicated to the king, after it has been agreed upon by both Houſes, clearly explains, what might otherwiſe have been matter of doubt, " Why the commiſſioners, who in ſeveral inſtances " had been, by a prior commiſſion, authoriſed not only to begin " and hold the parliament, *but to do every thing which for us, and* " *by us, ſhall be there to be done*, could not under that commiſſion " have authority to give the royal aſſent to any bill." And as the former commiſſion is not revoked, this ſhews why the Lord Chancellour in 1708, 1754, 1768, and 1789, gave the royal aſſent by virtue of two commiſſions, *viz.* the general one upon opening the ſeſſion, and a ſpecial one for the purpoſe of giving the royal aſſent to the bills in queſtion. Lord *Clarendon* ſays, " That when " it was propoſed on *Charles* the Firſt going into *Scotland* in 1641, " that he ſhould leave a commiſſion with ſome perſons to paſs " ſuch acts as ſhould be prepared and be agreed to by both Houſes " in his abſence, it was found that no ſuch commiſſion could be " legally granted, to give the royal aſſent to any acts that were " not conſented to by both Houſes, at the date of the com- " miſſion." 2 Hatſ. Pre. 323.

(*a*) " It is " not only " lawful," ſaith my LordClarendon, " for " the Privy " Council, " but their " duty, to " give " faithfully " and freely " their ad- " vice to " the king " upon all " matters " concluded " in parlia- " ment, to " which his " royal " aſſent is " neceſſary, " as well as " upon any " other ſub- " ject what- " ſoever. " Nay, a " privy- " counſel- " lour, as ſuch, is bound to diſſuade the king from conſenting to that which is prejudicial to the crown; " at leaſt, to make that prejudice manifeſt to him; though as a private perſon he could wiſh the matter con- " ſented to. And therefore, by the conſtitution of the kingdom, and the conſtant practice of former times, " all bills, after they had paſſed both Houſes, were delivered by the clerk of the parliament to the clerk of " the crown, and by him brought to the Attorney-General, who preſented the ſame to the king in " council; and having read them, declared what alterations were made by thoſe bills to former laws; " and what benefit or detriment, in profit or juriſdiction, would accrue thereby to the crown: and then " upon a full and free debate by his counſellours, the king reſolved accordingly upon ſuch bills as were " to be enacted into laws; and reſpited the other that he thought not fit to conſent to. As this hath " been

" been the known practice, ſo the reaſon is very viſible; that the royal aſſent being a diſtinct and eſſen-
" tial part towards the making a law, there ſhould be as much care taken to inform the underſtanding
" and conſcience of the king upon thoſe occaſions, as theirs, who prepare the ſame for his royal aſſent."
Hiſtory of the Rebellion, vol. 1. book the 3d, pag. 157. One of the reaſons aſſigned in the preamble to the act of 13 & 14 Car. 2. c. 29. for the reverſing of Lord Strafford's attainder, is, that when the king ſigned the commiſſion for giving the royal aſſent to the bill, he did it " with exceeding great ſorrow, and
" it was ever remembered by him with inexpreſſible grief of heart; and out of his majeſty's great piety
" he did publickly expreſs it, when his own ſacred life was taken away by the moſt deteſtable traitors that
" ever were." This ſhews that it was the opinion of parliament, that it was eſſential to the validity of an act, that the royal aſſent to it ſhould be given freely. *Note*, The inherent and conſtitutional prerogative of the crown, to withhold the royal aſſent, has not been exerciſed ſince the 11th of March 1707, when Queen Anne refuſed her aſſent to " a bill for ſettling the militia of that part of Great Britain
" called Scotland."

2 Hatſ. Prec. 320. When a bill has paſſed both Houſes, it is not neceſſary that it ſhould be ſent back to the Commons before it receives the royal aſſent, unleſs it be a bill of ſupply, for this the Commons claim a right of preſenting by their Speaker.

2 Hatſ. Prec. 321. On the 7th of *March* 1785 a commiſſion was made out and paſſed the great ſeal, for giving the royal aſſent to ſeveral bills agreed upon by both Houſes; but, by ſome miſtake, the malt bill, which had paſſed both Houſes, and the agreement to which by the Lords had been communicated to the Commons, was left out. As ſoon as this was diſcovered, from the liſt of bills ready for the royal aſſent, which is always ſent to the Speaker, notice of the error was given to the Lords, and a deſire expreſſed, that it might be rectified by iſſuing a new commiſſion, and not executing the commiſſion which was then ready. Accordingly, no proceedings were had upon the firſt commiſſion, but another commiſſion, in which the malt-bill was included, was prepared, and paſſed the great ſeal, and the bills named in it received the royal aſſent the next day, the 8th of *March*.

2 Hatſ. Prec. 337-8. 3 Hatſ. Prec. 24. 63. In a bill which paſſed in 1663, intituled, " An act for ſettling Bills for a general pardon; for the reverſal of attainders or outlawries, and for reſtitution in blood; for granting honours and precedency, originate with the crown, and muſt be formally recommended by the king before they can be taken into conſideration. So, of bills of ſupply, and all bills for the application of publick money. But though recommended immediately from the crown, theſe bills muſt afterwards receive the royal aſſent in the ſame manner with other bills.

" the lands of the Earl of Kent and the Lord Lucas on the marriage of the ſaid Earl with the daughter
" of the ſaid Lord Lucas," there is a clauſe (which, as no particular mention of it appears in the Lords Journal, was probably inſerted, whilſt the bill was before the committee) that has no reference to the title of the bill; and though it relates to honours and dignities, does not appear to have had the conſent of the crown till the bill was offered for the royal aſſent. The clauſe recites, " That Charles II.
" having by letters patent created the Counteſs of Kent Baroneſs Lucas, to her and her heirs male, and
" for want of ſuch iſſue, to the heirs of her body; and if at any time after her death, and default of
" iſſue male, there ſhall be more perſons than one co-heirs, that then the ſaid honour ſhall not be in
" ſuſpence or extinguiſhed, but ſhall go to ſuch of the co-heirs as by courſe of deſcent would be entitled
" to other entire inheritances, as, offices of honour or publick truſt;" the clauſe proceeds to enact, " That the ſaid declarative clauſe in the ſaid letters patent ſhall be and is hereby ratified and confirm-
" ed; and that the ſaid barony, honour, and title, from time to time, &c. &c." repeating the words of the letters patent. By this uncommon limitation, perhaps the only one of its kind, the barony of Lucas, upon the death of the Marchioneſs Grey, widow of Philip ſecond Earl of Hardwicke, in 1797, devolved upon her ladyſhip's eldeſt daughter Amabella Viſcounteſs Polwarth, who has accordingly aſſumed the title of Baroneſs Lucas. The Marchioneſs Grey was daughter of Amabel Counteſs of Breadalbane, the eldeſt daughter of Henry, thirteenth Earl and firſt Duke of Kent.

In

In general, each Houſe has a right to originate and paſs ſuch bills as to them may ſeem proper; except that the Lords have in ſeveral inſtances claimed the excluſive right, that bills for reſtitution of honours, or in blood, ſhould commence with them; and the Houſe of Commons have on their part aſſerted, and, it ſhould ſeem, invariably preſerved, the excluſive exerciſe of the right, "that bills of ſupply, impoſing burthens on the people, ſhould "be the grant of the Commons; and that the Lords ſhould have "no other voice, than, as one branch of the legiſlature, by their "aſſent to give the authority of a law to the levying of thoſe "aids and taxes which the Commons ſhall think wiſe and fitting "to impoſe." Other bills of what nature ſoever, whether relating to the parliament itſelf, or to either Houſe ſeparately, may have their commencement indifferently in either Houſe.

3 Hatſ. Prec. 62-3.

Comm. Journ. July the 3d, 1678.

(F) Of the Continuance, Adjournment, Prorogation, and Diſſolution of the Parliament.

THERE ſeems to be no doubt but that it is the privilege of both Houſes to adjourn themſelves. The king may ſignify his deſire, and has frequently done ſo, that the parliament ſhould adjourn itſelf, but he has no authority to adjourn it, and it is in the wiſdom and prudence of either Houſe to comply with his requiſition or not, as they ſee fitting.

Vide 2 Hatſ. Prec. tit. King, c. 3.

A prorogation of the parliament is either by the king's command, and in his preſence, ſignified by the Lord Chancellour, or Speaker of the Houſe of Lords, to both Houſes, or by writ under the great ſeal directed to the Lords and Commons, or by commiſſioners appointed by a ſpecial commiſſion for that purpoſe. The firſt is the uſual mode of proceeding, where the parliament is prorogued at the cloſe of the ſeſſion. But there ſeems to be no inſtance where the parliament has been prorogued by writ, except upon the meeting of a new parliament after a general election, and before a Speaker of the Houſe of Commons is choſen: upon this occaſion, when the members of the Houſe of Commons come to the place appointed for adminiſtering to them the oaths, by the Lord Keeper or his deputies, "on their being "informed, that the parliament is to be prorogued by writ di-"rected to the Lords and Commons, they go directly without "going into the Houſe of Commons, or expecting any meſſage "from the Lords, to the Houſe of Peers, where the writ for "proroguing the parliament is read." This is the form of the entry in the Journal of the Houſe of Commons, without expreſſing by whom, or upon what authority, this information to the Commons is conveyed. The proroguing by commiſſioners, ſpecially appointed for that purpoſe, is the uſual form, when the parliament meets from time to time during the receſs.

2 Hatſ. Prec. 309, 310.

The more ancient form of diſſolving parliament was by the king's command, ſignified to both Houſes in the preſence of the ſovereign, in the Houſe of Lords, by the Lord Chancellour, or

2 Hatſ. Prec. 360.

Speaker of that Houſe. Where the king was not preſent in perſon, a commiſſion was iſſued under the great ſeal, appointing certain lords therein named to be commiſſioners for the purpoſe of executing the royal authority upon this occaſion. The later practice (*a*), and that which hath been followed without interruption ever ſince the Revolution, hath been, that the parliament is prorogued to a certain day; and then a proclamation iſſues, diſcharging the members of both Houſes from their attendance upon that day, and diſſolving the parliament.

(*a*) This practice, ſays Mr. Hatſell, has probably ariſen from thoſe motives, that are ſuggeſted by Charles I. in his ſpeech in 1628, "That it ſhould be a general maxim with "kings, themſelves only to execute pleaſing things, and to avoid appearing perſonally in matters "that may ſeem harſh and diſagreeable." For however proper it may be frequently to appeal to the ſenſe of the nation at large, by the election of a new parliament; and however flattering this may be to the electors; it happens from a variety of circumſtances, that to the elected, who are actually in poſſeſſion of ſo valuable a privilege, as that of giving their voice in the great council of the nation, a diſſolution of parliament is always an unwelcome and unpleaſing meaſure. 2 Hatſ. Prec. 362. Where the diſſolution is rather abrupt, and the king is diſſatisfied with his parliament, the reaſon here aſſigned for the practice may have its weight: but, where the period of the natural diſſolution of parliament is not very diſtant, it does not ſeem to be a very harſh meaſure in the crown to accelerate the event a little; and therefore, though previouſly to the diſſolution of the parliament in 1796, it was, as uſual, formally prorogued, yet his majeſty in his ſpeech at the cloſe of the ſeſſion intimated his intention of immediately diſſolving it, and calling a new one.

With reſpect to the calling and holding of parliaments, the prerogative of the crown by the ancient laws of the realm was under no particular reſtraint. But by the ordinance of the 5th of *Edward* 2. it was directed, "That the king ſhall hold a par-"liament once in every year, or twice, *ſi meſtier ſoit* (*b*)," and this ordinance was afterwards enforced by the ſtatutes of the 4th and 36th of *Edward* the Third.

(*b*) The *Dictionnaire de Trevoux* explains the word "*meſtier*" ſometimes to mean *opus, neceſſitas*, but adds, "*Il eſt vieux en ce ſens.*"

By the ſtatute of 16 *Car.* 1. and 16 *Car.* 2. *c.* 1. it is enacted, "That the holding of parliaments ſhall not be diſcontinued above "three years at the moſt."

By the bill of rights, 1 *W. & M.* ſeſſ. 2. *c.* 2 it is declared, "That for redreſs of all grievances, and for the amending, "ſtrengthening, and preſerving of the laws, parliaments ought to "be held frequently."

By the 6th of *W. & M.* *c.* 2. it is declared and enacted, "That a parliament ſhall be holden once in three years at the "leaſt."

(*c*) This appears to be the firſt act which limited the prerogative of the crown in this reſpect; for the acts paſſed in the 16th year of Charles I. and 16th of Charles II. which by Lord Clarendon, Burnet, and the other hiſtorians of thoſe times, are improperly called, "Bills for triennial Parliaments," were not intended to limit the duration, but to ſecure the meeting and ſitting of parliaments. 2 Hatſ. Prec. 364.

The latter act limits the duration of parliaments (*c*) to three years; but this limitation has been extended by a ſubſequent act, *viz.* 1 *G.* 1. *ſtat.* 2. *c.* 38. to ſeven years.

By the ſtatute of the 6th of *Anne*, *c.* 7. § 4. it is provided, that thenceforth no parliament ſhall be determined or diſſolved by the death or demiſe of her majeſty, her heirs or ſucceſſors; but ſuch parliament ſhall continue, and is empowered and required, if

if ſitting at the time of ſuch demiſe, immediately to proceed to act, notwithſtanding ſuch death or demiſe, for and during the term of ſix months, unleſs it ſhall be ſooner prorogued or diſſolved: and if ſuch parliament ſhall be prorogued (*a*), then it ſhall meet and ſit upon the day to which it ſhall be prorogued, and continue for the reſidue of the ſix months, unleſs ſooner prorogued or diſſolved. And by § 6. in caſe there is no parliament in being at the time of the demiſe of the crown, that hath met and ſat, then the laſt preceding parliament ſhall immediately convene and ſit at *Weſtminſter*, and be a parliament to continue, as if it had never been diſſolved.

(*a*) That is, by the ſucceſſor.

But this clauſe is repealed by the 37th of *G.* 3. *c.* 127. by which it is enacted, that in caſe of the demiſe of the crown ſubſequent to the diſſolution or expiration of a parliament, and before the day appointed by the writs of ſummons for aſſembling a new parliament, then the laſt preceding parliament ſhall immediately convene and ſit at *Weſtminſter* and be a parliament to continue for ſix months, and no longer, but ſubject to be ſooner prorogued or diſſolved by the ſucceſſor. And in caſe of the demiſe of the ſucceſſor within the ſix months, and before ſuch parliament ſhall have been diſſolved by him, or after it ſhall have been ſo diſſolved, and before it hath met in the manner thereby provided, the ſaid laſt preceding parliament ſhall immediately convene and ſit, and continue to be a parliament for ſix months longer, to be computed from ſuch laſt-mentioned demiſe, but ſubject to be ſooner prorogued or diſſolved by the ſucceſſor; and ſo as often as any ſuch demiſe ſhall happen before a new parliament ſhall have met in manner thereby provided. And in caſe of the demiſe of the crown on the day appointed by the writs of ſummons for calling and aſſembling a new parliament, or at any time after ſuch day, and before ſuch new parliament ſhall have met and ſat, ſuch new parliament ſhall, immediately after ſuch demiſe, convene and ſit at *Weſtminſter*, and be a parliament, to continue for ſix months and no longer, but ſubject to be prorogued or diſſolved by the ſucceſſor.

Court of Exchequer.

THE court of Exchequer has a general juriſdiction over every part of the publick revenue; and has complete power to interfere in the taking of the publick accounts in every part of their proceſs. It cannot be deprived of this power but by expreſs proviſion in an act of parliament: it is competent to it therefore to control the conduct of the commiſſioners of publick accounts under the 25 *Geo.* 3. *c.* 52., that ſtatute not having expreſsly ouſted it of its juriſdiction. *Ex parte* Durrand, Anſtr. 743.

This authority may be exerted in two ſhapes; either by motion or petition to the court, or by the more formal method of an information by the Attorney General, or a bill againſt him. In the ordinary applications to take off an *inſuper* improperly impoſed, to remove the hands of the ſheriff on an improper levy, and the like, a motion is the proper mode of obtaining the aſſiſtance of the court. But, where the nature of the queſtion, or intricacy of the circumſtances render it impoſſible to come at the juſtice of the caſe on motion, the more formal mode, by bill or information, muſt be reſorted to.

Of the County Court.

Walſh v. Troyte, 2 H. Bl. 29. Tubb v. Woodward, 6 Term Rep. 175.

NO action can be brought in the county court, unleſs both the defendant reſide, and the cauſe of action ariſe within the county: therefore, though the demand be under forty ſhillings, yet, if the cauſe of action ariſe in one county, and the defendant reſide in another, the action muſt be brought in the ſuperior courts.

Of the Court-Baron.

Watkins's Gilb. Ten. 433. Co. Litt. 58. 4 Term Rep. 446. 484.

IN the court-baron, as we have ſeen before, the freeholders are judges, the court therefore ſhould be ſtated to be holden before *them*. And the ſuitors, before whom it is holden (*a*), ſhould, regularly, be named.

2 Ld. Raym. 862. Spir. Laws, b. 28. c. 27. and 42. (*a*) Moore, 75. pl. 205. 3 Leon. 8.

Watkins's Gilb. Ten. 432. (*b*) Baldwin v. Tudge, 2 Wilſ. 20. (*c*) 1 Freem. 525. ca. 707.

It happens in many manors that the court-baron and cuſtomary court are blended together. In ſuch caſe care ſhould be taken to keep the acts of the ſeveral ſuitors quite diſtinct. For it has been ruled (*b*), that debt will not lie for an amerciament of a free-tenant, unleſs it appear ſatisfactorily, that the perſons who affeer it are free-tenants alſo. It ſeems the ſafer way, when theſe courts are holden together, not to mention expreſsly before whom they were holden; but to ſtate the perſons preſent generally, and ſo leave it to the law, which will conſider the proper buſineſs of each court to have been tranſacted before the regular judges (*c*).

It

It is generally laid down in our books, that if there be not two frank ſuitors at the leaſt, a court-baron cannot be holden, and conſequently, that the manor is deſtroyed. But it ſhould ſeem, that there muſt be *more* than two frank tenants holding of the manor, to enable the lord to hold a court; for otherwiſe, if one of them was the plaintiff, and the other the defendant, it would be impoſſible to try them by their peers. We find an inſtance in the regiſter (11 *b.* & *Bro. Cauſe a remover plea, &c. pl.* 35.) of a cauſe being removed out of a court-baron, by reaſon there were *but four* ſuitors there. Tonkin v. Croker, 2 Ld. Raym. 863-4.

See Watk. Treatiſe on Copyholds, 9. Bro. Court-Bar. pl. 22. Compriſe, pl 31. Glover v. Lane, 3 Term Rep. 445.

Although there be but *one* free-tenant, yet the ſignory, as to him, remains with reſpect to his ſervices, *&c.* notwithſtanding there can be no court holden. 1 Anderſ. 257. 2 Ld. Raym. 864.

And though *all* the tenancies eſcheat, yet it ſhall ſo far continue a manor in contemplation of law as to preſerve the rights of leets, wrecks, *&c.* Calth. 13.

Of the Court of Requeſts.

1. In *London.*

THE court of requeſts for the city of *London* has no juriſdiction in a ſuit, unleſs both the plaintiff and defendant reſide within the city. Brooks v. Moravia, 2 H. Bl. 220.

2. In *Southwark.*

The *Southwark* court of requeſts act, 22 *G.* 3. *c.* 47., cannot be *pleaded* to an action brought in a ſuperior court, there being no prohibitory clauſe in that act, as there is in the *Weſtminſter* act of 23 *Geo.* 2. *c.* 27. and the *Tower Hamlets* act of 23 *G.* 2 *c.* 30. The proper mode for the defendant to avail himſelf of it is, *by entering a ſuggeſtion* on the record after verdict, or the execution of a writ of inquiry.—Where the plaintiff having obtained judgment on a general demurrer to ſuch a plea, executed a writ of inquiry on which the damages were aſſeſſed at leſs than forty ſhillings, five days before the end of the term, and ſigned judgment on the laſt day of the term, the court in the next term refuſed to direct their officer to review his taxation of coſts to the plaintiff, on an affidavit ſtating the former proceedings, and that the defendant was *reſiant* within the juriſdiction of the inferior court, becauſe he ought to have entered a ſuggeſtion, and that before final judgment was ſigned. And to entitle himſelf to ſuch a ſuggeſtion, even ſuppoſing it to be moved for in time, the de- Barney v. Tubb, 2 H. Bl. 351.

fendant muſt ſtate in the affidavit, not only that he is *reſiant* within the juriſdiction of the court of requeſts, but alſo that he is liable to be warned or ſummoned to it. And after a judgment by default, the defendant is ſtill in court for the purpoſe of entering ſuch a ſuggeſtion. It ſhould ſeem too, that a judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be conſidered as a judgment by default.

Curteſy of England.

THE right of a huſband to retain the land of his deceaſed wife was confined, according to *Glanville* (*a*), to ſuch eſtates as were given with the woman *in maritagium*. But in *Bracton*'s time the claim had extended itſelf; for he ſays (*b*), the huſband ſhould have the land if he married a woman *habentem hæreditatem vel maritagium, vel aliquam terram ex cauſâ donationis*, having any inheritance, whether a *maritagium* or other gift of land.

(*a*) Lib. 7. c. 18.
(*b*) Lib. 5. c. 30. § 7.

It appears from both theſe writers, that the ſecond huſband was equally entitled to be tenant by the curteſy with the firſt. But this doctrine was combated by one *Stephanus de Segrave*, whoſe name is found among the juſtices itinerant in the reign of *Henry* the Third, as founded on a miſconception of the meaning and deſign of this ſort of eſtate. He thought there was an injuſtice in giving an eſtate *per legem Angliæ* to the ſecond huſband, more eſpecially when there were children alive of the firſt marriage. And this opinion of *Stephanus de Segrave* was afterwards eſtabliſhed by the ſtatute *de donis* in reſpect of conditional eſtates.

1 Reeves's Hiſt. 298. Among the ſtatutes which are claſſed under the denomination of *ſtatuta incerti temporis*, we find the *ſtatutum pro terentibus Angliæ*, which muſt evidently have been written before the ſtatute *de donis*, inaſmuch as it declares that the *ſecond* huſband ſhall inherit. Again, as it confines the curteſy to eſtates given *in maritagium*, according to Glanville, without including all inheritances, as Bracton does, it muſt have been written before the latter author penned his book. But, if this was a ſtatute before Bracton's time, that author, where he examines the queſtion of the ſecond huſband claiming by the curteſy, and mentions Segrave's opinion againſt it, (lib. 5. c. 30. § 7.) could not be ſuppoſed to omit noticing any ſtatute that had been made ſo deciſive as this is. 2 Reeves's Hiſt. Law, 315.

(A) Of what Sort of Inheritance this Eſtate is allowable, of what not.

WHERE the cuſtom was, that if a man took to wife a cuſtomary tenant of the manor, and had iſſue, and over-lived her, he ſhould be tenant by the curteſy; and one married a woman to whom a cuſtomary tenement did deſcend during the coverture, and had iſſue, and ſurvived her; it was adjudged, that he ſhould not be tenant by the curteſy, becauſe the woman was not a cuſtomary

Sir John Savage's caſe, 2 Leon. 109.

tomary tenant *at the time of the marriage*, and ſo not within the cuſtom, which was to be taken ſtrictly. But this caſe has been denied to be law by *Holt*, C. J. and *Powell*, J. in the caſe of *Clements* v. *Scudamore*, 1 *P. Wms.* 62. 2 Lord *Raym.* 1028.; and in 1 *Salk.* 243. *S. C.* it is ſaid to have been denied by the whole court.

(B) Of the Eſtate of the Wife.

A. Agreed to give a cottage to his grandſon on his marriage, but no conveyance was executed; the grandſon entered, fitted it up at his own expence, and lived in it ſeveral years: then the grandfather died inteſtate, leaving an only child (the mother of the grandſon), who never entered on the cottage, or received or demanded any rent for it: the mother died leaving a huſband and an only ſon (the above-named grandſon): the huſband is not entitled to be tenant by the curteſy; for the wife never reduced the eſtate into poſſeſſion, ſhe never had a ſeiſin in fact. Rex v. Inhabitants of Great Farringdon, 6 Term Rep. 679.

A woman, tenant in tail, by leaſe and releaſe previous to her marriage, conveyed to truſtees to the uſe of herſelf till the marriage, then to the huſband for life, then to herſelf for life, then to the firſt and other ſons of the marriage, *&c.* The marriage took effect; the feme died in the lifetime of her huſband, leaving iſſue. The huſband cannot take as tenant by the curteſy, for there was never any one moment during the coverture when the wife was ſeiſed of an eſtate-tail in poſſeſſion. Doe v. Rivers, 7 Term Rep. 277.

Cuſtoms.

CUSTOMS muſt in their nature be confined to individuals, and what is common to all mankind can never be claimed as a cuſtom. Hence, a cuſtom for all executors to be ſued by action of debt in the Mayor's Court in *London*, was holden to be bad. So, of a cuſtom for *all perſons* for the time being, *being in a particular pariſh*, to play at all kinds of lawful games, ſports, and paſtimes, in the cloſe of *A.* at all ſeaſonable times of the year, at their free will and pleaſure. *Secùs*, of ſuch a cuſtom for *all the inhabitants* of the pariſh. Sherſom v. Boſtock, Fitzg. 51. Fitch v. Rawling, 2 H. Bl. 393.

Debt.

Wilkins v. Wingate, 6 Term Rep. 62.

DEBT will lie for use and occupation generally without setting forth the particulars of the demise.

Descent.

Where a Person shall be said to take by Descent and not by Purchase.

Smith v. Triggs, 1 Str. 487. 8 Mod. 23.

IF a copyholder surrender to the use of his will, and devise to his heir in fee, the heir shall be in by descent. S. C.

Martin v. Strahan, 1 Wilf. 66. 4 Br. P. C. 486. S. C. and Watk. on Desc. c. 5. pag. 787. &c.

If a person seised in tail *ex parte maternâ* suffer a recovery, the fee gained by the recovery shall descend to his maternal heirs, as the estate-tail would have done.

Roe v. Baldwere, 5 Term Rep. 104.

So, as to copyholds.

Benson v. Scott, 12 Mod. 49. Doe v. Morgan, 7 Term Rep. 103.

A copyholder seised in fee by descent *ex parte maternâ* surrendered to the use of a person in fee by way of mortgage: the mortgage became forfeited: the mortgage-money was afterwards paid, and the mortgagor re-surrendered the estate to the mortgagor and his heirs. The mortgagee upon such re-surrender took a new estate, and the heir on the part of the father must inherit.

Dower.

Ilderton v. Ilderton, 2 H. Bl. 145.

A MARRIAGE celebrated in *Scotland* (but not between persons who go there merely to evade the laws of *England*) will entitle the woman to dower in *England*. As the lawfulness of such a marriage may be tried here by a jury; therefore a replication of "*ne unques accouple*" in a writ of dower alleging a marriage in *Scotland*, may conclude to the country.

It

It is laid down in the preceding part of this work under this title, and alſo under the title "Marriage and Divorce," that a divorce *propter adulterium* does *not* bar the wife of dower. But this doctrine ſeems ſcarcely maintainable. *Rolle*'s report of the caſe of *Powell* v. *Weeks*, the principal caſe referred to in ſupport of it, differs from that of the other reporters; for he expreſsly ſays, it was adjudged, that a divorce for adultery *is* a bar of dower. If the going away with an adulterer deprives a woman of her dower, of which there can be no doubt (*a*), it ſhould appear rather extraordinary to aſſert, that a divorce for that cauſe ſhould not have the ſame effect, that is, that a woman convicted of a crime ſhould not incur that puniſhment which ſhe would otherwiſe be expoſed to. But the truth ſeems to be, that a divorce *propter adulterium* does not diſſolve the marriage; and therefore does not of itſelf occaſion a forfeiture of dower: but the loſs of dower is not the conſequence of the divorce, but of the crime: though there were no divorce, yet if the adultery of the woman were manifeſt ſhe would loſe her dower. In order therefore to ſhew that a woman has no title to dower by reaſon of adultery, it is not neceſſary to produce a ſentence of divorce for that cauſe. This ſeems to be a ſolution of the difficulty.

Vol. ii. 370. Vol. iv. 555. Ro. Abr. 680. (*a*) Co. Lit. 32 a. 6 Term Rep. 604.

If the right to dower is controverted, it muſt be made out at law: but, if not controverted, the court of Chancery has a concurrent juriſdiction: therefore, where to a bill for dower and arrears ſince the death of the huſband, the defendant demurred, and by anſwer admitted the right, and ſtated an offer to aſſign the dower, and an offer of the arrears ſince the claim, the court overruled the demurrer. For, whether a widow is entitled to the arrears of dower from the death of her huſband, or only from her claim, cannot be determined on a writ of dower. To a writ of dower only legal bars can be oppoſed, which has had the effect of almoſt putting an end to them; and the idea that there muſt in equity be a legal bar ſeems to have prevailed till the caſe of *Lawrence* v. *Lawrence* (*b*) determined by Lord *Somers* in King *William*'s time.

Mundy v. Mundy, 2 Vez. jun. 122. 4 Br. Ch. Rep. 194. S. C. (*b*) 2 Vern. 365. 1 Eq. Ca. Abr. 218.

Ejectment.

(A) Of ſerving the Declaration.

A Declaration in ejectment may be ſerved on the wife, either on the premiſes, or at the huſband's houſe off the premiſes.

Doe v. Bayliſs, 6 Term Rep. 765.

(B) Of adding proper Parties.

NO perſon can be admitted to defend in ejectment without confeſſing leaſe, entry, and *ouſter*. In the caſe of tenants in common, where no *actual* ouſter is admitted, they may confeſs it under a ſpecial order of the court, that it ſhall be without prejudice.

Doe v. Roe, Anſtr. 86.

(C) Of the Right of Entry in the Leſſor of the Plaintiff.

Denn v. Sybourn, 7 Term Rep. 2. Goodtitle v. Jones, *Id.* 47.

IN all caſes where truſtees ought to convey to the beneficial owner of the eſtate, a jury may preſume a term ſurrendered to him. But, if ſuch a ſurrender be not preſumed by the jury, and it appear to the court on the face of a ſpecial verdict that the term, though ſatisfied, is ſtill outſtanding in a truſtee, ſuch an eſtate in the truſtee muſt prevail at law.

(D) Of bringing a new or ſecond Ejectment.

Thruſtout v. Holdfaſt, 6 Term Rep. 223.

IF the defendant in a former ejectment, who was then evicted, bring another ejectment for the ſame premiſes, the court will ſtay the proceedings until he pay the coſts of the former cauſe.

Keene v. Angel, 6 Term Rep. 740.

So, the court will ſtay the proceedings in a ſecond ejectment until the coſts of a nonſuit in a former ejectment be paid, if it be brought on the ſame title, though it be for different lands in a different county, and all the defendants be not the ſame.

Goodright v. Rich, Tr. 37 G. 3. B. R.

The plaintiff muſt prove the defendant or defendants in poſſeſſion.

(E) Where a Court of Equity will interpoſe by Injunction.

Hardcaſtle v. Shafts, Anſtr. 184.

WHERE in an ejectment the principal ſubject in diſpute is the locality of the lands of both the parties, which have been long holden together in the occupation of one perſon, a court of equity will not allow the leſſor of the plaintiff to take out his execution, ſo as to chooſe his own part of the lands.

Id. ibid.

Where lands are confuſed, and the plaintiff at law recovers on an inſtrument which ſtates the whole to be twenty-five acres, of which eighteen belonged to him, and in fact it appears that the whole are only twenty-one acres, he ſhall not be allowed to take out execution for eighteen, but muſt abate proportionably.

Election.

(A) Where a Party ſhall be put to his Election, or not.

2 Vez. jun. 370. 696-7. 2 Vez. 13, 14. Ambl. 390.

THE doctrine of election, as far as it may be conſidered under this head, is grounded upon this broad principle, that no man ſhall claim in repugnant rights; a principle of more frequent application perhaps in courts of equity, but yet equally recog-

nized

rized in courts of law. A court of law will not allow a tenant to ſet up a title againſt his landlord: it will not allow a man to affirm an act as to one part, and diſaffirm it as to other part; to treat the ſame act as lawful, and as injurious. If a man, either in a court of law or equity, claims under a deed, he muſt claim under the *whole* deed; it ſhall not be permitted to him to take one clauſe and reject the reſt; he muſt confirm the whole, or abandon the whole. The principle indeed is univerſal: it prevails in the laws of all countries; is applicable to all intereſts, to the intereſts of married women, of infants; to intereſts immediate, remote, contingent, of value and of no value. He who would take the benefit, ſhall not diſpute the title. If a teſtator deviſes an eſtate the property of *Titius*, and by another clauſe of his will gives *Titius* a legacy, *Titius* ſhall not hold the eſtate, and claim the legacy. He ſhall not take the benefit under the will, unleſs he ſuffers the whole inſtrument to take effect. It is immaterial whether the teſtator thought he had a right to diſpoſe of the eſtate of *Titius*, or whether he meant by an arbitrary exertion of power to exceed the extent of his authority,—if *Titius* will avail himſelf of the teſtator's bounty, he ſhall not diſappoint his will. If indeed an infant affect to deviſe real eſtate by a will not duly executed, here, admitting the infant to be of an age to make a will of perſonalty, a legatee under that will may take his legacy, and at the ſame time ſucceed to the real eſtate: for a will may be conſidered as two diſtinct inſtruments, as it purports to diſpoſe of real or of perſonal property; and in this caſe, the will *quoad* the real eſtate cannot be read; the court cannot look into it; it is a mere nullity; there is a want of capacity both in the inſtrument and in the teſtator. But perhaps even in this caſe, moſt undoubtedly, if the incapacity were only in the inſtrument, as, if a perſon competent to deviſe real eſtate were to deviſe it by an inſtrument not duly atteſted, if in ſuch caſe the teſtator were to annex to a perſonal legacy a condition that the legatee ſhould permit *Titius* to enjoy the real eſtate deviſed to him, here, the perſonal legatee ſhould not have his legacy, unleſs he renounced his claim to the real eſtate in favour of *Titius*. For the court can read the will as to the perſonal eſtate, the inſtrument as to that being valid: but, if they can read the will, they muſt read the *whole* clauſe relating to the perſonal legacy, let that clauſe be connected with what it may: and upon reading the *whole* clauſe, it appears that the legacy is given only conditionally: if therefore the legatee would take his legacy, he muſt take it on the terms upon which it is given: if he would abide by the will, he muſt abide by it *in toto*; if, therefore, he would have his legacy, he muſt give up the real eſtate. Wherever then it is *apparent*, that the claim of a legatee in another right, if purſued, will fruſtrate or obſtruct any of the diſpoſitions of the will, he muſt either forbear to inſiſt on that claim, and thereby diſturb thoſe diſpoſitions, or he muſt wholly renounce benefit under the will. 3 Br. Ch. Rep. 287.

Queſtions of election often ariſe in caſes of dower, where a dowreſs claims alſo a benefit under her huſband's will. The rights,

rights, however, under which the dowreſs claims in this caſe are not of themſelves obviouſly inconſiſtent: *a particular* intent in the teſtator, therefore, that his wife ſhould not have both muſt be made out, either from the words uſed by the teſtator in his will, or the ſtriking inconſiſtency of her claims with the diſpoſitions of it, before ſhe can be put to her election: ſuch intent, it ſeems, cannot be inferred from a teſtator's making a general diſpoſition of *all* his property, becauſe the eſtate is not his to give exempt from the claim of dower, the tenancy in dower being an eſtate in the land different from that of the huſband, and equally firm.

4 Br. Ch. Rep. 21. 2 Vez. jun. 572.

The putting a deviſee under a will to his election is ſaid to be a ſtrong operation of a court of equity: the calling upon him to elect is an argument addreſſed to his conſcience in favour of a deviſee whom he would otherwiſe diſappoint: it is evident therefore that the obligation to elect can only be enforced at the inſtance of a perſon claiming a ſpecifick intereſt under the ſame will. Neither can it be enforced without a clear knowledge of the extent and amount of each of the funds between which the party is to elect; for the will cannot be fairly determined where the objects it is to embrace or reject are not diſtinctly propoſed to it.

4 Br. Ch. Rep. 24. 2 Vez. jun. 562. Ambl. 727. 3 Wooddeſ. Append. 1. 2 Vez. jun. 371.

Streatfield v. Streatfield. Ca. temp. Talb. 176.

If an anceſtor by articles made previous to his marriage agrees to ſettle lands to the uſe of himſelf and wife, with remainder to the iſſue of the marriage in the uſual manner; and afterwards makes a deed not purſuant to the articles; and on the marriage of a ſon of that marriage ſettles other lands in the uſual manner, and levies a fine of the firſt mentioned lands to the uſe of himſelf in fee, and deviſes them for the benefit of his grandſon; the grandſon, being entitled under the articles, ſhall be put to his election, whether he will take under the will or the articles.

Wardell v. Wardell, 3 Br. Ch. Rep. 116.

So, where a teſtator having ſeveral copyholds, part of which he had ſurrendered to the uſe of his will, and part were not ſurrendered, deviſed to his heir, and the heirs of his body, and ſtated in his will, that as to ſome part of his copyholds, he was not enabled to deviſe them, becauſe they were not ſurrendered, and that therefore ſuch part would deſcend to his heir, and in conſequence thereof he directed his heir to ſurrender to the truſts he had created, and on his refuſal ſo to do, ordered, that the eſtate limited to him and the heirs of his body ſhould ceaſe, and the remainders take effect in poſſeſſion; the heir was decreed to ſurrender the premiſes.

Frank v. Standiſh, 3 Br. Ch. Rep. 588.

So, where a teſtatrix, being ſeiſed of freehold eſtates, and alſo having ſome copyhold lands, which lay diſperſed, and having ſurrendered her copyhold lands to the uſe of her will, deviſed all her real eſtates as well freehold as copyhold, and gave *J. S.* who was one of her co-heirs at law, 1000*l.*; and after the making of her will exchanged thoſe copyhold lands for others, which were ſurrendered to her, but not afterwards ſurrendered by her to the uſe of her will; *J. S.* was put to her election; and on her having elected

elected to take the 1000*l.* the court decreed, that ſhe and the other co-heirs ſhould ſurrender the copyholds to the uſes of the will.

So, where a teſtator deviſed all the reſidue of his eſtates, as well copyhold as freehold, (the copyhold being ſtated in the will to have been ſurrendered to the uſe of the will, but in truth never being ſo ſurrendered,) upon ſeveral truſts in favour of his wife and children; and the only truſt for his eldeſt ſon and heir was an annuity for life; it was holden to be a miſtaken deſcription, the copyhold being clearly intended to paſs, and the heir was decreed to elect. Indeed the heir would be equally bound, if it were not apparent that the teſtator intended the copyholds to paſs, ſince no one can claim under a will and contravene it. Rumbold v. Rumbold, 3 Vez. jun. 65. Wilſon v. Mount, *Id.* 191.

Where a teſtator appointed to grandchildren under a power to appoint to children a fund that was to go in default of appointment equally among the children; the appointment being bad; the children having legacies under the will, were put to their election. Whiſtler v. Webſter, 2 Vez, jun. 367.

Where a teſtator deviſed to truſtees to the uſe of his daughter for life, with remainders over; and directed that the annuitants under his will ſhould take in ſatisfaction of all claims upon him; and the daughter was entitled under a marriage-ſettlement to 1000*l.*; it was decreed, that the daughter could not take the benefits given to her under the will, but upon the terms of extinguiſhing her claim under the ſettlement. She muſt elect to take under the will, or againſt the will. Macnamara v. Jones, 1 Br. Ch. Rep. 480.

A wife was entitled to an eſtate under a marriage-ſettlement: the huſband by will gave her an intereſt in another eſtate, and all his perſonalty, in lieu of her claim; but the will was not executed ſo as to paſs real eſtate. She muſt elect between the perſonal eſtate and her claims under the ſettlement. Newman v. Newman. 1 Br. Ch. Rep. 186.

Where one deviſes what is not his own, giving the owner an equivalent; if the owner would defeat the deviſe, he muſt give up the equivalent. Lewis v. King, 2 Br. Ch. Rep. 600.

2 Vez. jun. 372. S. P. 4 Br. Ch. Rep. 24. S. P. *Id.* 38. S. P. 2 Vez. 618. S. P.

Where a teſtator gives his widow an annuity (charged upon an eſtate of which ſhe would be dowable), ſhe muſt elect between the annuity and her dower. Wake v. Wake, 3 Br. Ch. Rep. 255.

Where a freeman of *London* makes a will diſpoſing of more than the teſtamentary part of his eſtate, a wife or child of ſuch freeman muſt elect to take by the cuſtom, or by the will, and cannot claim part by one, and part from under the other. It is otherwiſe, indeed, where the will affects the teſtamentary part only. And where in ſuch caſe a child elects to take by the will, her ſhare does not accrue to the orphanage part, but to the teſtator's eſtate, and muſt go according to the will: for the electing to take by the will is only a ſubmiſſion that that part ſhall go according to the diſpoſition of the father. Pugh v. Smith, 2 Atk. 43. Car v. Car, *Id.* 278. Morris v. Burrows, 1 Atk. 404. 2 Atk. 627. Frederick v. Frederick, 2 P. Wms. 722. Cowper v. Scott, 3 P. Wms. 123.

A woman being entitled to a real eſtate under her marriage-ſettlement, her huſband by his will deviſed another real eſtate to her, Newman v. Newman. 1 Br. Ch. Rep. 186,

her, and gave her alſo the reſidue of all his perſonal property, both expreſsly *in bar of all her other claims*. The will was not duly atteſted to paſs the real eſtate. The widow muſt elect between the perſonal eſtate alone, and her claims under the ſettlement. The words extend to all her claims: general words cannot be confined to particular deviſes.

Read v. Crop, 1 Br. Ch. Rep. 492.

A teſtator deviſed all his real and copyhold eſtates ſituate in *R.*, *T.*, *E.*, and *W.*, (which copyholds he had ſurrendered to the uſe of his will,) and all other his freehold and copyhold eſtates to his wife for life, with remainders over. In *T.* he had no eſtate but a moiety of a copyhold eſtate in right of his wife, which he had not ſurrendered to the uſe of his will. It was not the teſtator's intention to deviſe this moiety, for he deſcribes what he meant to deviſe by the words *which he had ſurrendered*. The widow therefore ſhall not be put to her election.

Noys v. Mordaunt, 2 Vern. 582. *Qu.* Whether the rule eſtabliſhed by this caſe will apply

If a teſtator, diſpoſing of his eſtate among his children, deviſes to one fee-ſimple lands, to another lands entailed, it is upon an implied condition that each party acquit and releaſe the other; and ſuch deviſees ought to acquieſce in the will, or renounce all benefit thereby.

where the deviſe is not ſpecifick, but in general words, and whether ſuch a condition can be coupled with a partial intereſt, where there are ſubſequent limitations. See Forreſter v. Cotton, Ambl. 390. and Pulteney v. Lord Darlington, 2 Vez. jun. 552.

Hearl v. Greenbank, 3 Atk. 695. 2 Vez. 298.

A feme covert and an infant, who had by her father's will a power to diſpoſe of real and perſonal eſtate, being above 17, bequeathed the perſonal eſtate to her daughter, and deviſed the real eſtate to two collateral relations, and died under age. The will is good as to the perſonal eſtate, but void as to the real by reaſon of the teſtatrix's infancy, and the daughter is not bound to elect; for here is no inſtrument executed ſufficient to paſs land; and no caſes have determined that there ſhall be ſuch election but where there is a will concerning the land. There is no ground for the court to imply a condition to abide by a will of land, where there is none. It would be dangerous to break in upon the ſtatute of frauds to make an eſtate paſs by an inſtrument not ſufficient to paſs it, and not by the words of the teſtator, but by a condition implied by conſtruction of the court.

2 Vez. 15.

But, if there is no deviſe of a real eſtate, but a perſonal legacy is given upon expreſs condition, that the legatee ſhall not enjoy it, unleſs within a certain time he conveys a real eſtate, whether coming from the teſtator or not, he ſhall not enjoy it, but on thoſe terms; the lands not paſſing by force of the will, but from the operation of the clauſe. The legatee has it in his power, whether he will part with the lands or not; if not, he forfeits the condition; for any lawful condition may be annexed.

Ibid.

So, if in the ſame inſtrument there is a deviſe both of real and perſonal eſtate, and the will is only executed ſo as to paſs the latter, not the real eſtate; but a condition is annexed, that the perſonal legatee ſhall permit the perſons to whom the land is given to hold to them and their heirs; the condition annexed will take

take place, though the deviſe be void as to the lands; for the legatee cannot take it in contradiction to the teſtator's words.

A teſtatrix in purſuance, as ſhe recited, of a power for that purpoſe, when in fact ſhe had no ſuch power, deviſed a copyhold eſtate to a perſon for life, who was entitled after her death to the ſame in fee, and appointed him executor, whereby he became entitled to the reſidue of the perſonal eſtate. The deviſee was admitted to the copyhold after the teſtatrix's death under her will and that of her huſband, under whoſe will ſhe claimed the power whereby ſhe made the above diſpoſition. The deviſee died without iſſue about ſix years after the teſtatrix, having deviſed away this copyhold. Thirty years after the teſtatrix's death one of the perſons to whom the eſtate was limited in remainder after the deviſee for life, filed a bill for an account of rents and profits, and a ſurrender of the copyhold, inſiſting that this was a caſe of election, and that the deviſee had made his election by proving the will, and being admitted to the copyhold under it. But Lord *Apſley* held this not to be a caſe of election, as well becauſe the teſtatrix had no deviſable intereſt whatever (*a*), and therefore the parties did not take under the will, as becauſe from the length of time it was impoſſible to aſcertain the amount of the perſonal eſtate; and no perſon can be put to elect without a clear knowledge of both funds (*b*).

Call v. Showell, Ambl. 727. 3 Wooddeſ. Append.

(*a*) This firſt ground is impeached by the Maſter of the Rolls in 2 Vez. jun. 371. The parties, he ſays, did not in any one of the caſes of election take under the will.

(*b*) So, Wake v. Wake, 1 Vez. jun. 335.

Where a father recited by his will that he, as executor of *J. S.*, was obliged to pay his ſon ſeveral ſums particularly, and ſeveral payments having been made (ſome of which were allowable, others not) he liquidated the debt to a ſum certain, and gave the ſon ſeveral legacies; on a bill by the ſon it was decreed at the Rolls, that he was entitled both to the legacy for which his father was debtor to him, and alſo to the legacies under the will. But Lord *Talbot* varied that decree, ſaying, the plaintiff muſt make his election, muſt ſubmit to the adjuſtment of his debt, otherwiſe the perſons prejudiced by his reſorting to his debt muſt have the benefit given to him under the will.

Jenkins v. Jenkins, cited in 2 Vez. 617.

But, where a teſtator gave an annuity to *J. S.* of 50*l. per ann.* charged on his real and perſonal eſtate, and then went on, "Whereas I am indebted to her in the ſum of 500*l.* ſhe having "my obligation for 680*l.* 2*s.* 4*d.* Memorandum, paid her "100*l.* to let *A. B.* have, and at divers times having paid her "80*l.*, I make the balance I am indebted to her in the full ſum "of 500*l.* I ordain this to be paid out of my real and perſonal "eſtate;" on a bill by the annuitant to be paid her whole debt, the teſtator having miſcalculated it, and alſo to have her annuity under the will; it was decreed, that ſhe was entitled to both, the bounty being unconnected with the debt, and the teſtator not affecting to ſtate the debt accurately, or to make a compoſition with her, but manifeſtly intending to pay the whole.

Clark v. Guiſe, 2 Vez. 617.

A. tenant in tail with power to leaſe, remainder to *B.* wife of *C.* in tail, conceiving himſelf to have obtained the fee under a void execution of a power, made leaſes exceeding his power, reciting, that he was ſeiſed of the freehold and inheritance, and

Lady Cavan v. Pulteney, 2 Vez. jun. 544.

covenanting for quiet enjoyment againſt any act, or default of himſelf or thoſe claiming under him. *A.* deviſed the eſtates and others to *B.* for life, remainder to truſtees to preſerve contingent remainders, remainder to her firſt and other ſons in tail male, remainder to her daughter and her firſt and other ſons, remainder to *D.* and his firſt and other ſons ſucceſſively in the ſame manner; and gave to *B.* and *C.* other benefits by his will, and the reſidue to *D.* who filed a bill to have the will eſtabliſhed. *B.* elected to take her eſtate-tail in oppoſition to the will, which the Maſter reported to be for her benefit. After her death *C.*, who had taken under the will, claimed as tenant by the curteſy, and brought ejectments againſt the leſſees, ſome of whom had expended conſiderable ſums on their tenements. It was decreed, that neither the leſſees nor *D.* were entitled to ſtop the ejectments, or to put *C.* to his election.

Briſtow v. Warde, 2 Vez. jun. 350.

The doctrine of election cannot apply, where there is no other ſubject but that to be appointed. It never can be applied, but where, if an election is made contrary to the will, the intereſt that would paſs by the will can be laid hold of to compenſate for what is taken away; therefore in all caſes there muſt be ſome free diſpoſable property given to the perſon, which can be made a compenſation for what the teſtator takes away. It cannot apply where no part of the teſtator's property is compriſed in the will, but that which he has power to diſpoſe of.

Forſyth v. Grant, 3 Br. Ch. Rep. 242.

J. S. entered into a bond previous to his marriage, by which he bound himſelf to leave 2000*l.* to his wife and children, but if no children, then the whole to his wife. There was no iſſue of the marriage, and *J. S.* by his will gave his wife a life-eſtate in his whole property. Lord *Thurlowe* held, ſhe was entitled both to the ſum ſecured by the bond, and the life-eſtate under the will.

Freke v. Lord Barrington, 3 Br. Ch. Rep. 274.

By ſettlement in 1712, a houſe called *B.*, part of the manor of *H.*, was ſettled upon the ſettlor's nephew for life, remainder to the firſt and other ſons in tail, with divers remainders over. By indenture in 1722 the brother of the ſettlor ſettled the remainder of the manor upon his ſon (nephew of the firſt ſettlor) for life, remainder to *W.* his firſt ſon for life, remainder to *W.*'s firſt and other ſons in tail male: and a term was created, by this deed, to raiſe 4000*l.* for the daughters of *W.*, and there was a proviſo in the deed, that in caſe *W.*, or ſuch perſon as ſhould come into poſſeſſion of the manor, ſhould, within ſeven years, convey *B.* to the ſame uſes to which the manor was limited, he ſhould have a power of making a jointure; but, if he ſhould refuſe or neglect ſo to do, all the uſes limited of the manor, ſubſequent to his eſtate for life, ſhould ceaſe. There was alſo a proviſion, by which *W.* was empowered to make leaſes for the benefit of his daughters or younger ſons.—*W. F.* the grandſon took poſſeſſion of *B.*, and afterwards of the manor, and lived ſeveral years, but did not ſettle *B.* to the uſes of the deed of 1722, but ſuffered a recovery of it, and diſpoſed of it by will; neither did he execute the power of jointuring, but charged the term with

4000*l.* for his daughters, and executed the power of leasing for their benefit. A bill was filed to have *B.* conveyed to the uses of the deed of 1722, or to have the leases declared void, and the execution of the power bad; or for a compensation to the amount of the charges on the manor of *H.* But the Master of the Rolls held, that this was not a case of election; and that, as upon neglecting to settle *B.* to the same uses, only the estates subsequent to *W.*'s estate for life were made void, and the powers (though subsequent in the order of the deed) were annexed to the estate for life, the execution thereof ought not to be set aside.

By marriage settlement 1000*l.* was covenanted to be laid out to the use of the husband during the joint lives of the husband and wife, remainder to the wife, in case she should survive; and if the husband should survive, then to such uses as the wife should appoint; in default of appointment, to such person as the same would have gone to by the statute of distributions, in case the wife had died unmarried. The wife died without any appointment, leaving a daughter. The father devised a real estate to the daughter in fee in performance of the covenant. This was holden to be a case of election, but the daughter electing to take under the will, takes the personal estate also as next of kin. Hoare v. Barnes, 3 Br. Ch. Rep. 316.

Error.

WRITS of error or false judgment are of a higher nature than other kinds of civil suits. They are *quasi casus reservati* to the king's special cognizance. And therefore by the statute of *Marlbridge*, *c.* 20. *nullus excepto domino rege teneat placitum in curiâ tenentium suorum, quia hujusmodi placita specialiter pertinent ad coronam et dignitatem domini regis.* Hale's Lords' Jurisdiction, c. 23. 25.

And hence it is, that even in the greatest courts of ordinary jurisdiction, the King's Bench or Common Pleas, those courts cannot, barely by virtue of their ordinary jurisdiction, without the king's writ under the great seal, hold plea to reverse a judgment given in an inferior court of record; no not so much as a judgment in a court-baron, or hundred court, though no courts of record. And the reasons are these two principally, 1st, In respect of the king, all jurisdiction is mediately or immediately derived from him; and the courts of all kinds are his courts, and have that style (unless in counties palatine where the lord hath *jura regalia*, and yet even that is derived from the crown), and consequently judgments there given are virtually given by the king; and therefore it is not reasonable to have them examined, but by the king's writ or commission derived from him specially. 2d, In respect of the subject, who having run his course to obtain or defend his right in the ordinary

courts of juſtice, it is not reaſonable after his long expectation and expence to turn all about again, without the ſolemnity of the king's ſpecial writ or commiſſion.

(A) Of Writs of Error in Parliament.

Hale's Lords' Juriſdiction, c. 23. 25.

THE writ of error in the ordinary courts of juſtice is *breve de curſu*, and grantable in Chancery of courſe; and ſo is the writ of error in parliament as to ſome purpoſes, and therefore made by the curſitor; but, conſidering that the court of parliament is an extraordinary court, whoſe principal end is to adviſe the king *circa arduа regni;* that ſuch writs may be brought there for delay, and without any juſt cauſe; that the proceedings in parliament muſt neceſſarily be dilatory and expenſive in reſpect of the intervention of publick buſineſs, and their frequent adjournment, prorogations, and diſſolution; and that ſuits for error in parliament are for the moſt part upon judgments given in the higheſt court of ordinary juſtice, the court of King's Bench, where the proceeding is *coram ipſo rege*, and where the cauſes are diſcuſſed by judges of great learning and experience; all theſe reaſons conſidered, the writ of error in parliament ought not to paſs the ſeal without a petition or bill to the king, and that bill ſigned by him. And the writ itſelf was anciently, and ſtill ought to be *per regem*, or *per warrantum domini regis;* and this appears expreſsly by the books of 22 *E.* 3. 1 *H.* 7. 19. *Flourdew's* caſe; and *Dy.* 375. and by the conſtant indorſement of theſe writs, *viz. per regem.* And this courſe anciently obtained till the long parliament; where, by reaſon of the king's abſence, he who then exerciſed the office of Attorney-General, did grant his warrant to the curſitor for the making of writs of error returnable in parliament, and the writ was indorſed *per warrantum attornati domini regis generalis.* And upon that account it hath been alſo practiſed ſince the reſtoration, which is an error, and ought to be reformed.

Id. c. 26. According to the courſe of parliament as ſettled in the time of *Hen.* IV. in error from the King's Bench, when the Chief Juſtice was commanded either by petition of error or writ of error to bring the record into parliament either *indilatè* or in a day certain, he brought up the roll and a tranſcript of the record, and left the tranſcript and roll with the clerk of the parliament to be examined, and then the ſame day, or ſome ſhort time after, the rolls themſelves were carried back into the treaſury. And this hath obtained to this day. In the parliament of 18 *Jac.* when the Chief Juſtice of the King's Bench was made Speaker of the Houſe of Lords by commiſſion on the ſuſpenſion of the Lord Keeper, yet it was reſolved 14 *Maii* 1621, in that parliament, that upon a writ of error he ſhould bring in the record as Chief Juſtice.

Id. c. 28. If a writ of error be brought in parliament upon a judgment in the King's Bench, if the writ abate by death, a record is made of it in the Lords' Houſe, and by judgment the writ is there abated, and the judgment of abatement is entered upon the tranſcript

tranſcript left in the Lords' Houſe, and the ſame is remanded into the King's Bench to proceed according to law, *H.* 22 *Car.* 1. *B. R. rot.* 696. *Trowl* and *Methurſt.*

So, if the judgment be affirmed by the Lords, the judgment of affirmation is entered upon the tranſcript, and *remittitur* entered thereupon, and the record delivered back to the King's Bench to proceed with execution. *T.* 26 *Car.* 2. *rot.* 807. *Id. ibid.*

And ſo, if the judgment be reverſed by the Lords, the judgment of reverſal is entered upon the tranſcript with a *remittitur* in this form: *Et ſuperinde recordum et proceſſus per curiam parliamenti curiæ domini regis coram dicto domino rege ubicunque*, &c. *remittuntur, et in eâdem curiâ coram dicto domino rege jam reſident.* M. 24 Car. 2. B. R. rot. 237. Streter's caſe. *Id. ibid.*

And it ſeems, that although as to ſome purpoſes the record was removed from the King's Bench into parliament; yet really the record remains as to many purpoſes in the King's Bench; and after ſuch a *remittitur* the court of King's Bench proceed upon the original record before them, and enter the reverſal and *remittitur* upon that record. Therefore, if the parliament be diſſolved before any judgment of affirmance or reverſal, upon a ſuggeſtion thereof upon the roll in the King's Bench, the court of King's Bench ſhall proceed upon the record before them, though there be no *remittitur* of the tranſcript out of the parliament into the King's Bench. *Id. ibid.*

(B) Of the *Scire Facias.*

THE ordinary return of the *ſcire facias* in a writ of error in parliament was *ad proximum parliamentum*; for the ſeſſions were ſhort and uncertain; and if it had been returnable at a day certain (as it muſt) in the ſame ſeſſion, the ſeſſion might end before the return of the writ. But in caſes where no *ſcire facias* was to iſſue, as, where the king was party, the errors were oftentimes examined the ſame parliament wherein the petition of error was exhibited. But in *Charles* the Firſt's parliaments the ancient courſe was altered; for they made writs of error returnable *in præſens parliamentum*, and gave notice by orders from day to day to the defendant. And this courſe holds now in uſe, the old way of *ſcire facias* returnable the next parliament being laid aſide, yet without any law at all to warrant it; for the record cannot be reverſed or affirmed without making the defendant a party by writ, unleſs he appear *gratis* without a *ſcire facias*, and plead to the errors. This is now the common courſe, and the defendant commonly appears upon orders of the Houſe without any *ſcire facias*, and pleads to the errors *gratis*; which therefore being done *gratis* ſupplies the defect of a regular proceſs, which yet the defendant may inſiſt upon, if he will. *Id.* c. 26.

(C) Of assigning Errors.

James v. Staples, 6 TermRep. 367.

THE defendant in error cannot rule the plaintiff to assign errors before the expiration of the rule to appear to the *scire facias*.

6 TermRep. 255.

It is not a cause of error to enter a judgment of *misericordia* in a *qui tam* action for a penalty.

Pullin v. Stokes, 2H. Bl. 312.

Neither is it assignable for error that the plaintiff is adjudged to be in *misericordiâ* instead of the defendant.

Parrot v. Spraggon, 2 H, Bl. 608.

Although it appear on the return to a *certiorari* that no bill was filed in the King's Bench against the defendant, in a suit there by bill, *in* the term of which the declaration is entitled, but that *a* bill was filed against him by the plaintiff *in the following vacation*, it is not error, if it also appear that the bill was filed *of* the preceding term.

(D) Of the Judgment to be given on the Writ of Error.

Rex v. Amery, Anstr. 178.

A COURT of error ought to give the same judgment upon reversal which the court below ought to have given.

Campbell v. French, 6 TermRep. 200.

If judgment be given for the plaintiff on one count of a declaration, and a distinct judgment for the defendant upon another, and the defendant bring a writ of error to reverse the judgment on the first count, the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record.

Escape.

Alsept v. Fyles, 2 H. Bl. 108.

DEBT will lie against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge or fault of the gaoler; for nothing will excuse him but the act of God, or the king's enemies.

Gabel v. Perchard, Anstr. 522.

If a sheriff suffers a person taken on mesne process to escape, he is answerable for the debt which shall be proved, not merely for that sworn to.

Jones v. Eamer, *Id.* 675.

If a sheriff let a defendant, arrested on mesne process, go at large without bail below, and on being ruled to return the writ, returns *cepi*, but no bail is then put in above, the sheriff is liable to an action for an escape, from which he cannot protect himself by putting in bail, when ruled to bring in the body.

Evidence.

(A) Who may be a Witneſs.

A Perſon who is employed to ſell goods, and is to have for himſelf whatever money he can procure for them beyond a certain ſum; is a competent witneſs to prove the contract between the buyer and the ſeller. Such a perſon is to be conſidered as a broker; there is no difference between an agent taking to him a part of the price for which he bargains, and taking a commiſſion from his employer upon that price. Benjamin v. Porteus, 2 H. Bl. 590. *Per* Heath and Rooke, J. againſt Eyre, C. J.

A perſon who has depoſited title-deeds of an eſtate with his creditor, as a ſecurity, and afterwards mortgaged the eſtate to another, is competent to prove that the mortgagee had notice of the depoſit. Plumb v. Pluitt, Anſtr. 432.

By the 27 *Geo.* 3. *c.* 29. pariſhioners are made competent witneſſes in proſecutions where the penalty is given to the pariſh, unleſs it exceed twenty pounds. Rex v. Davis, 6 Term Rep. 177.

The informer under the ſtatutes of 17 *Geo.* 2. *c.* 40. & 9 & 10 *W.* 3. *c.* 41. againſt any perſon for having naval ſtores in his poſſeſſion, is a competent witneſs to prove the fact; for his intereſt is precarious, the court having a power to inflict at their diſcretion a corporal puniſhment, or to impoſe a fine, in caſe of conviction. Rex v. Cole, Eſpin. Caſ. 169.

The reputed father or mother is a competent witneſs to diſprove the fact of marriage on a queſtion of ſettlement. 6 Term Rep. 330.

In an action by huſband and wife in right of the wife as executrix, no act or declaration of the wife can be given in evidence by the defendant. Alban v. Pritchett, 6 Term Rep. 680.

(B) Of written Evidence.

INSTRUMENTS of very ancient date which are incapable of being otherwiſe proved, derive their authenticity from being found in the repoſitory which the law has allotted for them, or in which they ought properly to be; and therefore cannot be received in evidence where they come out of the cuſtody of mere private hands. It is true, that where a connection can be eſtabliſhed, ſo as reaſonably to account for their being in ſuch cuſtody, the courts have ſomewhat relaxed the rule, and admitted them to be read, though not coming from exactly the moſt proper repoſitory. But, where the cuſtody is merely private, and wholly unconnected with the ſubject-matter, the courts have never gone the length of admitting ſuch papers in evidence. Potts v. Durant, Anſtr. 789. Atkyns v. Helton, *Id.* 387.

Dor v. Syburn, 7 Term Rep. 2.

A bill in Chancery is not admiſſible in evidence any further than to ſhew, that ſuch a bill did exiſt, and that certain facts were in iſſue between the parties, in order to let in the anſwer or depoſitions of the witneſſes.

Taylor v. Cole, Weſtm. Sitt. after Hil. Term 1789, *coram* Kenyon, C. J. cited *ibid.*

But a bill in Chancery by an anceſtor under whom the party claimed has been admitted in evidence to prove a family pedigree ſtated therein, in the ſame manner as an inſcription on a tomb-ſtone, or in a bible.

Sintzenick v. Lucas, Eſpin. Ca. 43.

A record is evidence only of what was in iſſue, and appears on the face of the record itſelf: it is not competent to a party to offer evidence to ſhew that under that record any particular matter came in queſtion.

Barnes v. Trompowſkey, 7 Term Rep. 266. In debt on bond tried before Lord Kenyon, at the ſittings at Weſtminſter, 13th Feb. 1790, it appeared,

Every inſtrument, whether under ſeal or not, the execution of which is witneſſed, muſt, generally ſpeaking, be proved by the witneſs himſelf, if living; if dead, by proving his hand-writing; if reſiding abroad, by ſending out a commiſſion to examine him, or at leaſt by proving his hand-writing, which laſt, indeed, is a relaxation of the old rule, and admitted only of late years. The ſame medium of proof has alſo been admitted where the ſubſcribing witneſs has been ſought for, and could not be found, ſo as to furniſh a preſumption that he was dead. But the rule has never been relaxed further than theſe inſtances.

that the bond, which bore date in 1774, had been executed by the defendant at New York in America. There were two witneſſes to it, and it was proved thus—Evidence was given of the hand writing of Rivington, one of the ſubſcribing witneſſes, who was in America. Objection was taken, that this was not ſufficient, without proving alſo the hand-writing of the obligor; and Lord Kenyon being of that opinion, it was proved accordingly. It was then objected, that the hand writing of W. Moreton the other ſubſcribing witneſs, ſhould alſo be proved, and that he alſo was abroad or dead; otherwiſe *non conſtat*, but he might have been ſubpœnaed here. Lord Kenyon thought that ſome evidence of that ſort was neceſſary. Whereupon the plaintiff proved, that there had been a man of the name of Moreton, who had lived as a clerk with Rivington, the other ſubſcribing witneſs: but it could not be proved that his name was William, or that it was the hand-writing of that Moreton, or that that Moreton might not now be in England; all which was urged againſt the admiſſion of the proof. But Lord Kenyon held it ſufficient; for this being the caſe of a foreign tranſaction, though perhaps the evidence was capable of being more perfect, yet it was ſufficient and reaſonable evidence to go to the jury, at leaſt, unleſs it were rebutted by ſome evidence on the other ſide. The expence of ſending out a commiſſion would (he ſaid) in many inſtances be more than the value of the ſum in diſpute. Wallis v. Delancey, cited *ibid.*

Johnſon v. Maſon, Eſpin. Ca. 89.

A party ſhall not be permitted to acknowledge a deed he has executed, until it has been proved by the ſubſcribing witneſs.

(C) Where parol Evidence is admiſſible to explain written Inſtruments.

Thomas v. Thomas. 6 Term Rep. 671. Beaumont v. Fell, 2 P. Wms 141.

WE have ſeen that a latent ambiguity in an inſtrument may be explained by parol evidence. It may, therefore, be admitted to ſhew that at the time of making a will, the deviſor gave inſtructions to inſert the name of *A.* in the will, when the attorney inſerted that of *B.* by miſtake. But parol evidence of declarations made by the teſtator before the making of the will cannot be received to contradict the will.

Where

Where the deviſor made one will in 1752, and another in 1756, without diſpoſing of his perſonalty, or appointing executors by either, and by a codicil (reciting that *by his laſt will*, dated in 1752, he had made no diſpoſition of his perſonalty) diſpoſed of it, and appointed executors, it was holden, that there was no latent ambiguity ſo as to let in parol evidence to ſhew that the teſtator intended by the codicil to confirm the will of 1756, and not to republiſh that of 1752. Lord Walpole v. Earl Chomondeley, 7 Term Rep. 138.

A doctrine did at one time prevail, that the court might receive evidence which they thought, according to the ſtrict rules of law, ought not to be offered to a jury. But evidence which ought not to be received as between the parties, to give a conſtruction to a written inſtrument that is brought in diſpute, ſeems to be no more admiſſible by a court than by a jury. In the caſe in 2 *Vern.* 98. (which is referred to in ſupport of this doctrine in a preceding part of this work (*a*),) the court refuſed to receive ſuch evidence. And ſo they did in the two other paſſages of that book (2 *Vern.* 337 & 625.) referred to alſo in its ſupport. *Per* Buller, J. 2 H. Bl. 524. (*a*) *Vide ſupra*, vol. ii. p. 652.

An agreement in writing between a landlord and a perſon who was then his tenant under a leaſe which had ſome time to run, was ſigned by the landlord for a new leaſe to be granted at any time after the completion of repairs which were to be made by the tenant with all convenient ſpeed; but blanks were left for the time of the commencement of ſuch new leaſe. Upon the completion of the repairs the landlord tendered a leaſe to commence from that time; and upon the tenant's refuſal to accept it, filed a bill for a ſpecifick performance. The tenant admitted, by his anſwer, that he accepted the agreement, but inſiſted, that the new leaſe was not to commence before the old one was expired. The landlord offered evidence to ſhew, that it was the true meaning of the agreement that the new leaſe ſhould commence from the completion of the repairs; but the Maſter of the Rolls rejected it. Pym v. Blackburn, 3 Ves. jun. 34.

Excommunication.

WHERE a writ *de excommunicato capiendo* ſtated that the defendant was excommunicated in a cauſe of "defamation "and ſcandal *merely ſpiritual*," it was allowed to be ſufficient. Rex v. Payton, 7 Term Rep. 153.

It is no ground to call upon the temporal courts to quaſh the writ, that the greater, inſtead of the leſs, excommunication was pronounced; for this is merely matter of appeal. *Id. ibid.*

It is not neceſſary that the defendant ſhould be reſident in the dioceſe at the time of the excommunication; it is ſufficient if he were there at the time of the citation. *Id. ibid.* *Vide ſupra*, vol. ii. 673. S. P.

Execution.

(A) Of the *Fieri Facias* and *Levari Facias*.

Lupton v. Barker, by diſtreſs. Bunb. 348.

IT ſhould ſeem, that a *levari facias* ought not to iſſue for a fee-farm rent, but that the proper remedy is by diſtreſs.

Francis v. Naſh, Ca. temp. Hardw. 53.

Nothing can be taken in execution that cannot be ſold, as deeds, writings, *&c.* Neither can Bank notes be taken in execution, for though they are aſſignable over, yet notwithſtanding they remain in ſome meaſure *choſes in action*.

Jeanes v. Wilkins, 1 Ves. 195.

Regularly, a *fieri facias* ought not to be taken out during the exiſtence of a *capias ad ſatisfaciendum*, and the perſon in cuſtody under it: but if it be ſo taken out, it is not void, though the court, it ſeems, would ſet it aſide on motion, without putting the party to his *audita querela*. A ſheriff, therefore, may juſtify the ſeizure of a leaſehold eſtate under it, and may convey a good title to the eſtate to a purchaſer; and this, though he make the ſale after the expiration of the return of the writ, and without any writ of *venditioni exponas*. For the property of the ſheriff continues till the execution is completed, which cannot be till ſale of the things taken in execution, and payment of the money to the plaintiff. This, indeed, is ſhewn by the common courſe of proceeding; the ſheriff not being bound to make a return of the writ of execution, unleſs the party requires it. And as to the writ of *venditioni exponas*, that writ, though a proper writ, yet is not of neceſſity, being rather to compel the ſheriff, when guilty of laches, to do what he has authority to do, than to give him any new authority.

Bradley v. Wyndham, 1 Wilſ. 144.

If a *fieri facias* be executed inſufficiently and colluſively, a ſecond *fieri facias* executed afterwards ſhall ſtand good, and be preferred, and the ſheriff may return *nulla bona* to the firſt.

(B) Of the *Capias ad ſatisfaciendum*.

Campbell v. Cumming, 2 Burr. 1187.

IF a *capias ad ſatisfaciendum* is made returnable wrong, as in vacation time, yet the writ is not therefore void, but only liable to be ſet aſide upon motion for irregularity.

(C) Of ſuing out Execution where there are ſeveral Parties concerned.

Clark v. Clement, 6 Term Rep. 525.

THERE cannot be a ſeparate *capias ad ſatisfaciendum* on a joint judgment againſt two or more.

(D) Of Execution againſt a Clerk in holy Orders.

ALTHOUGH a *levari facias de bonis eccleſiaſticis* is a continuing execution, and a levy under it may be made from time to time after it is *returnable*, until the ſum indorſed be ſatisfied, yet, if it be *actually returned*, the authority of the biſhop is at an end. Therefore, where ſuch a writ remained in the hands of the biſhop long after it was returnable, who ſequeſtered the profits of the living accruing as well before the return-day as after, and being ruled to return the writ, returned only the amount of the ſum levied up to the *return-day*, the court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inſerting the ſum levied up to the time when the writ was *actually returned*.

Marſh v. Fawcett, 2 H. Bl. 582. If the writ was not returned, adds the reporter, in a note upon this caſe, the execution would undoubtedly continue till the ſum indorſed was ſatisfied. But he queſtions, Whether the plaintiff could, after that ſum was levied, preſerve his priority with reſpect to the future arrears of the annuity over another judgment creditor, who might have delivered another writ to the biſhop, in the interval after the ſum indorſed on the former writ was levied, and before the time of the next periodical payment arrived? The equitable interpoſition of the court, he ſays, ſeems hitherto to have extended no further, in caſes of judgments entered on bonds to ſecure annuities, than to permit the judgment to ſtand as a ſecurity for the future payments, and freſh executions to be taken out as thoſe payments became due, without a ſuggeſtion or *ſcire facias* under the ſtatute of 8 and 9 W. 3. c. 11. Howell v. Hanforth, 2 Bl. Rep. 843. 1016. Ogilvie v. Foley, *Id.* 1111. Scott v. Whalley, 1 H. Bl. 297.

(E) Of the Prerogative Proceſs in Executions.

WE have already taken notice of executions where the crown is concerned: ſome points, however, ſtill remain untouched.

The uſual proceſs for the king's debt is an *extendi facias*, which is given by the ſtatute of 33 *H.* 8. *c.* 39. Of ſuch extents there are two kinds: the one *immediate*, the other *in aid*: the former iſſuing immediately at the proſecution of the crown for the proper debt of the crown againſt its immediate debtor: the latter, the extent *in aid*, properly ſo called, iſſuing, not againſt the immediate debtor, but againſt the ſurety. It is uſual, however, to give the name of an extent *in aid* to that extent which iſſues at the ſuit and *in aid* of the king's debtor, for the purpoſe of ſecuring a debt found by inquiſition upon an extent iſſued againſt ſuch debtor to be due to him. For, in an extent there are three kinds of property that are liable, *viz.* the real eſtate, the perſonal eſtate in poſſeſſion, and *choſes in action*; and it is for the purpoſe of ſecuring this laſt that an extent, generally, though improperly called an extent *in aid*, is given. This extent is deduced from the prerogative of the king to take an aſſignment of the debts of his debtors; for if the debts can be aſſigned to the king, it ſeems to follow, that he may take them as part of the perſonal eſtate.

The extent *in aid*, we mean that improperly ſo called, is in its nature and effect an immediate extent. It iſſues againſt the debt as part of the effects of the principal debtor, and when

when executed, gives that debt the like priority over other debts as a proper immediate extent would give. Though ultimately intended for the ſecurity of the crown, yet it is in truth given in eaſe of its debtor; who is entitled to the benefit of it, though he be in a ſtate of perfect ſolvency, and the crown be not in the ſlighteſt danger; and even, it ſhould ſeem, though the crown debt ſhould be ſatisfied.

Rex v. Blatchford, Anſtr. 164. Rex v. Clarke, Bunb. 222.

As this is a ſtrong prerogative remedy imparted to a ſubject, the court of Exchequer have thought it proper to reſtrict it within certain rules. It is therefore provided, that no ſuch extent ſhall iſſue, without affidavit that the debtor to the crown is the original creditor. It is alſo provided, that for debts *in aid*, no proceeding ſhall be had any further than to an inquiry and ſeizure, and not to ſale of the goods, without *ſpecial* order of the court. Indeed it ſeems, that in this caſe no proceſs ſhould be ſuffered to go againſt the debt of the king's debtor without a *ſcire facias*, unleſs there be immediate danger that the king will loſe his debt, and that be made out, either to the court, or before a baron of the Exchequer.

Gilb. Excheq. 174. Anſtr. 164. R. 15 Car. 1.

The *ſcire facias* on ſuch extents *in aid* ſets forth the original debt, and then ſets forth the inquiſition taken of the debt due to the king's debtor by virtue of ſuch extent *in aid*. And extents may likewiſe be had againſt the debtor of ſuch debtor, and ſo on as far as any effects can be traced (*a*). There are inſtances of this in *Freeman*'s Entries, 572 to 616. And the reaſon is, becauſe the ſecond debtor, when the debt is ſeized, is a debtor to the king, ſince the king, for the reaſons above given, can ſeize a *choſe in action*; and the ſecond debtor, being become a debtor to the king, he likewiſe can have an extent, to ſeize the *choſe in action* that is due to him. For in relation to the king, not only the money which the debtor has in his actual poſſeſſion, but that which he has out in other people's hands, ſhall belong to the king. For common perſons, if their debtors made away with their eſtates, were ſuppoſed to be able to look after them, and to watch the goods in the actual poſſeſſion of them: but the king, being engaged in publick affairs, could not watch an actual poſſeſſion of his debtors; and therefore, ſince there was no danger of maintenance, he might proceed to get in their debts, as far as he could diſcover them.

Gilb. Excheq. 377.

(*a*) But debts cannot be ſeized beyond the third degree. To that extent debts either by ſpecialty or ſimple contract may be found and ſeized into the king's hands, upon affidavits and motion. Evin's caſe, Parker, 259. See alſo Parker, 19. Hardr. 403.

Another reſtriction which the court have laid upon theſe extents *in aid* is, that no debts without ſpecialty ſhall be found by inquiſition for debts in aid, unleſs it be by order, upon motion in open court, and except it be for debts due to the king's farmers.

Gilb. Excheq. 176. Rex v. Packington, Bunb. 42.

An immediate extent ſhall be preferred to an extent *in aid*, though prior to it; and though the ſheriff have ſold the goods taken under the extent *in aid*, yet the king will be entitled to the money, if he hath not paid it over. *Immediate extents in general ſhall be preferred according to the* teſte of the *writ*.

Rex v. Boudage, Parker, 282. Reg. v. Quaſh, *Id.* 281.

But a ſecond immediate extent, upon which evidence was offered, to find the goods ſeized upon an extent *in aid*, ſhall be preferred

preferred to a prior immediate extent, not offering such evidence.

Upon the execution of an extent a person must answer all questions though affecting his interest, if they do not subject him to penalties or forfeiture; else the court will grant an attachment against him. Reg. v. Newel, Parker, 269.

A debt due to a man *jure uxoris* is considered as a debt originally due to him within the meaning of the above rules, and the statute of 7 *Ja.* 1. *c.* 15., which prohibits any debts from being assigned to the king by his debtor, but what were due originally to such debtor *bonâ fide*. Reg. v. Thornton, Parker, 271.

Where an extent has long been dormant, though an inquisition has been taken upon it, yet process shall not issue without motion. Reg. v. Robinson, Bunb. 62.

Debts are not bound by the *teste* of the extent, but only from the day of the caption of the inquisition. Rex v. Green, Bunb. 265.

It is laid down as a rule, that wherever an extent might have issued against a man in his lifetime, a *diem clausit extremum* may issue against his estate after his death. And debts to the third degree may equally be found upon a *diem clausit extremum* as upon an extent. Bunb. 119. Parker, 19.

If a person be indebted to the king by simple contract in his lifetime, and that debt be found upon record after his death, the goods which he had at his death are bound to the king's debt, and the officer may seize them under a *diem clausit extremum*. But, if he owe nothing to the king at his death, the goods will go to his personal representatives, and the *diem clausit extremum*, if any have issued, will be superseded. Parker, 16. 95.

(F) Whether a Court of Equity will aid an Execution at Law.

WHERE property is so circumstanced as to be out of the reach of a legal execution, as, where it is vested in the funds, or is in the hands of a trustee, a court of equity will not extend its arm in aid of the legal process. Horn v. Horn, Ambl. 79. Caillaud v. Estwick, Ambl. 381.

Executors and Administrators.

(A) Of the Distribution of the personal Estate in Cases of Intestacy.

Moor and Barham, 1 P. Wms. 53.

IF a person dying intestate, leave a grandfather by the father's side, and a grandmother by the mother's side, his next of kin; these (grandfather and grandmother) shall take in equal moieties by the statute of distributions, as being in equal degree: for though the grandfather on the father's side may, in some respects, be more worthy of blood, yet here dignity of blood is not material; in regard the brother of the half-blood shall take equally with the brother of the whole blood.

Evelyn v. Evelyn, 4 Burn's E. L. 363. Ambl. 191. S. C.

If a person dying intestate leave a grandfather and a brother, the grandfather shall not share the personal estate with the brother, but the latter shall take the whole: for the brother is nearer than the grandfather, there being by our law but one degree between brother and brother, whereas there are two degrees between grandfather and grandson.

Bruce v. Bruce, Dom. Proc. 15 April 1790. Hog v. Lashley, Dom. Proc. 7 Mar. 1792. Balfour v. Scott, Dom. Proc. 11 Mar. 1793. Ommaney v. Douglas, Dom. Proc. 18 Mar. 1796. Bempde v. Johnstone, 3 Vez. jun. 200.

Where a person dies intestate, having personal property in different places and subject to different laws, it is now settled, that the *lex domicilii*, not the *lex rei sitæ*, shall attach upon the property, and direct the succession to it. What shall be considered as the *domicil* of the party is rather a question of fact than of law.

Ambl. 415.

Upon this principle it was determined by the privy council in the case of *Burn* v. *Cole*, 7th *April* 1762, that where a testator domiciled in *England* died, the judge of the probate in the plantations was bound by the probate granted in *England*. The *lex domicilii* regulates testate as well as intestate succession.

(B) Where the personal Estate shall be first applied in discharge of Debts, &c.

See further upon this point, *Gray* v. *Minnethorpe*, 3 *Vez.* jun. 103. *Burton* v. *Knowlton*, Id. 107. *Brummel* v. *Prothero*, Id. 111.

(C) Where an Executor ſhall be excuſed from Coſts.

EXECUTORS and adminiſtrators are holden liable to pay the coſts of a *non-pros*, but not of a nonſuit: the former is imputable to themſelves; the latter may be the effect of their ignorance of the nature and extent of the teſtator's or inteſtate's demand. But, where the cauſe of action accrues ſubſequent to the death of their teſtator or inteſtate, there, this ground of excuſe fails them, and if they are nonſuited, they muſt pay the coſts: they are not entitled to the protection of the character they have aſſumed, for they ought not to have ſued in it: they ſtand therefore merely in the ſituation of common plaintiffs.

Higgs v. Warry, 6 Term Rep. 654. Bollard v. Spencer, B. R. Tr. 37 G. 3.

Extinguiſhment.

IF money is due for goods ſold, or upon any ſuch like account, and a promiſſory note is given for the amount of the debt, which note, afterwards, upon action brought, appears not to have the proper ſtamp upon it, ſo that it cannot be given in evidence, the party may reſort to evidence on the goods ſold, or the demand upon account of which the note was given: for a promiſſory note is not like a bond, which merges the demand.

Wilſon v. Kennedy, Eſpin. Caſ. 245.

Fees.

How much ſhall be ſaid to be due.

WHERE two extents iſſue into two different counties, the ſheriff who completes his levy is entitled to his full poundage, nor can the ſheriff of the other county call for an apportionment. And the ſheriff may be ſaid to complete his levy, as well where the money is paid by the debtor by the compulſion of the levy, and to relieve himſelf from it, as where it is raiſed upon a *venditioni exponas*. The poundage by the 9th ſection of the ſtatute of 3 *G.* 1. *c.* 15. is to be proportioned only where the ſeizure is by one ſheriff, and the goods are ſold by another. But a ſheriff is not entitled to any allowance for coſts and charges beyond his poundage.

Rex v. Caldwell, Anſtr. 279. Rex v. Fry, *Id.* 358. Rex v. Jetherell, Parker, 177. Rex v. Crackenthorpe, Anſtr. 412.

Fines and Recoveries.

(A) Of the Operation of a Fine in barring Strangers.

Dillon v. Leman, 2 H. Bl. 584.

A. ſeiſed in fee of lands dies leaving *B.*, a feme covert, his heir. Upon his death, a ſtranger makes a tortious entry on the lands, continues in poſſeſſion, and levies a fine *ſur cogniſance de droit come ceo*, &c. with proclamations. *B.* afterwards dies under coverture, no entry having been made on her behalf to avoid the fine, leaving *C.* her heir of the age of twenty-one, of ſound mind, out of priſon, and within the realm. No claim is made by *C.* at any time within five years after the death of *B.* His right is therefore barred by the fine. For the exception in the firſt branch of the ſtatute of the 4th of *Hen.* 7. and the proviſo at the end of it are to be taken together; and being ſo taken, they do not amount ſo much to an exception as a ſaving, the true meaning of which is, that the rights of thoſe perſons who are under diſabilities, and of their heirs, are ſaved as long as the diſabilities continue, and five years after; the heir therefore not being himſelf diſabled is barred, unleſs he proſecutes his right within five years after it accrues by the death of his anceſtor dying under a diſability: conſequently, *C.* in this caſe is prevented by the fine from recovering the lands in queſtion.

(B) What Eſtates and Intereſts may be barred by a Recovery.

Philips v. Brydges, 3 Ves. jun. 120.

A Teſtator deviſed his eſtates at *B.* to *C.*, *E.*, *F.*, and *K.* in fee, in truſt to pay his mortgages and debts, and after payment he directed them to convey the eſtates to the perſons to whom he had deviſed his eſtates at *T.* He then deviſed his eſtates at *T.* ſubject to a life-eſtate therein to his wife the ſaid *C.* to the ſaid *E.*, *F.*, and *K.* in fee, in truſt out of the rents and profits to diſcharge his debts and mortgages, and to raiſe portions for his two grand-daughters: and from and after ſuch payment he deviſed his eſtates at *T.* to the ſaid *E.* and his heirs, to the uſe of him and his heirs, upon the truſts following, *viz.* to the uſe of his grandſon *F. T. W.* during his life, and after his deceaſe to the uſe of the heirs male of his body, remainder to the ſaid *E.* in tail male, remainder to the ſaid *F.* in tail male, remainder to the ſaid *K.* in tail male, remainder to *D.* in tail male, with the reverſion to his own right heirs. The teſtator's wife died in his lifetime. On the death of the teſtator in 1764, a bill was filed in the name

of *F. T. W.*, then an infant, to have the truſts of the will carried into execution; and by a decree in 1765 the will was eſtabliſhed and the uſual directions were given. No farther proceedings took place. In 1772 *F. T. W.* came of age; and the truſtees under the will having ſold part of the eſtates for payment of the debts, put him in poſſeſſion of the reſt: but no conveyance of the legal eſtate was executed. In 1772 and 1780 *E.* and *F.* two of the truſtees and deviſees in tail in remainder died. In 1785, the deviſed eſtates were conveyed by leaſe and releaſe by *F. T. W.* to *J. P.* in order to make a tenant to the *præcipe*, and a recovery was ſhortly afterwards ſuffered of them to the uſe of *F. T. W.* in fee. *K.*, the only ſurviving truſtee, in whom the legal eſtate was veſted, did not join in this tranſaction. Part of the eſtates were afterwards ſettled on the marriage of *F. T. W.*, and by his will he deviſed the remainder, and died without iſſue male. *K.* alſo died. A bill being filed after the death of *F.* to revive the proceedings in the former cauſe, and praying that the defendant, the ſon of *K.*, might be decreed to convey the eſtates ſettled on the marriage of *F. T. W.* to the uſes of the ſettlement, and to convey ſuch of the eſtates as were ſold to the uſe of the purchaſers, and the reſidue to the uſes of the will of *F. T. W.*; the defendant inſiſted, that by the union of the equitable and legal eſtates in his father *K.* he had a legal remainder in tail in the eſtates, whereof the recovery was ſuffered; and therefore ſuch remainder was not barred for want of a legal tenant to the *præcipe*. But it was decreed, that *K.* was only truſtee for himſelf in remainder after an eſtate-tail in *F. T. W.*; and that therefore the recovery well barred that remainder: that *K.*'s equitable intereſt did not merge in his legal intereſt, inaſmuch as it was not commenſurate and co-exiſtent with it; that an eſtate in fee may exiſt in a truſtee, and a partial intereſt in the equitable eſtate may at the ſame time ſubſiſt for the benefit of ſuch truſtee.

(C) Of other Effects of a Recovery.

A Perſon who was ſeiſed to him and the heirs male of his body, remainder to his own right heirs, previous to his marriage, conveyed his eſtate to truſtees to the uſe of himſelf for life, remainder to the uſe of his intended wife for life, remainder to his firſt and other ſons in tail male: the marriage took effect, and they had iſſue a ſon: nineteen years afterwards the huſband ſuffered a common recovery, and declared it to be to the uſe of *A. B.* and his heirs, in truſt to ſell the eſtate for the payment of his debts: *A. B.* ſold the land for the payment of the debts, according to the truſt repoſed in him: the tenant in tail died, and his ſon claimed the eſtate. The court were unanimouſly of opinion, that the recovery enured to the uſes of the ſettlement, and therefore that the purchaſer had no title. Goodright v. Mead, 3 Burr. 1703.

A father by ſettlement on his marriage conveyed an eſtate to the uſe of himſelf for life, remainder to the firſt and other ſons of Cheney v. Hall, Ambl. 526.

of the marriage in tail. Afterwards, the ſon on his marriage conveyed part of the eſtate by leaſe and releaſe to the uſe of himſelf for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs. Some years after this ſettlement, the father and ſon mortgaged the eſtate for a term of years, and ſuffered a common recovery, and declared the uſes to the mortgagee, and then to the father for life, remainder to the ſon in fee. Lord *Hardwicke* was clearly of opinion, that the recovery enured to the uſes of the ſettlement on the marriage of the ſon.

Game.

Rex v. Davis, 6 Term Rep. 177.

PROOF that the defendant "did keep and uſe a gun with intent to kill and deſtroy the game" is ſufficient evidence to ſupport a conviction on the game laws, though the witneſs may allege a very inſufficient reaſon for imputing ſuch intent to the defendant. It is not the province of the court to examine whether the concluſion drawn by the magiſtrate be or be not the inevitable concluſion from the evidence. It is ſufficient in convictions, if there were ſuch evidence before the magiſtrate, as in an action might be left to a jury.

Gaming.

Mynd v. Francis, Anſtr. 5. Hudſon v. Davis, *Id.* 504. Cowan v. Phillips, *in Scacc.* Hil. 37 G. 3.

BY 9 *Ann. c.* 14. two ſorts of action are given for money won at play: the one to the party loſing, if he ſues in three months; the other, after that period, to the firſt informer. To entitle a party therefore to maintain a bill for a diſcovery upon this act, it muſt appear upon the face of the bill, either that he is himſelf the loſer of the money, or that the three months have elapſed, and that he has actually inveſted himſelf with the character of informer by having commenced a ſuit at law. He need not indeed ſtate in terms that the action he has commenced is a *qui tam* action; if the right to ſue in the character of informer appears on the bill, the court will preſume the action to be regularly inſtituted.

Newman v. Franco, Anſtr. 519. Andrews v. Berry, *Id.* 634.

A party is entitled in equity to a diſcovery againſt ſecurities given for money loſt at play, as well as for the money only. The

The action of debt given to the loſer of money at play by the above act of Queen *Anne* is given on the ground of a contract, not by way of penalty. Hence, a defendant may be holden to bail in it; and it may be pleaded in abatement to it that the money was due from others not named as well as from the defendant. Hence alſo the right to ſue it is tranſmiſſible to the aſſignees of a bankrupt.

Turner v. Warren, 2 Str. 1079. Briſtow v. James, 7 Term Rep. 257. Brandon v. Pate, 2 H. Bl. 308.

Gaol.

THE lord of a franchiſe is not, as ſuch, bound to repair a gaol within it; but he may be ſubject to ſuch a charge by immemorial uſage.

Rex v. Earl of Exeter, 6 Term Rep. 373.

Habeas Corpus.

IF an apprentice of the age of eighteen voluntarily enter into the ſea ſervice, his maſter is not entitled to ſue out a *habeas corpus* to bring him up. The writ of *habeas corpus* can be taken out only at the inſtance of a party who is in cuſtody, or with his conſent: but here, the apprentice is not in cuſtody.

Rex v. Reynolds, 6 Term Rep. 497.

Heir and Anceſtor.

IT ſhould ſeem from the expreſſion uſed in a former part of this work, that the king's *firſt begotten* only is entitled to the Duchy of *Cornwall*, not the *eldeſt ſon*. This, it is true, was the opinion of Lord *Coke*; but Lord *Hardwicke* has clearly ſhewn it to be erroneous.

Vol. iii. pag. 449. 8 Co. The Prince's caſe, 1 Vez. 294. The eldeſt ſon of a king of England, ſays Lord Hardwicke, takes it as *primogenitus*; although Lord Coke at the end of the Prince's caſe, 8 Co. ſays otherwiſe. But that was not the point there, being only an obſervation of his own, and has ever ſince been held a miſtake of that great man. He was alſo miſtaken in the fact, in ſaying that Henry VIII. was not Duke of Cornwall, becauſe not *primogenitus*: for

Lord Bacon in his History of Henry VII. affirms the contrary, that the dukedom devolved to him upon the death of Arthur: and this is by a great lawyer, and who must have looked into it, as he was then Attorney or Solicitor General. So was Edward VI. in his father's life, without a new creation, although the king's second son. Lord Ellesmere in his printed observations upon Lord Coke says, with some warmth, that Lord Coke split on this rock, in restraining it to *primogenitus*, and not to the first *pro tempore*, voluntarily, without any occasion, or the concurrence of any judge. Selden in his *Titles of Honour*, 6 vol. 776. says, the eldest sons living are also Dukes of Cornwall; and that Prince Charles was Duke on the death of his brother, appears from the records, *Rym. Fœdera*, tom. 16. 702. He is so described in the patent creating him Prince of Wales. There is no act of parliament afterwards in the time of *James* I. creating him Duke: nor can any doubt arise of his right thereto under the charter of 11 Edward III. from the act of James I. enabling him to lease part of the duchy lands; several acts being passed to enable the Dukes for the time being so to do. Nor is it a satisfactory answer, that that case was founded on an act of parliament made on political views, and so different from the rules of common law; for the difference of that case from others is in the nature and form of the limitation of the kind of estates to be taken in the duchy, not in the persons to take. But I own, adds my Lord Hardwicke, I should not be quite satisfied to found my opinion on this, for political reasons might have some weight. But this determination happens to be strictly agreeable to the rules of law in cases of common persons; as appears from F. N. B. 188. on the writ *de auxilio ad filium militem faciendum*, where he says, that *primogenitus* then alive is sufficient; which is agreeable to Lord Ellesmere's observation, that *Charles* became *primogenitus* on the death of his brother without issue. This is an original writ, where the phrase and language of the law is most critical and precise, and has been always construed with great strictness. I have been furnished with the original case of the *duchy* printed in 1613, which is very scarce, where it appears to have been by the greatest men with full assent of council, and the reasons of the resolution at large: and *Fitzherbert's Natura Brevium* is expressly mentioned and relied on there. 1 Ves. 294.—*Note*, Mr. Christian, in his edition of Sir *William Blackstone's Commentaries*, supports Lord Coke's opinion; but takes no notice of what fell from Lord Hardwicke in the above passage: it is therefore that the editor has given it at length.

Idiots and Lunaticks.

Ex parte Mildmay, 3 Ves. jun. 2.

THE bankruptcy of the committee is a sufficient cause for removing him on account of the fund for maintenance: but the custody of the person will not therefore be changed, if the Master finds it proper with regard to the comfort of the lunatick that it should continue.

Indictment.

(A) What Matters are indictable.

Rex v. Mawbey, 6 Term Rep. 619.

IT is an indictable offence to conspire to prevent the course of justice by producing a false certificate (under the hands of justices of the peace that a road indicted is in repair) in evidence to influence the judgment of the court. And in stating such a crime in the indictment, it is not necessary to set forth that the defend-

ants

ants knew at the time of the conſpiracy that the contents of the certificate were falſe; it is ſufficient that for ſuch purpoſe they agreed to certify the fact as true, without knowing that it was ſo.

(B) How far it is neceſſary to bring the Offence indictable within the very Words of the Statute.

AN indictment on the 23 *G.* 3. *c.* 13. for enticing artificers to go out of the kingdom, *&c.* alleged that the defendant contracted with a manufacturer workman *and* artificer to go out of this kingdom of *Great Britain* into a foreign country called *America*, ſuch foreign country not then being within the dominion of or belonging to the crown of *Great Britain*, was holden good;—though it was objected, that the ſtatute was in the disjunctive, workman *or* artificer; and that the indictment charged *America* generally to be out of the king's dominions, whereas ſome parts of it are within them. Rex v. Myddleton, 6 Term Rep. 739.

In an indictment on 17 *G.* 3. *c.* 26. § 7. for taking more than 10*s.* in the 100*l.* for brokerage, *&c.* it is not neceſſary to prove that the defendant took the exact ſum laid in the indictment, though it be not laid under a *videlicet*. It is to be left to the jury to conſider, whether the exceſs were really taken as a fair charge, for drawing the writings, *&c.* or whether it was not ſo taken as a device to avoid the ſtatute. Rex v. Gilham, 6 Term Rep. 265.

Infancy and Age.

(A) How far the Law takes notice of an Infant in *ventre ſa mere*.

WE have already ſeen that an infant in *ventre ſa mere* is to many purpoſes conſidered as if he were actually born. It has been alſo holden, that he may be vouched; and ſhall be entitled to take under a deviſe to children *living at the teſtator's death*, whether the deviſor be his parent or a ſtranger: that he is within the terms of a power to charge lands for the portions of younger children, living at the father's death, that he may have an injunction granted on his behalf to ſtay waſte; and may have a guardian appointed for him under the ſtatute of 12 *Car.* 2. *c.* 24. But, where the terms of the deviſe are general, as to the teſtator's children and grandchildren, not referring to the period of his death, it has been holden, that a poſthumous child cannot take under it. At the ſame time it muſt be remembered, that it is laid down in a moſt reſpectable Beale v. Beale, 1 P. Wms. 244. Burdet v. Hopegood, *Id.* 342. Cooper v. Forbes, 2 Br. Ch. Rep. 63. Bennet v. Honeywood, Ambl. 708. Clarke v. Blake, 2 Br. Ch. Rep. 320.

2 Vez. jun. 673. Northey v. Strange, 1 P. Wms. 342.

respectable work (*a*), that it is now a fixed principle, that wherever the consideration will be for his benefit, a child in *ventre sa mere* shall be considered as actually born.

Lancashire v. Lancashire. 5 Term Rep. 49.

(*a*) Watkins's Law of Descents, 142.

Information quo Warranto.

Rex v. Sargent, 5 Term Rep. 466. Rex v. Duke of Richmond, 6 Term Rep. 560.

IF it be doubtful whether a residence in a borough previous to an election which required residence as a qualification were *bonâ fide* or not, the court will grant an information in nature of a *quo warranto*.

Injunctions.

(A) The several Kinds of Injunctions, and when granted.

Longman and another v. Calliford, Anstr. 645.

THE defendant had contracted with the plaintiffs to supply them with musical instruments for a stipulated time, and not to sell any on his own account, but the plaintiffs becoming bankrupts, the defendant conceived that he was discharged from the contract, and sold them for himself. On a bill being filed, the plaintiffs moved before answer for the injunction. But the motion was refused, as an attempt to anticipate by an interlocutory order the decision of the court upon the effect of the contract, and so to obtain in that shape a specifick performance of it. Besides, the court never interfere in this stage of the cause, but in those cases where the defendant is committing a trespass, by which immediate injury may be sustained; as in the motion to stay waste. In matters of contract it is never done.

Craft v. Lord Belfast, in Ch. Feb. 1796. Johnson v. Goldswaine, Anstr. 749.

An injunction has been granted by the court of Chancery before appearance to restrain the defendants, who had gotten a bill of sale from the plaintiff of all his effects, from removing fixtures and manure. But it has in such case been refused by the court of Exchequer to restrain a tenant from ploughing up land, and carrying away manure and compost, contrary to the terms of his

his leaſe; conſidering it merely as a breach of contract, not a caſe of irreparable waſte.

On a truſt to ſell, a ſuggeſtion in the bill of improper conduct in the truſtees, in not giving ſufficient notice of the ſale, is not a ground for an injunction to ſtop the ſale; it is not one of theſe caſes in which, on account of irreparable injury to the plaintiff, this ſummary proceeding is admitted. Pechel v. Fowler, Anſtr. 549.

After an injunction on the original bill diſſolved on the coming in of the anſwer, the plaintiff cannot have an injunction on the amended bill, though ſupported by affidavits, unleſs the defendant be in contempt; and not after an injunction diſſolved on the merits, if the defendant be in contempt, without ſpecial affidavit of merits. Gadd v. Worrall, Anſtr. 553. Lingham v. Toule, *Id.* 188.

Though, in general, an injunction cannot be extended (*a*) to protect one, who is not a party to the ſuit in equity; yet an injunction to ſtay proceedings at law will prevent a ſuit againſt the ſheriff (*b*) for not paying over money levied by him in the original action before the injunction iſſued, provided he comply with the terms of it, by bringing the money into court. (*a*) Gadd v. Worrall, *ubi ſupra*. (*b*) Bolt v. Stanway, Anſtr. 556. 569.

An injunction will be granted upon affidavit before ſervice of ſubpœna to prevent the negotiating of a note unfairly obtained. Such an injunction is in the nature of an injunction to ſtay waſte. —— v. Blackwood, Scac. Hil. 37 G. 3.

(B) How diſſolved.

IF an injunction be granted for want of an anſwer, and the defendant afterwards demur, and his demurrer be allowed, yet by the courſe of the court of Exchequer, the injunction cannot be diſſolved without a previous order for that purpoſe. Hurſt v. Thomas, Anſtr. 585.

An unreaſonable delay on the part of the plaintiff is a ſufficient ground to diſſolve an injunction; as, where a commiſſion to examine witneſſes was not returned in two years. Penney v. Edgar, Anſtr. 276.

A reference of the anſwer for impertinence is a good cauſe for continuing the injunction. Hunt v. Thomas, Anſtr. 594.

Joint-Tenants and Tenants in Common.

(A) What Words create a Joint-Tenancy, and not a Tenancy in common, and *è converſo*.

THE Earl of *Suffolk* bequeathed 20,000*l.* to his brothers *George Howard* and *Henry Howard*, and to the four children of *Henry*, equally to be divided between them, ſhare and ſhare alike; Lord Bindon v. Earl of Suffolk,

1 P. Wms. 96. 1 Br. P. C. 189.

and if either of them die, to the ſurvivors or ſurvivor of them. *George* ſurvived the teſtator, but died before any part of the money was paid; and a queſtion was made, Whether his ſhare ſhould go to his repreſentatives, or be divided between the ſurvivors? Lord *Cowper* held, that the intereſt in this ſhare was veſted in *George* by his ſurviving the teſtator, and of courſe tranſmiſſible to his repreſentatives. He ſaid, by the firſt words, "ſhare and ſhare "alike," it was plain the legatees were tenants in common; and by the ſubſequent words, "that if any of them die, his ſhare "ſhall go to the ſurvivor," it muſt be intended, if any of them ſhould die in the lifetime of the teſtator; for by that conſtruction every word of the will would have its effect and operation. But this decree was reverſed upon an appeal to the Lords, their lordſhips being of opinion, that the time of ſurvivorſhip related to the time when the debt ſhould be paid, not to the death of the teſtator, and that *George* not having lived to that time, the ſurviving legatees were entitled to his ſhare. This deciſion of the Lords ſeems to have been impeached in the caſe of *Stringer* v. *Philips* (*a*), which was ſoon afterwards determined at the Rolls, and later judges have expreſſed a doubt of the ground upon which their lordſhips proceeded. However, the circumſtances of the caſe, it ſhould ſeem, would bear out the decree of the Lords. The ſum bequeathed was an old debt from the crown ſecured upon the hearth-money revenue, which was taken away by ſtatute. It was an unproductive fund till payment, and could be of no uſe to any one. That was an event depending upon intereſt and ſolicitation, and was extremely retarded by the conſideration of its going to repreſentatives. From theſe circumſtances, therefore, the words ſhould ſeem to relate to the time when the debt ſhould be paid. But the conſtruction put on the words of ſurvivorſhip by Lord *Cowper*, and recognized by Sir *Joſeph Jekyll* in *Stringer* v. *Philips*, has generally obtained, unleſs it has been manifeſt from the tenor of the will that they pointed to the diſtribution of the fund.

(*a*) *Supra*, vol. iii. pag. 684.

2 Vez. jun. 638

Roebuck v. Dean, 2 Vez. jun. 265. 4 Br. Ch. Rep. 403. S. C.

A teſtatrix gave ſtock to truſtees upon truſt to pay the dividends to her niece for life, and after deceaſe that the ſtock ſhould be equally divided between the brother and four ſiſters of the teſtatrix, "and in like manner between the ſurvivors or ſurvivor of "them." Lord *Loughborough* adopting Lord *Cowper*'s idea in *Bindon* v. *Suffolk*, held that the words "ſurvivors or ſurvivor" related to the time of the teſtatrix's death, in order to prevent the lapſe of a ſhare by the death of a legatee in her lifetime: that therefore this was a tenancy in common between thoſe who were alive at the death of the niece, and the repreſentatives of thoſe who died in her lifetime.

Perry v. Woods, 3 Vez. jun. 204.

A teſtator bequeathed ſtock to truſtees upon truſt to pay the intereſt to *A.* for life, and after her deceaſe to her children; but in caſe ſhe ſhould die leaving no children, to *B.* and *C.*, ſhare and ſhare alike, or to the ſurvivor of them. *B.* died in the lifetime of *A.*, and then *A.* died without iſſue. The intereſt veſted in *B.* and *C.* upon the death of the teſtator, as tenants in common, and upon the

the death of *A.* became diviſible in moieties between *C.* and the repreſentatives of *B.*

A teſtator deviſed a real eſtate to his heir at law and his iſſue male in ſtrict ſettlement; remainder in truſt to be ſold, and the money ariſing from the ſale to be equally diſtributed among the three ſons and daughters of the teſtator's niece, or *the ſurvivors or ſurvivor of them.* Lord Chancellour admitted it to be in general perfectly true, that theſe words of ſurvivorſhip will not prevent the intereſt from veſting at the death of the teſtator: but in this caſe he was of opinion, that it was clearly the ſenſe of the will that the produce of the ſale was to be perſonal eſtate, that the children were to take it in money: there was to be no gift till diſtribution, that is, the death of the tenant for life without iſſue: the object of the diſtribution was pointed out to be among the perſons named, or the ſurvivors or ſurvivor; ſo that that excluded the poſſibility of taking in perſons who were then dead. Brograve v. Winder, 2 Vez. jun. 634.

A teſtator directed by his will, that "in caſe both his ſons *M.* "and *I.*," to whom he had deviſed his eſtates, "ſhould happen to "die unmarried, and that neither of them ſhould have any iſſue "lawfully begotten, then his daughters *M.*, *S.*, and *C.*, and the "ſurvivors and ſurvivor of them, and their aſſigns, be permitted "to receive all the rents, iſſues, and profits of all the ſaid leaſes, "lands, and premiſes, as tenants in common, and not as joint-"tenants." The teſtator then gave legacies to his daughters, and added, "in caſe his ſaid daughters *M.*, *S.*, and *C.*, or any "or either of them, ſhould happen to die before their re-"ſpective days of marriage, his will was, that the ſaid fortunes "to them reſpectively bequeathed as aforeſaid ſhould go to and "be divided between his ſaid ſons, and the ſurvivor of them, and "to and among the ſurvivors and ſurvivor of them the ſaid "*M.*, *S.*, and *C.*, ſhare and ſhare alike." All the deviſees ſurvived the teſtator. *M.* the eldeſt ſon died unmarried, leaving his brother *I.*, who upon his death became entitled to the whole intereſt in the teſtator's leaſehold eſtates. *M.* and *S.* both married after the teſtator's death, and both died in the lifetime of their brother *I.* Upon the death of *I.*, *C.* the ſurviving daughter claimed *all* the teſtator's leaſehold eſtates and intereſts; which were accordingly decreed to her by the court of Chancery in *Ireland*; but upon appeal to the Lords in this country, that decree was reverſed; and it was declared that the eſtates, by virtue of the will, upon the contingencies which had happened, were well deviſed to the teſtator's daughters *M.*, *S.*, and *C.*, as tenants in common; and that therefore they were to be equally divided between the ſurviving daughter and the repreſentatives of the two, who were dead. Wilſon v. Bayly, 5 Br. P. C. 388.

A teſtator bequeathed 30,000 *l.* to his executors in truſt for the equal and ſeparate uſe of his five daughters, equally among them and their reſpective children, being 6000 *l.* a-piece for each of his ſaid daughters and their reſpective children, to be placed out at intereſt with the approbation of each of his ſaid daughters reſpectively, as to her ſhare. And if any of his ſaid daughters ſhould Earl of Salisbury v. Lambe, Ambl. 383.

ſhould die, then the 6000*l.* given for the benefit of ſuch daughter and her children ſhould be in truſt for her daughters and younger ſons, in ſuch manner, proportion, and to be payable at ſuch time, as ſuch his daughter ſo dying ſhould by deed or will appoint; and for want of appointment, in truſt for the daughters and younger ſons equally between them, and to the ſurvivors and ſurvivor of them: and in caſe there ſhould be no ſuch daughter, or younger ſon, or all ſhould die before 21 or marriage, then in truſt that his daughter ſo dying ſhould diſpoſe of the 6000*l.* and intereſt to ſuch of her ſiſters and younger children, and in ſuch proportions, as ſhe ſhould then judge would have moſt occaſion for the ſame: and for want of appointment, then in truſt for all and every the daughters and younger ſons of her ſiſters that ſhould be living at her death, equally to be divided between them. *J. S.*, one of the daughters, made her will, and appointed the 6000*l.* among her children. Her children died in her lifetime, having reſpectively attained 21. The 6000*l.* veſted in theſe children, on their attaining 21, ſo as to be tranſmiſſible to their repreſentatives. The words "ſurvivors and ſurvivor" only meant to give croſs remainders to the children before the deviſe over could take place.

Frewen v. Relfe, 2 Br. Ch. Rep. 220.

A teſtatrix, after making ſeveral deviſes and bequeſts to different perſons, (among whom were *A.*, *B.*, and *C.*, her executrixes,) declared it to be her will, that if any of her legatees ſhould die in her lifetime, or before their legacies became due and payable to them or any of them ſo dying, the ſame ſhould go and deſcend *equally* between her executrixes. By codicils the teſtatrix ſubſtituted *D.* and *E.* as executors in the ſtead of *A.*, and *F.* inſtead of *B.*, with the ſame power, authority, and ſhare of her eſtate, as *A.* and *B.* would have had with the other executors. One of the executrixes died ſoon after the teſtatrix, and one queſtion was, Whether her ſhare in the reſidue ſurvived to the others, or went to her perſonal repreſentatives, which depended upon, whether they took as tenants in common under the will, or as joint-tenants? The queſtion was occaſioned by the introduction of the word *equally* into the will. By Lord *Thurlow*—The firſt clauſe in the will is certainly not ſufficient to make the executors tenants in common; I never knew any conſtruction carried ſo far. In giving the lapſed legacies the teſtatrix has uſed the word *equally*. Certainly the word *equally* has been held to give a tenancy in common, but that is always with reference to the other parts of the gift. The general intent of the teſtator will over-rule the word *equally*, rather than the word *equally* ſhall over-rule the general intent of the teſtator. From the whole of the words, I think the teſtatrix meant them all to be executors, with equal authorities and equal ſhares, and that they being now reduced to three, thoſe three muſt take in equal ſhares.

Mackell v. Winter, 3 Ves. jun. 236.

A teſtatrix bequeathed the reſidue of her perſonal eſtate to two grandſons and a grand-daughter, to be equally divided between them, ſhare and ſhare alike; the ſhares of the two former to be paid at twenty-one, and the ſhare of the latter to be paid at the like

like age or marriage: and ſhe directed, that if the grand-daughter died before the time of payment, her ſhare ſhould be equally divided between the grandſons; and in caſe of the death of either of them, the whole ſhould be paid to the ſurvivor: and if either of the grandſons ſhould die under twenty-one, his ſhare ſhould go to the ſurviving grandſon: and if they all three died before the time appointed for the payment, the whole ſhould go over. Both the grandſons died under twenty-one; but the grand-daughter attained that age. It was decreed, that ſhe was entitled to one third; and the repreſentative of the ſurviving grandſon to the other two.

(B) Of the joint and diſtinct Intereſts of Joint-Tenants and Tenants in Common.

AN advowſon belonging to joint-tenants or tenants in common is, it ſhould ſeem, one entire thing, nor is it in its nature ſeverable but by partition: therefore, as we have ſeen before, if one joint-tenant or tenant in common preſent, or if they preſent ſeverally, the ordinary may admit or refuſe ſuch a preſentee, and unleſs they will join in the preſentation, may, after the ſix months, preſent himſelf, as by lapſe. But if the ordinary chooſe to admit the preſentee of one of them, the preſentation of that one will be a preſentation in the right of all. But this is to be underſtood of mere joint-tenants or tenants in common; for in the caſe of co-parceners the law is different. For upon their not agreeing to preſent, the law conſiders their right of preſenting as ſevered by a partition to preſent by turns, as much as if they had actually made ſuch a compoſition: therefore though tenants in common muſt join in a *quare impedit*, coparceners need not. If they cannot agree, it is of common right that the eldeſt ſhall preſent on the firſt avoidance; the ſecond on the ſecond, the third on the third, and ſo on. This privilege goes to the iſſue or aſſignee in law, or in fact, ſuch as the grantee (*a*), or tenant by the curteſy.

Vol. iii. 687. 1 H. Bl. 417. 5 H. 7. 8. pl. 17. 2 Ro. Abr. 346. pl. 1, 2, 3. Co. Litt. 166. b. Moore, 225.

(*a*) It hath been queſtioned, whether it goes to the grantee. See Hargr. Co. Litt. 166. b. n. 2. The affirmative however is maintained by a great living authority. See 21 H. Bl. 412.

If two tenants in common be ſued in a *quare impedit*, one make default, and the other appear, if he have judgment, he ſhall have a writ to the biſhop, though on default the plaintiff is entitled to a writ to the biſhop againſt him who made default. And where one ſuffers judgment by default, and the other dies pending the writ, this judgment will be a bar to another *quare impedit* brought by the one who ſuffered judgment by default and the repreſentative of the other (in which the former is ſummoned and ſevered) to recover the *ſame* preſentation; though it is no bar to the right of ſuch repreſentative to recover on the next avoidance *in his* turn, where they have agreed to preſent by turns.

2 Inſt. 124. 2 Ro. Abr. *Preſent.* 372. pl. 112. 373. pl. 12. Barker v. Biſhop of London, 1 H. Bl. 412.

If a lapſe incurs, where perſons have a right to preſent by turns, it is holden, that the right only of the perſon who had then a right to preſent, ſhall be loſt.

Bro. *Preſent.* pl. 26.

So,

Bro. Qua. Imp. pl. 318.

So, if there are four co-parceners, the eldeſt and ſecond preſent, a ſtranger uſurps on the third; this uſurpation will only affect that turn, and the fourth may preſent when his turn comes, and if diſturbed may have a *quare impedit;* for the uſurpation only diſturbed the turn of the third.

Pyke, widow, executrix, v. Biſhop of Bath and Wells, and Lindſey, clerk, C. R. Hil. 27 G. 3.

A *quare impedit* was brought againſt the Biſhop of *Bath* and *Wells*, and *Theophilus Lindſey* clerk, for the vicarage of *Cherb Magna* with the chapel of *Dundrey* annexed, in *Somerſetſhire*. The declaration ſtated, that the advowſon belonged to one *Richard Roberts* in the time of Queen *Elizabeth*, upon whoſe death it deſcended to his four daughters in coparcenary. It then ſtated the ſeveral alternate preſentations by them or their aſſignees, till the 7th avoidance thereof, after the death of the ſaid *Richard Roberts*, by the death of *John Hatch* clerk. It then ſtated, that upon that avoidance one *Silvanus Bond*, claiming title under *Prudence Amory*, one of the daughters of the ſaid *Richard Roberts*, preſented *William Smith* his clerk, who was thereupon admitted. It then ſtated the preſentation of one *Robert Pyke* on the death of *Smith*, and the death of *Pyke*, which made the preſent avoidance, and the plaintiff, claiming title under *Mary Weſtcot*, the eldeſt daughter of *Richard Roberts*, ſaid, that it belonged to her now to preſent in this the ninth avoidance after the death of the ſaid *Richard Roberts*, and that the defendants diſturbed her.

To this the Biſhop pleaded, that he claims only as ordinary, *&c.*

The defendant *Lindſey* in his plea admitted the whole of the declaration down to the ſeventh avoidance by the death of *Hatch*, but derived a title under *Prudence Amory* to one *Thomas Gibbon*, who upon that avoidance preſented one *Robert Rogers* his clerk, who was thereupon admitted, *&c.* and that the ſaid *Robert Rogers* died incumbent thereof; that his death made the eighth avoidance after the death of the ſaid *Richard Roberts*. It then ſtated that *Bond* afterwards, upon the death of *Rogers*, uſurping on the right of one *Elizabeth Pyke*, who claimed under the fourth daughter of *Richard Roberts*, preſented *Smith*; it ſtated alſo the death of *Smith*, and preſentation and death of *Pyke*, and that it now belongs to the defendant claiming title under *Elizabeth Squire*, the ſecond daughter of *Richard Roberts*, to preſent a clerk on this avoidance, being the tenth avoidance ſince the death of the ſaid *Richard Roberts*.

The plaintiff in his replication, after ſtating the title of *Silvanus Bond* to preſent upon the ſeventh avoidance by the death of *Hatch*, ſaid, that *Thomas Gibbon*, attempting to uſurp upon the ſaid *Silvanus Bond*, obſtructed him in his preſentation, and brought a *quare impedit* againſt him and the then Biſhop of *Bath* and *Wells*. He then ſtated the whole proceedings on that *quare impedit*, and that judgment was given for the ſaid *Silvanus Bond*, and a writ awarded to the biſhop to admit his clerk. It then ſtated the ſeveral continuances of the writs to the biſhop for near two years, when *Smith* was admitted at the preſentation of *Bond* in purſu-

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ance of that recovery. The plaintiff then ſaid, that pending this *quare impedit* between *Gibbon* and *Bond*, the biſhop, at the inſtance and preſentation of *Gibbon*, admitted the ſaid *Robert Rogers*, which ſaid admiſſion, *&c.* being made pending the ſaid writ, by virtue of the ſaid judgment, became wholly void in law; but that before the ſaid *Silvanus* could obtain the admiſſion of his clerk, the ſaid *Robert Rogers*, died ſo incumbering the ſaid vicarage, *&c.*

The defendant in his rejoinder, after proteſting againſt the title of the ſaid *Silvanus*, and proteſting that the ſaid *Robert Rogers* did not die before the ſaid *Silvanus* could have obtained the admiſſion, *&c.* of his clerk, ſaid, that the ſaid *Robert Rogers* lived a year three months and ten days after the giving of the ſaid judgment, and was during all that time incumbent of the ſaid vicarage; and that the ſaid *Silvanus* did not at any time during his lifetime deliver any writ to the biſhop to admit his clerk, but neglected to do it till after the death of the ſaid *Robert Rogers*, and ſuffered him to continue incumbent till the time of his death.

To this there was a general demurrer, and joinder in demurrer.

Lawrence, Serjeant, for the plaintiff.

The queſtion in this caſe is, Whether the inſtitution and induction of *Rogers* pending the *quare impedit* brought by *Gibbon* againſt *Silvanus Bond* be not wholly void? Whether the inſtitution and induction of a clerk at that time can be conſidered as a plenarty? The effect of this inſtitution and induction being to defeat the object of the ſuit, it is fraudulent, and therefore void. For any act done by fraud to defeat the law, is void. In *Dyer*, 295. *b. p.* 16. it was held, that if the anceſtor a few days before his death, with intent to diſcharge the heir of aſſets, enfeoff him of the ſame land by fraud, the heir ſhall not take advantage of this fraud. In 3 *Co.* 78. *b.* a preſentation obtained by colluſion is void. *Co. Litt.* 102. *a. b.* If an action of debt be brought againſt the heir, and he alien, hanging the writ, yet ſhall the land which he had at the time of the original purchaſe be charged; for that the action was brought againſt the heir in reſpect of the land. Again, in *Co. Litt.* 344. *b.* At the common law, if hanging the *quare impedit* againſt the ordinary for refuſing of his clerk, and before the church was full, the patron brought a *quare impedit* againſt the biſhop, and hanging the ſuit, the biſhop admit and inſtitute a clerk at the preſentation of another, in this caſe, if judgment be given for the patron againſt the biſhop, the patron ſhall have a writ to the biſhop, and remove the incumbent that came in *pendente lite* by uſurpation, for *pendente lite nihil innovetur.*

In the caſe of *Elvis*, Knight, *v.* Archbiſhop of *York* and others, in *Hob.* 320. Lord *Hobart* ſays, "I hold it clear that the "biſhop cannot refuſe to admit the clerk of the party that reco- "vers, and return a plenarty upon another's preſentation and "right:" and again, "It is clear that the clerk that came in "hanging the ſuit, by the preſentation of them that have no "right, ſhall be removed." In 3 *Leon.* 138. *Moore* v. Biſhop of *Norwich*, Lord *Anderſon* has theſe words, "What perſon ſoever "is preſented and admitted after the action brought, and unleſs

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" it be that the title of the patron be paramount the title of the " plaintiff upon ſuch recovery, he ſhall be removed."

In *Hob.* 193. *Winchcombe* v. *Pulleſton*, the defendant in a *quare impedit* pleaded that the plaintiff had filled the church hanging the writ, whereupon the plaintiff demurred, which confeſſed as much, and yet judgment was given of a writ to the biſhop; and *F. N. B.* 35. *c.* agrees that a preſentment hanging the writ, ſhall not abate the writ; and 7 *H.* 4. 34. and 36. This ſhews that there is no plenarty in contemplation of law by a preſentation and inſtitution during the ſuit, for if there were, this writ to the biſhop of *ad admittendum clericum* would be totally uſeleſs. All theſe caſes are where the judgment was in favour of the plaintiff; but that makes no difference, for in *quare impedit* both plaintiff and defendant are actors. *Booth*, 121. 230. Beſides, in *F. N. B.* 35. *c.* it is laid down, that if the plaintiff's clerk be inſtituted and inducted pendant the writ, it ſhall not abate the plaintiff's writ; but in that caſe, if the defendant recover againſt the plaintiff, he ſhall avoid the plaintiff's clerk; and ſo, if the defendant's clerk be admitted pendant the writ againſt him, if the plaintiff recover, he ſhall avoid the defendant's clerk.

There can be no doubt then, from theſe caſes, but that the admiſſion of *Rogers* pending the ſuit was merely void, and that during his lifetime *Bond* might have removed him. The queſtion, then, ariſes, Whether *Bond*'s ſuffering him to continue incumbent till his death will make any difference? whether it makes that a plenarty which would otherwiſe have been wholly void? It certainly does not; for no length of time can give effect and validity to a void act. *Quod ab initio non valet, tractu temporis non convaleſcit.* The moment the judgment was given, *Rogers* was as to *Bond* amoved. In 2 *Roll. Abr.* 350. *pl.* 6. if a man recover in a *quare impedit* againſt the incumbent, the incumbent is ſo removed by the judgment, that the recoveror may preſent to the church without any other amoval of the incumbent, though the incumbent continue incumbent *de facto* until the preſentment by the recoveror. And in *pl.* 7. But after ſuch recovery in a *quare impedit*, a ſtranger to the recovery cannot preſent to the church; for, notwithſtanding the recovery, ſtill the incumbent continues incumbent *de facto* as to ſtrangers. This laſt authority ſhews the diſtinction between the effect of the recovery on the parties to the ſuit, and on ſtrangers; that as to the one, there is a plenarty; as to the other, the church is merely void. In the firſt caſe, in *Rolle*, it may be ſaid that the *quare impedit* was againſt the incumbent himſelf, but that in this caſe it was not, but only againſt the patron: but by analogy the rule will hold in either caſe, for at the time the ſuit was inſtituted the church was void, *Rogers* was not preſented; he could not be made a party to the ſuit. It would be abſurd to ſay that the judgment can remove parties to the ſuit, but not thoſe introduced pending the ſuit. If, then, the effect of a judgment on a ſtranger admitted pending the ſuit, be the ſame as on the incumbent himſelf where he is a party to the ſuit, ſo as to remove him from the time of the judgment being given, I conceive it can make no difference

ference that the writ was not ſued out earlier. For I know of no limitation in law for ſuing out a writ of *ad admittendum clericum*. In *F. N. B.* 38. *f.* If a man do recover an advowſon, and the ſix months paſs, yet if the church be void, the patron may pray a writ unto the biſhop, and ſhall have it; and if the church be void when the writ cometh to the biſhop, the biſhop is bound to admit his clerk. And in reaſon the ſame law is, if the patron after the ſix months preſent unto the biſhop, if the church be then void, the biſhop is bound to admit his clerk. This ſhews that there is no time of limitation for ſuing out the writ, but that it may be ſued out at any time whilſt the church is void. If ſo, the death of the party can make no difference. In *Hob.* 166. *Winchcombe* v. *Pulleſton*, the ſame thing may be void as to one perſon and not as to another, *&c.* Again, "this preſentation, "*&c.* made upon ſimony, is utterly void againſt the king, and the "church in no ſort filled by it: which being ſo, it is repugnant in "itſelf to ſay, that it ſhould be both void and not void at once "againſt the king. Now it is confeſſed that it is utterly void "againſt the king during the life of *Say*, ſo that the king might "preſent as to a void church, which being granted, it is abſurd to "ſay that his death ſhould alter the caſe; for the king cannot be "diſpoſſeſſed or barred but by an act, and the death is a privation "but no act."—This authority clearly ſhews, that if the church were void as to *Bond*, the death of *Rogers* could make no difference. It is clear, then, that *Bond* was entitled to a writ to the biſhop to admit his clerk; if, therefore, the court ſhould give judgment in favour of the preſent defendant, they muſt decide that a clerk coming in under a writ of *ad admittendum clericum* is an uſurper; and ſuch a deciſion would be arraigning the juſtice of the former judgment.

Hill, Serj. for the defendant.

The queſtion in this caſe is, Whether the preſentation now in queſtion be the ninth or tenth turn of the perſon claiming under the laſt common anceſtor who was ſeiſed of the entirety? The declaration ſtates it to be only the ninth turn, and omits for that purpoſe the preſentation of *Rogers*. The defendant in his plea has introduced this preſentation. The replication ſtates that this preſentation was made by one *Gibbon*, pending a ſuit in a *quare impedit* brought by *Gibbon* againſt one *S. Bond*, wherein there was a judgment for *Bond*; but that before *Bond*'s clerk could be admitted, *Rogers* died incumbent. The rejoinder admits this judgment, ſtates the particular time of the death of *Rogers*, which was long after the judgment recovered; and that *Bond* ſued out no writ in the lifetime of *Rogers* to remove him. I admit that the preſentation of *Gibbon*'s clerk pending the ſuit was covinous, and that he might have been removed by *Bond*. But *Bond*'s conduct in not removing him was fraudulent; for if he who was firſt defrauded ſits by, and ſuffers that fraud to continue, when he might have prevented it, to the prejudice of a third perſon, he is himſelf guilty of fraud. And where an advowſon deſcends to coparceners, the law is exceedingly preciſe in obliging them to due diligence, ſo as they may not by any laches on their parts affect the

the rights of thoſe who are to come in ſucceſſion after them. All the caſes which have been cited on the other ſide prove, that *Rogers* was incumbent as to all but parties to the ſuit. If he had ſued his pariſhioners for tythes, they could not have pleaded this judgment in bar to that action; they could not have impeached his title on that ground to recover as againſt them. He was in full perception of the profits, and enjoyed all the benefits of the church. *Wolſ. Co. In.* ed. folio, 414.; octavo, 749. As to *Bond*, the church was ſo vacant by this judgment that he might have preſented his clerk. The plaintiff has in ſome manner affirmed that a writ was delivered to the biſhop for that purpoſe. This fact, if true, would have been ſome excuſe; but it is falſe: here is in fact no averment of delivery; the plaintiff only ſays, "although "he informed the court he had delivered it." The biſhop is the officer of the court, and if he had been properly ſerved with it, there can be no doubt but he would have executed it. If he had not, this court would have compelled him to have done it. In *F. N. B.* 38. *c.* it is ſaid, that the party recovering ſhall have an *alias* and a *pluries*, if the biſhop do not execute the writ, and attachment againſt the biſhop, if need be. So, in the caſe of *Moore* v. Biſhop of *Norwich*, cited from 3 *Leon.*, the biſhop was fined 10 *l.* for not executing the writ, and a *ſicut alias* under a penalty of 100 *l.* was awarded. Or he might have had a writ of *quare non admiſit*, as in *F. N. B.* 47. *c.* If a man do recover an advowſon, and hath a writ unto the biſhop to admit his clerk, and he will not admit him, then the party may ſue an *alias* and a *pluries*, or attachment, *&c.* or may ſue a writ out of the Chancery, or out of the Common Pleas at his election, *de quare non admiſit*, *&c.* This fine on the biſhop for a contempt of the court in not obeying the writ was introduced by 25 *Ed.* 3. *c.* 6., which directs that the temporalties ſhall not as before be ſeized into the king's hands for a contempt, but that the court ſhall take a reaſonable fine. Why did not *Bond* then, armed with this proceſs, deliver this writ to the biſhop, or compel him to execute it? Or *Bond* might have had a *quare incumbravit*, for though a *ne admittas* was not ſued out to the biſhop, that was unneceſſary, the biſhop being a party to the ſuit. I admit, that there is no difference between the plaintiff and defendant in a *quare impedit*, where the defendant makes title.—But it is manifeſt, that there would be the greateſt injuſtice done to the other parties in coparcenary, if a party who had recovered in a judgment were to lie by, and not take advantage of ſuch recovery till the living became void; he would by this means get two turns. Now this very thing is confeſſed on this record, and not the ſlighteſt excuſe offered for it. Though I may not be able to produce a caſe directly in point, yet there are many that apply upon principle. If an incumbent be deprived or reſign to the ordinary, it is the duty of the ordinary to give notice to the patron, otherwiſe there can be no lapſe; or if he collates or inſtitutes on the preſentation of a falſe patron, the true patron may preſent. But, if the true patron do not preſent, and the collatee or preſentee die incumbent, the true

Bro. Abr. Qu. Incumb. p. 3.

true patron, if he have only an alternate right of preſentation, has loſt his turn. This was determined in the caſe of *Leak* v. Biſhop of *Coventry* and another, in *Cro. Eliz.* 811. In that caſe there was an alternate preſentation in two perſons, and the clerk of the one patron had been deprived—the biſhop, without giving notice of that deprivation to the other, collated his clerk, which collatee died incumbent. The court ſaid that this collation by the biſhop is good againſt all but the very patron, and this only through defect of notice, ſo as he might have removed the incumbent by a *quare impedit*. But where he doth not remove him, ſo as he dies incumbent, this is a ſerving of his turn, and as a preſentment in his turn, ſo as that the other patron ſhall not be now prejudiced by his negligence, but ſhall have it now as in his turn. And it is a plenarty and incumbency as againſt him, ſo as he now may preſent, and well ſay, that the turn of the other was ſerved. Theſe caſes ſhew the great attention the law requires where the patron has only a turn, and the care it takes that the intereſt of another patron ſhall not be affected by his negligence. Suppoſe the church had been totally void, and *Bond* had ſat ſtill, and ſuffered a lapſe to the biſhop, and the biſhop had preſented, that would have ſatisfied his turn. And as in that caſe the other parceners could not interfere to prevent the lapſe to the biſhop, ſo in this caſe there was no poſſible way for them to make *Bond* take any ſteps to remove *Rogers*. Here *Rogers* lived a conſiderable time after the judgment was recovered; but ſuppoſing he had lived a much ſhorter time, ſtill if he had not been removed, *Bond*'s turn would have been ſatisfied. In the great *commendam* caſe of the King and Queen *v.* Biſhop of *London* and others, in 4 *Mod.* 212. and 1 Lord *Raym.* 26., it was held that if the incumbent die during the continuance of the diſpenſation, the king will loſe his title to preſent. This being determined againſt the crown, holds *à fortiori* againſt a ſubject. *Qu.*

The preſent caſe is grounded on wilful laches, which is not denied by the plaintiff himſelf. Had the diſpute been only between *Gibbon* and *Bond*, and *Bond* had, after the recovery, permitted *Gibbon*'s clerk to continue incumbent, his acquieſcence would have prejudiced no one. But where other perſons have an intereſt, his acquieſcence ſhall not be allowed to prejudice their rights. For in law and in equity, where there is an alienation, of which a party may take advantage, and neglects to do it, and ſuch neglect works prejudice to a third perſon, there, the rule of *pendente lite nihil innovetur* does not hold.

There is a great difference where the vacancy is cauſed by the death of the incumbent, and where it is cauſed by his reſignation. It was held in the caſe of the Queen *v.* Biſhop of *Lincoln* and *Ligh*, *Cro. Eliz.* 119., that by an avoidance by reſignation or deprivation, the queen ſhould not loſe her preſentment; but, if the incumbent had died, it were otherwiſe. And ſo in *Goldſ.* 66. 86. The reaſon is that an avoidance made by reſignation may be covinous, and

therefore ſhall not paſs for a turn; but that in caſe of death, there can be no ground for preſuming covin.

Lord *Loughborough*, after ſtating the pleadings and the arguments that had been uſed by the counſel on each ſide, ſaid—It is material upon theſe pleadings to inquire at what time *Smith* was preſented by *Bond*. Neither the replication nor the rejoinder have ſtated any given time when the preſentation was made. But the plea has ſtated expreſsly that *Rogers* died incumbent, and that *Smith* was not preſented by *Bond* till after the death of *Rogers* in the eighth turn, after the death of *Richard Roberts*. That preſentation muſt therefore have been an uſurpation upon the right of the perſon then entitled to preſent; and as the replication has neither avoided nor denied this fact in the plea, of courſe it ſtands admitted. There muſt therefore be judgment for the defendant.

(C) Of Severance.

2 Br. Ch. Rep. 224.

THE joint-tenancy may be ſevered by any contract; therefore a note will do it. And if joint-tenants ſhould ſay in an anſwer in Chancery that they had agreed to ſever, this, it ſeems, would be conſidered as a ſufficient act to effect a ſeverance. But their merely ſaying in an anſwer that it was a tenancy in common, will not have the operation of a ſeverance.

Abel v. Heathcote, 2 Vez. jun. 98.

Where truſtees under a ſettlement of an undivided part of an eſtate holden in common have power given them to ſell or exchange, they may within the limits of that power make a partition. Indeed there is no occaſion to give truſtees an expreſs power to make partition; ſince an eſtate holden in common cannot be ſo ſettled upon the marriage of one of the tenants as to prevent the right of the others to make partition.

2 Vez. jun. 1. 4. 570. Ambl. 236. 2 Atk. 380.

Partition is, regularly, a proceeding at common law: but the court of Chancery now entertains ſuits for it, though it has no original juriſdiction, nor is any expreſs authority given to it by ſtatute, we mean, as to joint-tenants, for as to tenants in common, its juriſdiction originates in the ſtatute, which makes tenants in common accountable to one another. The juriſdiction of the Chancery probably obtained from a principle of convenience; for the party chooſing to have a partition has the law open to him; there is no equity for it: but the commiſſion is far more convenient than the writ: the valuation of the proportions is much more conſidered, and the intereſts of all the parties are much better attended to. But, be the origin of this juriſdiction what it may, a bill for a partition is now conſidered as a matter of right, provided the party applying for it can ſhew a title.

2 P. Wms. 518. Ambl. 197. 3 Atk. 627.

A court of equity will decree a partition as well where one of the parties is an infant, as where they are both adult: but it will reſpite the conveyance in each caſe till the infant comes of age. It is clear, that the infant will be bound by ſuch a decree where he is plaintiff; but *quære*, whether he will be ſo, where he is defendant.

A par-

A partition was decreed of an eſtate, two thirds whereof belonged to *A.*, and one third to *B.* The eſtate conſiſted (*inter al.*) of a great houſe and park, and of a farm and lands about it of 1000*l. per annum*. *B.* inſiſted to have a third of the houſe and park aſſigned to him by the commiſſioners, who were to make the partition; but Lord Chancellour *Parker* held, that though *B.* muſt have a third part in value of this eſtate, yet there was no colour of reaſon that any part thereof ſhould be leſſened in value, in order that he might have a third part of it; that if *B.* ſhould have one third of the houſe and of the park, this would very much leſſen the value of both. He recommended therefore that the ſeat and park ſhould be allowed to *A.*, ſhe having two thirds, and that a liberal allowance out of the reſt of the eſtate ſhould be made to *B.* in lieu of his ſhare of the houſe and park. His lordſhip ſaid, if there were three houſes of different value to be divided among three, it would not be right to divide every houſe; for that would be to ſpoil every houſe; but ſome recompence is to be made, either by a ſum of money, or rent for owelty of partition, to thoſe that have the houſes of leſs value. It is true, if there were but one houſe, or mill, or advowſon to be divided, then this entire thing muſt be divided in manner as the other ſide contended; *ſecùs*, where there are other lands which may equalize the ſhares. By this reaſon, every farm-houſe upon the eſtate muſt be divided, which would depreciate the eſtate, and occaſion perpetual contention; and it may be the intent of the defendant, when this partition is made, to compel the plaintiff to give him forty years purchaſe for his third of the houſe and park. Earl of Clarendon v. Bligh, 1 P. Wms. 4; 6.

There are no coſts upon a writ of partition at law; therefore he who procures the partition muſt be at the whole expence, unleſs the other will be at the expence for his own convenience. But a court of equity allows coſts to the iſſuing and executing of the commiſſion, though not farther; and directs them to be paid by parts in proportion to their intereſts in the eſtate. 2 Vez. jun. 570.

Leaſes and Terms for Years.

(A) Of Leaſes made purſuant to Powers in private Conveyances and Settlements.

BY the ſtatute of the 12th of *Car.* 2. the Maſter of the Rolls for the time being is enabled to grant leaſes of the ground and tenements belonging to the rolls, under theſe reſtrictions (among others) that after the premiſes ſhall have been once letten, he do not grant or make any *new* or *concurrent* leaſe, until within *ſeven* Wilſon v. Sewell, 4 Burr. 1975. 1 Bl. Rep. 617. S. C.

years of the expiration of the leaſe then in being; nor for any leſs rent than was reſerved upon the former leaſe; nor for any longer term than for the term of *one and twenty years from the making of ſuch leaſe.* Mr. *Verney*, Maſter of the Rolls, made a leaſe for 21 years from the 18th of *March* 1740, which would conſequently expire on the 18th of *March* 1761. Sir *Thomas Clarke*, his ſucceſſor, made a leaſe of the ſame premiſes on the 9th of *June* 1755, for 21 years, in truſt for himſelf: and on the 5th of *January* 1762, he made another leaſe of the ſame premiſes for 21 years in truſt for himſelf. On the 5th of *June* 1764 there was an actual ſurrender duly executed and accepted of the leaſe of 1755. On the death of Sir *Thomas Clarke*, his ſucceſſor, Sir *Thomas Sewell*, diſputed the validity of each of theſe leaſes of 1755 and 1762; inſiſting, 1ſt, that they were a fraud upon the truſt, as being made in truſt for the grantor himſelf. 2d, That the leaſe of 1762 was bad, becauſe at the time it was granted, there were more than ſeven years to run of the leaſe of 1755. 3d, That if the leaſe of 1762 was void, then the leaſe of 1755 was abſolutely gone, either by the *implied* ſurrender in 1762, or the *expreſs* ſurrender in 1764. But the court over-ruled every objection. It is immaterial to the ſucceſſor, who may be beneficially intereſted in the leaſe, ſo long as he receives the accuſtomed rent, and the leaſe is in other reſpects regular. The reſtriction as to a former leaſe is not to be confined to expiration merely *by effluxion of time*, but extends to ſurrenders, and re-grants may be made *toties quoties* upon proper ſurrenders, provided that the reverſion be not charged for a longer time than 21 years in the whole. But the acceptance of a new leaſe implies a ſurrender of the old one, provided the new leaſe be, as the leaſe of 1762 was in this caſe, a good one.

Clements v. Waller, 4 Burr. 2154.

By an *Iriſh* ſtatute of 10 and 11 *Car.* 1. *c.* 3. § 2. governors of colleges in *Ireland* are empowered to demiſe for 21 years, reſerving ſo much yearly rent or profits, or more, *at the peril of the* LESSEES *who ſhall take the ſame*, as the moiety of the true yearly value of the ſaid lands, *&c.* (*communibus annis*,) at or immediately before the time of making ſuch leaſe ſhall amount unto. A leſſee ſurrendered an old leaſe, and took a new one, upon which the rent reſerved did not amount to a moiety of the true yearly value of the premiſes demiſed. This leaſe is void againſt the ſucceſſor.

Doe v. Lady Cavan, 5 Term Rep. 567. Dom. Proc. *Maii* 7, 1795. Lady Cavan v. Pulteney, 2 Vez. jun. 544.

A. tenant in tail with power to grant leaſes, remainder to *B.* the wife of *C.* in tail, conceiving himſelf to have obtained the fee under a void execution of a power, granted leaſes exceeding his leaſing power, reciting in them that he was ſeiſed of the freehold and inheritance, and covenanting for quiet enjoyment againſt any act or default of himſelf or thoſe claiming under him. *A.* deviſed the demiſed eſtates with others to *B.* for life, remainder to truſtees to preſerve contingent remainders, remainder to *B.*'s firſt and other ſons in tail male, remainder to her daughter and her firſt and other ſons, remainder to *D.* and his firſt and other ſons ſucceſſively in the ſame manner: he alſo gave to *B.* and *C.* other benefits by the will,

will, and gave the reſidue to *D.* *D.* filed a bill to have the will eſtabliſhed. *B.* elected to take her eſtate-tail in oppoſition to the will, which the Maſter reported to be for her benefit. After her death *C.*, her huſband, who had taken under the will, claimed as tenant by the curteſy, and brought ejectments againſt the leſſees under the leaſes granted by *A.*, ſome of whom had expended conſiderable ſums upon their eſtates. Theſe leaſes not complying with the conditions impoſed by the power are abſolutely void; for powers muſt be executed ſtrictly, where the intereſts of remainder-men are affected. Nor can a court of equity, it ſhould ſeem, relieve the leſſees, or reſtrain *C.* from availing himſelf of the full effect of his ejectment ſuits. The leſſees cannot ſay that *C.* ſhall not diſturb their poſſeſſion, becauſe he has a part of thoſe aſſets out of which they are entitled to ſatisfaction under the covenant againſt eviction; for if it is plain, that tenant in tail has made leaſes not warranted by the ſtatute, and the eſtate-tail has deſcended, the iſſue in tail, though poſſeſſing large aſſets both real and perſonal, may eject the tenants; and there is no equity to compel him to confirm the leaſes. He may at his pleaſure aſſume the poſſeſſion; and the only remedy for the leſſees will be an action of covenant. A court of equity cannot interfere, for a court of equity cannot meaſure the damages that may be given upon ſuch an action. The leſſees have truſted to a legal ſecurity, and can have no more.—Nor are the leſſees in this caſe entitled to put *C.* to his election: they ſtand merely in the ſituation of creditors; but parties claiming to put a perſon to his election muſt claim ſpecifick rights under the ſame inſtrument. Fitzg. 219.

A tenant for life under a marriage ſettlement of an eſtate in mines which were opened, with a power inſerted in ſuch ſettlement of leaſing the *meſſuages, lands, tenements, and hereditaments* therein contained, except the manſion-houſe and warren, under the uſual reſtrictions, that the leaſe ſhould not exceed 21 years ſhould be made in poſſeſſion and not in reverſion, reſerve the beſt rent to be *incident to the immediate reverſion*, &c. granted a leaſe for *twenty-ſix* years of the mines both *opened* and *unopened*, without reference to the power, and *before the expiration of a former leaſe*, reſerving *ore as rent to him, his heirs, and aſſigns.* This new leaſe was granted to one of the two leſſees in the former leaſe. The mines, it appeared, had been worked to very little advantage under the former leaſe, and as it would require new levels and other works which would be attended with a great expence to work them to more advantage, this leſſee had propoſed to execute them at his own expence, provided he had an additional term for 21 years. Upon this conſideration the new leaſe was granted, and upon the faith of that leaſe extenſive improvements were made by the leſſee at a very great expence. Shortly after the new leaſe was granted, *A.* the tenant for life died, leaving an infant ſon, who then became tenant in tail in poſſeſſion under the ſettlement. The guardian of this ſon permitted the original leſſees to continue tenants of theſe mines, and received Campbell v. Leach, Ambl. 740.

No new mines were opened under this leaſe, ſo that this queſtion did not ariſe.

the rent reſerved by the new leaſe for three years, when a bill was filed againſt the leſſee under that leaſe to ſet it aſide as not conformable to the power. Upon the hearing of the cauſe the bill was ordered to be retained for a year, with liberty for the infant to proceed at law to recover poſſeſſion. The infant brought an ejectment, and the leſſee being adviſed, that the leaſe could not be ſupported at law, made no defence, but brought a bill to have the benefit of the leaſe to the extent, and as far as it could be warranted by the power. This laſt bill was diſmiſſed at the Rolls, and an account directed of the produce of the mines from the death of the tenant for life. But upon appeal from this decree, the Lord Chancellour, aſſiſted by *De Grey*, C. J., and *Smythe*, C. B., held, that under the circumſtances of this caſe, if the rent ſhould be found to be a fair rent, the leaſe, though clearly bad at law, ought to be executed in equity: and therefore directed an iſſue to try, whether the rent reſerved were the moſt improved rent that could reaſonably be gotten. As to the reſervation of ore by way of rent, inſtead of money, ore, it was ſaid by the court, was analogous to money, and a reſervation of it will go to the remainder-man as money, though made payable to the *leſſor, his heirs and aſſigns*. Though it was not in proof that the old leaſe was actually ſurrendered, yet, ſaid the court, it muſt be preſumed to have been ſo, the new leaſe having been acted under. As to the power of the leſſee to enforce the contract againſt the remainder-main, they ſaid, the objection that the remainder-man is neither party nor privy to the leaſe may hold, where the leaſe is made by a mere tenant for life; but under the power of leaſing, there was a referable privity given by the ſettlement; and ſuch tenant has a qualified power of contracting to bind the remainder-man. If the bill had been brought againſt the tenant for life in his lifetime, the leaſe would have been executed, and would then have bound the remainder-man. It muſt be underſtood the parties meant to execute it legally.

(B) By what Form of Words Leaſes may be made.

Brewer v. Hill, Anſtr. 413.

ALTHOUGH no ſpecifick words are neceſſary to create a leaſe, yet there muſt be words uſed which ſhew an intent to demiſe. Therefore, where a leſſee of tythes agreed with the owner of lands for certain collateral conſiderations not to take tythes in kind from the tenants of the lands for twelve years, but to accept a reaſonable compoſition not exceeding 3*s*. 6*d*. per acre, this was adjudged to be no leaſe. 1ſt, The rent affected to be reſerved is uncertain: under this agreement it is at the option of the party either to pay tythes in kind, or to tender the reaſonable value of the tythes, which may be under 3*s*. 6*d*. per acre. And 2d, The owner of the lands, the perſon with whom the agreement is made, is neither to enjoy any thing, nor to pay any rent. It cannot therefore be a demiſe to him. The tenants are not parties or privy to the tranſaction; it cannot therefore be a demiſe to them.

It

It can, at the utmoſt, amount to no more than a mere covenant with *A.* that *B.* ſhall enjoy, and creates no leaſe to either.

(C) What Certainty is requiſite to Leaſes for Years, as to their Beginning, Continuance, and Ending.

IF the parſon of *D.* make a leaſe of his glebe for ſo many years as he ſhall be parſon there, this leaſe is ſaid to be void for the uncertainty of its continuance, becauſe none can ſay how long the leſſor will be parſon; and then it cannot be a leaſe for years, when by no poſſibility the number of years can be aſcertained. But, ſaith our author, it ſhould ſeem, that if livery were made, the leſſee will be tenant during the incumbency of the leſſor, and ſo have the freehold in him, though for want of certainty in the number of years, he cannot be ſaid leſſee for years. This obſervation of our author has been ſanctioned by the judgment of the court of Exchequer in a recent caſe: for the court after citing it, and acknowledging its juſtneſs, ſay, "But of rents or "other things which lie in grant, the mere delivery of the deed "has the ſame force as livery has in the caſe of land; and there"fore any demiſe of uncertain duration gives an eſtate for life de"terminable on the particular event." They therefore held, that a leaſe of tythes "for all the time the leſſor ſhould continue "vicar," was good without livery, and conveyed an eſtate for life to the leſſee during the incumbency of the leſſor.

Vide ſupra, vol. iv. pag. 174.

Brewer v. Hill, Anſtr. 419.

Where the duration of a leaſe is not preſcribed by the terms of the contract, but is left ſubject to the will of the parties, the law, for the ſake of convenience, and that neither of the parties may be ſurpriſed or diſtreſſed by the caprice of the other, will not permit the tenancy to be determined without a regular notice. What ſhall be a regular notice muſt depend upon the nature of the letting: hence, if the letting be originally for a month or week, a month's or week's notice will be ſufficient. But, where there is a clear tenancy from year to year, the notice muſt be of half a year, not ſix months, at the leaſt, and determinable with the year. This notice being required for the ſake of convenience, it muſt, conſequently, extend to a tenancy in houſes as well as in lands; it may be waived by the party giving it; or it may be wholly diſpenſed with by the conſent of both parties. But no collateral conſiderations, ſuch as a reſervation of the rent quarterly, ſhall be conſtrued to be a diſpenſation with it. What ſhall be a waiver of a notice is a queſtion of fact to be determined by the conduct of the party who has given it (*a*). The receipt of rent due after the expiration of the notice, *eo nomine* as rent, or the taking of a diſtreſs for ſuch rent, have both been holden to be a waiver of it (*b*).

1 Term Rep. 162. Eſpin. Ni. Pri. Ca. 94. 267.

(*a*) *Vide* Shirley v. Newman, Eſpin. Ca. 266. Oakapple v. Copons, 4 Term Rep. 361.

(*b*) Goodright v. Cordwent, 6 Term Rep. 219. Zouch v. Willingale, 1 H. Bl. 311.

Where the tenant denies the right of his landlord, no notice from the landlord is neceſſary. The tenant controverts the right out of which the notice is to ariſe: he diſclaims the relation of landlord and tenant: it is an inſtant determination of the tenancy on his part.

Doe v. Watts, 7 Term Rep. 83.

Although a leaſe granted by a tenant for life under a limited power of leaſing, if it exceed that power, is abſolutely void, and therefore incapable of confirmation by the remainder-man; yet, if the remainder-man accept rent, as rent, after the death of the tenant for life, he thereby admits that the leſſee is *his tenant*, and therefore entitles him to a notice to quit.

Roe v. Ward, 1 H. Bl. 97.

A tenant for life made a leaſe for years, to commence on a certain day, and died (before the expiration of the leaſe) in the middle of the year. The remainder-man received rent from the leſſee, (who continued in poſſeſſion, but not under a freſh leaſe,) for two years together, on the days of payment mentioned in the leaſe. This is evidence from which the court will preſume an agreement between the remainder-man and the leſſee, that the latter ſhould continue to hold from the day, according to the terms of the original demiſe: ſo that *notice to quit ending on that day* is proper.

Doe v. Kightley 7 Term Rep. 63.

The notice, except where the leſſor means to proceed under the ſtatute for double rent, need not be in writing: but, if it be in writing, a ſlight inaccuracy, where the intention of the party giving is apparent upon the face of it, will not vitiate it. Therefore, a notice delivered to a tenant at *Michaelmas* 1795, to quit at "*Lady-day which will be in the year* 1795," was holden to be good.

(D) Leaſes when forfeited.

Doe v. Wandlaſs, 7 Term Rep. 117. In conſequence of this deciſion, it is adviſable to provide in the clauſe for re-entry, that in caſe the rent ſhall be demanded, on the expiration of the extra time uſually allowed for the payment of it, or at any time afterwards, and ſhall not then be paid, it ſhall be lawful, &c.

UNDER a power of re-entry in caſe of non-payment of rent, the landlord cannot recover in ejectment at common law, unleſs he prove a demand on the very day on which the rent became due; nor under the ſtatute of 4 *G.* 2. *c.* 28. unleſs he prove that there was not a ſufficient diſtreſs on the premiſes.

(E) Of the Renewal of Leaſes.

Richardſon v. Sydenham, 2 Vern. 447.

A Leaſe was granted of ſix acres of land for three years at 13*l.* a-year, with a covenant by the leſſee to lay out 100*l.* in improvement, and with a covenant by the leſſor at the end of the term to grant a new leaſe *under the ſame rents and covenants*. The eſtate being ſold to the defendant, he refuſed to grant the new leaſe. The queſtion ſimply was, whether the covenant to renew bound the land, or was merely perſonal to the leſſor. A new leaſe was decreed.

The

The defendant made a leaſe to *William Hyde* the plaintiff's late huſband, of a houſe in *Enfield* for ſeven years at 35*l.* a year; and therein covenanted, (*inter alia*,) that he, his executors, adminiſtrators, or aſſigns, ſhould before the end of twelve months before the expiration of the leaſe, if thereto required by the ſaid *William Hyde* execute to the ſaid *Willium Hyde*, a further leaſe of the premiſes *under the like covenants*, and at the ſame rent, as were therein contained, *for ſuch further term as the ſaid* William Hyde *ſhould then deſire*. Mr. *Hyde* died before the expiration of the leaſe; and the plaintiff, being his executrix, gave notice within the time limited by the leaſe, that ſhe would take a new leaſe for a further term of *fifty* years, and now brought her bill to have a ſpecifick performance of the covenant and leaſe for fifty years purſuant thereto. The defendant inſiſted the covenant was perſonal only; and that Mr. *Hyde* being dead, the defendant was not obliged to make a new leaſe to his executrix. But Lord Chancellour was clear of opinion, that the plaintiff was entitled to the benefit of the covenant, and decreed the defendant to make a new leaſe at the ſame rent and *under the ſame covenants* as were contained in the old leaſe, *except the covenant for renewal, which was to be omitted:* but this leaſe was to be made for *twenty-one* years only; for though the covenant was general, that a leaſe ſhould be granted for ſuch further term of years as Mr. *Hyde* ſhould deſire, yet that muſt have a reaſonable conſtruction.

Hyde and Skynner, 11th Nov. 1723. This caſe, which is to be found in 2 P. Wms. 196. has already been referred to in vol. iv. p. 230. of this work: but this report of it is extracted from the manuſcript collection of reports of the late Mr Melmoth, in the poſſeſſion of Mr. Hargrave, and is publiſhed by the latter gentleman in his "Juridical Arguments," p. 426. It differs from the report in P. Wms. in the terms of the requiſition for a new leaſe; the expreſſion in Peer Williams's report being, that the leſſor was to grant a further leaſe generally at the requeſt of the leſſee; whilſt that in Mr. Melmoth's is, *ſuch farther leaſe as the leſſee ſhould deſire*.

In a leaſe made by the defendants to the plaintiff's teſtator, of a houſe, for 21 years, there was a covenant, that the defendants at the end of the firſt ſeven years would upon the ſurrender of that leaſe make a new leaſe for the term of 21 years *at the ſame rent, and with the ſame covenants as were reſerved and contained in the old leaſe*. The bill was for a ſpecifick performance of this covenant: and the queſtion was, *if the covenant for renewal ſhould be inſerted in the new leaſe*. Maſter of the Rolls, Sir *Joſeph Jekyll*, was of opinion it ſhould not: there being no words to ſhew that it was the intention of the parties the leaſe ſhould be renewed *toties quoties*; for that in effect would be to give the plaintiff a fee: and therefore decreed the defendant to make a new leaſe, *but without the covenant for renewal*.

Davis v. Taylors' Company, 25th of Mar. 1726, Hargr. Jurid. Arguments, 427.

The dean and chapter of *St. Paul, London*, being ſeiſed in fee of *Mountjoy-houſe* in *London*, on the ſite of which are the buildings now called *Doctors' Commons*, made a leaſe of the houſe and premiſes in 1567 to *Trinity-Hall* in *Cambridge*, for *ninety-nine* years from the determination of a ſubſiſting leaſe, which had been granted to Sir *Thomas Pope* in 1555, and was then become veſted in *Trinity-Hall*. The rent reſerved was only 5*l.* 8*s.* a-year. But the houſe and premiſes were in *great ruin* and decay; and the leſſees were to be at great expence in *new building*, and were to keep and leave the premiſes in good repair. Though *Trinity-Hall*

Betteſworth v Dean and Chapter of St. Paul, London, Hargr. Jurid. Arguments, 428. 3 Br. P. C. 389. S. C.

Hall were the nominal leſſees, yet the leaſe itſelf expreſſed, that the premiſes were to be occupied by the ſociety of doctors and advocates in the civil and canon law with the reſerve of an apartment for the Maſter of *Trinity-Hall*; ſo that *Trinity-Hall* were leſſees under a ſort of truſt for the doctors, who had removed from *Pater-noſter-Row*, their former reſidence, and apparently meant to make *Mountjoy-houſe* their *fixed place of reſidence* in future. In the leaſe thus made to *Trinity-Hall* in truſt for the doctors, there was a covenant by the dean and chapter, if *Trinity-Hall* ſhould at any time during the term of 99 years ſurrender the leaſe, to make a new one for the fine of 20*l.* *for the number of ſo many years, and with* ALL *and ſingular the ſame covenants and conditions contained in this leaſe*, as the caſe of Dr. *Betteſworth* and the other appellants ſtates the covenant, or *for the number of ſo many years and with* ALL *the ſame covenants, articles, and conditions expreſſed and contained in the ſaid leaſe*, as the covenant is given in the caſe of the dean and chapter of *St. Paul*, the reſpondents. This covenant was followed by a covenant from *Trinity-Hall*, that if the dean and chapter *at any time thereafter*, as well as during the term of 99 years, ſhould have need of counſel or advice in any cauſe or queſtion concerning the eccleſiaſtical laws of the realm, then the advocates or doctors, on reaſonable requeſt from time to time by the dean and chapter, would freely give their beſt advice and counſel to them in every ſuch matter or queſtion. Within three or four years afterwards the ſtatute of the 13th of *Eliz.* reſtraining deans and chapters, amongſt others having ſpiritual promotion, from leaſing for more than 21 years or three lives, was paſſed; and though there was a proviſo in this ſtatute againſt extending it to any leaſe which ſhould be afterwards made *by reaſon of any covenant prior to the act*, yet this was ſo, that the leaſe to be made ſhould not contain *more years than the reſidue of the years of the leaſe made before the act and then continuing leaſe* ſhould be at the time of the leaſe, which ſhould be made afterwards. By the act of the 14th of *Eliz.* the reſtriction from the act of the 13th was taken away as to houſes in cities and towns corporate, but not ſo as to warrant any leaſe for any longer term than forty years. But the ſtatute of the 18th of *Eliz.* made void all leaſes of eccleſiaſtical poſſeſſions, whereof there was any former leaſe having more than three years to run, and *all covenants for making ſuch leaſes.* In conſequence of theſe three ſtatutes which ſeemed to impede the execution of the covenant to renew for 99 years, a conteſt aroſe in the year 1725 between the ſociety of doctors at Doctors' Commons, and the dean and chapter: for then, not only the original term of 99 years was expired, but a ſubſequent term of 14 years (which in execution of a parliamentary power was added after the fire of *London* by order of the court of judicature created by the parliament on that occaſion, and which ſo enlarged the 99 years when only 46 years of that term were unexpired into a term of 60 years) was within three years of expiring. Thus ſituate, the doctors filed their bill againſt the dean and chapter and *Trinity-Hall*, praying, that the dean and chapter might be compelled to renew

renew to *Trinity-Hall* according to the exact terms of the covenant of renewal in the leaſe of 1567, or at leaſt for 40 years, *and ſo from time to time in the way of perpetual renewal.* Under theſe circumſtances of the caſe, the Lord Chancellour, with the concurrence of Lord *Raymond* and Judge *Price*, but againſt the opinion of Sir *Joſeph Jekyll*, diſmiſſed the bill of the doctors. But upon appeal to the Houſe of Lords, the Lords reverſed the decree, and ordered renewal for 40 years for a fine of 20*l.*, and under the ancient rent with the covenants and conditions in the original leaſe *except the covenant of renewal.*

A leaſe was dated in 1744, and was of a water griſt-mill, with houſes, lands, a wear, and fiſhery, and was made in conſideration as well of the leſſee's *having at his own coſts newly built a meſſuage or dwelling-houſe* on part of the premiſes demiſed, as of the rent and the covenants on the leſſee's part: the leaſe was for ninety-nine years, determinable on the death of the ſurvivor of three perſons, at the yearly rent of 20*l.*, and ſix ſalmon of ſixteen pounds each, and two hens: the leſſee covenanted to repair, except in caſe of deſtruction of the mill, mill-ſtones, wear, and boat, by heavy rains in flood, or hard froſt, and to leave the premiſes repaired, the leſſor finding timber, braſſes, and iron for the mill and wear, and carriage to them. Then there was a covenant by the leſſee not to aſſign without the leſſor's licence. That was followed by a covenant by the leſſor, that when and as ſoon as any two of the three lives ſhould drop, and one only be left, the leſſor, his heirs or aſſigns, would, on payment to him or them by the leſſee, his executors, adminiſtrators, or aſſigns, of 20*l.* in the name of a fine, conſent to add two lives more to the one life then in being, and to grant a new leaſe for ninety-nine years if the two new lives and the old life ſhould ſo long continue, at the ſaid yearly rent of 20*l.* and hens and ſalmon, on the ſame days and in the ſame manner as by the ſaid old leaſe; ſuch new leaſe "to have and con-" tain the *ſame covenants, reſervations, proviſoes, conditions, and agree-*" *ments.*" Upon this leaſe with this covenant of renewal, the queſtion was, Whether in a new leaſe there ſhould be a queſtion of renewal? And the bill was brought to force a covenant for that purpoſe. The cauſe was heard before Lord *Thurlowe* the 21ſt of *April* 1788. At the firſt his lordſhip was for diſmiſſing the bill; but at laſt he ordered, that the cauſe ſhould ſtand over to *Michaelmas* term, and that the plaintiff ſhould be at liberty to bring an action on the covenant in the then term, and ſhould proceed to try the cauſe in the next term. But no action was brought; and on the 4th of *July* 1788, the plaintiff gave notice of a motion to have the minutes of the decree of the 21ſt of *April* varied, by ſubſtituting, inſtead of the directions therein contained, an order referring it to the Maſter to ſettle a leaſe according to the covenant *without a covenant for perpetual renewal.*

Reece v. Lord Dacre, Hargr. Jurid. Argum. 438. 2 Br. Ch. Rep. 638. S. C. cited.

The doctrine of the renewal of leaſes is very fully and very ably diſcuſſed in the juridical arguments, with the publication of which Mr. *Hargrave* has lately obliged the profeſſion. See *Jurid. Argum.* p. 88. 411. In further Vernon's & Scriven's Irish Rep. 15. 1. Ves. 1. Ves. Bro. Chanc. Cas. 162.

Legacies and Deviſes.

And firſt of Deviſes.

(A) What Words in a Will paſs a Fee.

Doe v. Buckner, 6 Term Rep. 610.

WE have already ſeen that general words in the introductory part of a will, will not of themſelves paſs a fee, or include real eſtate, where the will does not in the ſubſequent clauſes point to a diſpoſition of it. So in a late caſe, where a teſtator having given 4000 *l.* to *A.* and *B.* in truſt for certain perſons, by a reſiduary clauſe gave "all the reſt of his eſtate and effects, of "what nature ſoever to *A.* and *B.* their *executors and adminiſtra-* "*tors*, in truſt to add the *intereſt* to the *principal*, ſo as to accumu- "late the ſame, it being his will that the reſidue ſhould not paſs, "but at the time and manner as the principal ſum of 4000*l.* was "directed to be paid;" it was holden, that a houſe, the only freehold of which the teſtator was ſeiſed, did not paſs the will, notwithſtanding there were general words in the introductory clauſe, "as to all his *eſtate* and effects, *both real* and perſonal." In this caſe the force of the introductory words is taken off by the deviſe to the truſtees, their executors and adminiſtrators, terms applicable only to a perſonal intereſt; and by the direction that the intereſt and principal were to make one conſolidated ſum, which could not poſſibly refer to real eſtate.

(B) What Words create an Eſtate-Tail or for Life.

Daintry v. Daintry, 6 Term Rep. 307.

A Teſtator, after giving different annuities to an only ſon, increaſing at different ages till 30, and to be paid him until he married, deviſed thus: "In caſe my ſon ſhall happen to "marry before he attains the age of 30, then I give and deviſe to "him and the heirs of his body all my real and perſonal eſtates, "*&c.*; and if my ſon ſhall happen to die without leaving iſſue "of his body, then I give and deviſe the ſame to my brother *B.*" It was holden, that the ſon took an eſtate-tail in the real eſtates, and the perſonal eſtate abſolutely.

(C) Of void Deviſes.

Proctor v. Biſhop of Bath and Wells, 2 H. Bl. 358.

AN advowſon was deviſed to *the firſt or other ſon of* A. *that ſhould be bred a clergyman, and be in holy orders*, in fee, but in caſe *A.* ſhould have no *ſuch ſon*, then to *B.* in fee. Both deviſes are void,

as depending upon too remote a contingency: the firſt deviſe to the ſon of *A.* was void from the uncertainty as to the time when ſuch ſon, if he had any, might take orders: and the deviſe over to *C.* was alſo void, as it depended on the ſame event, for the words of the will would not admit of the contingency being divided, as in *Longhead* v. *Phelps*, 2 *Bl. Rep.* 704. The heir at law therefore was entitled; for there was no inſtance, in which a limitation after a prior deviſe, which was void from the contingency being too remote, had been let in to take effect; but the contrary was expreſsly decided in the Earl of *Chatham* v. *Tothill*, 6 *Br. P. C.* 451. in which the judges founded their opinion on *Butterfield* v. *Butterfield*, 1 *Vez.* 134. Vol. iv. 320.

Legacies.

(A) What Words create a good Bequeſt.

A Teſtator gave the reſidue of his perſonal eſtate to his wife, "deſiring her to provide for his daughter *A.* out of the "ſame, as long as ſhe, his wife, ſhould live, and at her deceaſe to "diſpoſe of what ſhall be left among his children, in ſuch man-"ner as ſhe ſhall judge moſt proper." It was decreed, that here was not an abſolute truſt for the children after the death of the wife. It is an abſolute gift to the teſtator's wife of any part of the property to any uſe ſhe might think fit, clothed only with a truſt for his daughter *A.* Puſhman v. Filliter, 3 Vez. jun. 7.

(B) What ſhall be a ſufficient Deſcription of the Perſon to take.

A. Compounded with his creditors, and paid 10*s.* in the pound: his widow by her will charged her eſtate with the reſidue of the debt to the compounding creditors, or *their perſonal repreſentatives*. The adminiſtratrix *de bonis non* of a deceaſed creditor is entitled beneficially under this bequeſt; and not the reſiduary legatees under the will of ſuch creditor, or her next of kin at the time of her death, or her next of kin at the time of the death of the firſt mentioned teſtatrix. Evans v. Charles, Anſtr. 128.

Money was ſettled in truſt to be paid according to the appointment of *A.*, and in default thereof to his legal repreſentatives according to the courſe of adminiſtration. *A.* by will in purſuance of the power appointed to his legal repreſentatives according to the courſe of adminiſtration, and made a reſiduary legatee, whom he appointed one of his executors. *Upon the will* the next of kin are entitled. Jennings v. Gallimore, 3 Vez. jun. 146.

A teſtatrix

Bridge v. Abbot, 3 Br. Ch. Rep. 224.

A teſtatrix bequeathed the reſidue of her eſtate to certain perſons, and if they ſhould die in her lifetime, to their *legal repreſentatives*. One of thoſe perſons died in the teſtatrix's lifetime. His ſhare of the reſidue will go to his next of kin, not all thoſe who may be living at the time of his death, but thoſe only who may be alive at the death of the teſtatrix.

(C) Of conditional Legacies, and how far the Condition muſt be complied with, otherwiſe the Legacy will be forfeited.

Stackpole v. Beaumont, 3 Vez. jun. 89.

A Teſtator deviſed his real eſtates to the eldeſt of his three natural daughters and her huſband for their joint lives, and the life of the ſurvivor, remainder to her ſons ſucceſſively in tail male; remainder to his next daughter and her huſband and iſſue male in the ſame manner; remainder to the youngeſt or ſuch perſon as ſhe ſhould firſt marry, (if under twenty-one, with the conſent of the truſtees,) for their joint lives, and the life of the ſurvivor, with like remainders. The teſtator alſo gave a rent-charge limited in the ſame manner to the ſecond, her huſband and iſſue male; and he gave a ſimilar rent-charge to the youngeſt, until ſhe ſhould marry, (under and with the reſtriction above-mentioned,) or for her life; and when ſhe ſhould marry as aforeſaid, upon the ſame truſts; and having given the ſecond daughter 10,000*l.* on her marriage, he gave the youngeſt a legacy of 10,000*l.*, payable, 5000*l.* upon her marriage, (with ſuch conſent as aforeſaid,) and 5000*l.* two years after. The youngeſt daughter married without the conſent of the truſtees, as required by the will. It was decreed, that ſhe was entitled to an eſtate for life in the rent-charge; but that her huſband was not. But it was alſo decreed, that ſhe was not entitled to the 5000*l.* payable upon her marriage with conſent, ſhe having married without conſent. Lord Chancellour *Loughborough*, in giving judgment upon this laſt point, ſpoke as follows—"There can be no ground in the conſtruction of legacies for a diſtinction between legacies out of perſonal and out of real eſtate. The conſtruction ought to be preciſely the ſame. I do not ſee more importance in reality in the diſtinction between conditions precedent and ſubſequent. The caſe of all theſe queſtions is plainly this. In deciding queſtions that ariſe upon legacies out of land, the court very properly followed the rule that the common law preſcribes, and common ſenſe ſupports, to hold the condition binding, where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to perſonal eſtate, the court felt the difficulty upon the ſuppoſition, that the eccleſiaſtical court had adopted a poſitive rule from the civil law upon legatory queſtions, and the inconvenience of proceeding by a different rule in the concurrent juriſdiction, (it is not right to call

" it ſo,) in the reſort to this court inſtead of the eccleſiaſtical " court, upon legatory queſtions; which after the Reſtoration was " very frequent, and in the beginning embarraſſed the court. " Diſtinction upon diſtinction was taken to get out of the ſup- " poſed difficulty. How it ſhould ever have come to be a rule of " deciſion in the eccleſiaſtical court is impoſſible to be accounted " for, but upon this circumſtance, that in the unenlightened ages, " ſoon after the revival of letters, there was a blind ſuperſtitious " adherence to the text of the civil law. They never reaſoned; " but only looked into the books, and transferred the rules with- " out weighing the circumſtances, as poſitive rules to guide them. " It is beyond imagination, except from that circumſtance, how " in a *Chriſtian* country they ſhould have adopted the rule of " the *Roman* law with regard to conditions as to marriage. " Firſt, where there is an abſolute unlimited liberty of divorce, " all rules as to marriage are inapplicable to a ſyſtem of religion " and law, where divorce is not permitted. Next the favor to " marriage, and the objection to the reſtraint of it, was a mere " political regulation applicable to the circumſtances of the *Roman* " empire at that time, and inapplicable to other countries. Af- " ter the civil war, the depopulation occaſioned by it, led to ha- " bits of celibacy. In the time of *Auguſtus*, the *Julian* law, " which went too far, and was corrected by the *Lex Papia Pop- " pæa*, not only offered encouragement to marriage, but laid " heavy impoſitions upon celibacy. That being eſtabliſhed as a " rule in reſtraint of celibacy, (it is an odd expreſſion,) and for " the encouragement of all perſons who would contract mar- " riage, it neceſſarily followed, that no perſon could act contrary " to it by impoſing reſtraints directly contrary to the law. There- " fore it became a rule of conſtruction, that theſe conditions were " null. It is difficult to apply that to a country, where there is no " law to reſtrain individuals from exerciſing their own diſcretion " as to the time and circumſtances of the marriage, their chil- " dren, or objects of bounty may contract. It is perfectly im- " poſſible now, whatever it might have been formerly, to apply " that doctrine not to lay conditions to reſtrain marriage under " the age of twenty-one to the law of *England*; for it is directly " contrary to the political law of the country. There can be " no marriage under the age of twenty-one without the con- " ſent of the parent. This teſtator places truſtees in the " room of a parent; and gives *quoad* the marriage the authority " to them. I am now called upon to pronounce, that this con- " dition is bad, becauſe it is illegal to impoſe a condition in re- " ſtraint of marriage. What: illegal here! I have committed " this gentleman for marrying without conſent. It is impoſſible " to ſay, that a condition has any ſtamp of illegality, impolicy, or " impropriety, that does no more than add an extenſion of bounty " to induce the parties to do that, which neglecting to do, the huſ- " band becomes an object of the cenſure of this court, and liable " to puniſhment. Therefore I am perfectly free in this court in " a caſe, where the condition only operates up to the age of

" twenty-

" twenty-one, and requires no more than the general policy of " the law and courſe of this court hold to be proper, to ſay, " there is nothing illegal in ſuch a condition, and therefore not " to determine that this legacy, which the teſtator directs to be " paid only under certain circumſtances, ſhall be paid, not only " though thoſe circumſtances have not happened, but where " every thing has been done directly in oppoſition and defiance of " the directions of the will. Confined therefore to ſuch caſes, " where the reſtraint operates only up to the age, till which by " the law and policy of the country conſent is neceſſary, I have " no difficulty to ſay, there is no authority to lead the court to " pronounce a propoſition ſo repugnant to that law, as that ſuch " a condition is invalid. In *Scott* v. *Tyler* there is a very accu- " rate though not a very extended opinion of Lord *Thurlowe*, " which carries conviction along with it. The queſtion is not " whether any forfeiture has been incurred; but whether the " parties, to whom the legacy is given, have put themſelves in " a ſituation to anſwer that deſcription of the perſon to take. " There is no gift here but in the direction to pay; for I cannot " ſtop in the middle of a ſentence. He gives her 10,000*l.*; that " is in effect two ſums of 5000*l.*, one payable upon her mar- " riage with conſent. She has not married with conſent. She " has married without it. Can ſhe claim the 5000*l.* under the " will? I do not ſee the great importance of the diſtinction upon " a bequeſt over of the legacy. It is one of the points that oc- " curred to judges ſitting here, to deliver them from the difficulty " ariſing from the rule of the civil law, adopted without ſeeing " the ground and the reaſon of applying it to this country under " different circumſtances. The authorities ſtand ſo well ranged, " that the court would not appear to act too boldly, whichever " ſide of the propoſition they would adopt; but I have always " upon repeated conſideration thought, there was not much rea- " ſon in any of the determinations founded upon a rule appli- " cable to the laws of the country, from which it is taken, but " not to this country, and rejecting theſe conditions as inappli- " cable to a country which adopts them as to real property, and " where the reſtraint impoſed is analogous to the political regula- " tion of the country upon the ſubject; and here I am deciding " upon the plaineſt circumſtances; for the condition is reſtrained " to the age, before which by the law of this country a marriage " cannot be had without conſent. Therefore declare her not en- " titled to this legacy."

Crommelin v. Crommelin, 3 Vez. jun. 227.

A teſtator deviſed his eſtates to truſtees to ſell, and to ſtand poſſeſſed of the money ariſing from the ſale in truſts for his natural daughters *M.*, *I.*, and *H.* equally; one moiety to be paid when they ſhould reſpectively attain the age of 24, or be married with the conſent and approbation of the truſtees, which ſhould firſt happen; but if any ſhould marry without ſuch conſent under 24, ſuch moiety to be paid to her or her huſband on her attaining 24, or when ſhe, if living, would have attained that age, or to the executors, *&c.* of her huſband; and the other moiety to be paid

paid to his daughters reſpectively when they ſhould attain 28, or be married with ſuch conſent and approbation as aforeſaid. But in caſe any of his daughters ſhould marry before 28 without ſuch conſent, then, as to a moiety of her or their ſhare or ſhares, upon truſt for her or their ſeparate uſe for life; and after the death of ſuch daughter or daughters for her or their children; and if there ſhould be none, for the other daughter or daughters, her or their children, ſubject to the ſame reſtrictions with regard to their marrying, and upon the ſame truſts as the original ſhares: and in caſe all his daughters ſhould marry without ſuch conſent, and die without children, then, as to all the ſaid moieties, in truſt for his next of kin. Provided that if any of his daughters ſhould marry under 21 with ſuch conſent, it ſhould be lawful for the truſtees to pay one moiety to her huſband, or to make a ſettlement; and if any ſhould die before 24 or marriage, the whole of her ſhare, and if after 24, and before 28 or marriage, the remaining moiety ſhould go to the ſurvivors equally, or the ſurvivor, their or her executors, &c. to be paid at the ſame time, ſubject to the ſame reſtrictions with regard to marrying, and upon the ſame truſts in caſe of marriage without ſuch conſent as aforeſaid, as the original ſhares: and in caſe all his daughters ſhould die before they ſhould reſpectively attain the age of 28, or be married after 24 with ſuch conſent, ſo that the whole or part of the ſaid reſidue ſhould not be abſolutely diſpoſed of, then in truſt for his next of kin. *I.*, one of the daughters, in the teſtator's lifetime married with the approbation of one of the truſtees under the will. Her father on being appriſed of her marriage approved of it. Soon after her father's death, her huſband being then dead, ſhe married the plaintiff, in the preſence and with the conſent of the ſame truſtee. It was adjudged, that having married, and being then a widow, ſhe was not intended to be ſubject to the conditions of the will.

(D) Where the Legatee ſhall have Intereſt and Maintenance till the Legacy is paid.

IT is a rule, that a legacy payable at any given time whatſoever, does not carry intereſt till that time, whether it is a veſted intereſt or not: the time of payment muſt govern the commencement of intereſt; with this difference only, that a legacy given by a parent to a child ſhall carry intereſt from the death of the teſtator on account of the obligation attaching upon the perſon, who gives it, and becauſe it is in nature of a portion: therefore intereſt in the mean time is added, though it is not given in expreſs terms; and *Acherly* v. *Vernon* was determined upon the idea, that the teſtator put himſelf *in loco parentis*. All the other caſes upon the point, whether the adminiſtrator of the legatee is entitled to the legacy immediately, or muſt wait till the period, at which the legatee would have been entitled to it, depend upon this. I hope this will be conſidered as a ſettled point, upon which

By the Maſter of the Rolls, in Crickett v. Dolby, 3 Vez. jun. 16.

which executors may not be put to the expence of defending, unleſs at the peril of coſts. I think a wife would certainly come under the ſame exception as a child. I do not find it in the books. It can hardly ever happen, that a wife has not ſome other proviſion; and that may make a difference in the caſe of a child. If maintenance is given generally to the child, ſo that the whole may be exhauſted by the maintenance, that ſhews the teſtator meant it to carry intereſt: but, if a partial maintenance is given, as, if an annual ſum leſs than the intereſt is given for maintenance, the child ſhall have no more; and the executor paying that ſum ſhall have all the reſt.

Shawe v. Cunliffe, 4 Br. Ch. Rep. 152. Wyndham v. Wyndham, 3 Br. Ch. Rep. 58.

If there be a fund, whether reſiduary or particular, given to *A.* for life, and afterwards upon a contingency, which contingency does not take effect upon the death of the tenant for life, the intermediate intereſt is an intereſt undiſpoſed of, and therefore falls into the reſidue.

Medlicot v. Bowes, 1 Vez. 207.

A teſtator by his codicil *deſired* his ſiſter out of the money given her by his will to *leave* 500 *l.* at her death to her nephew *D.* who ſurvived the teſtator, but died before his aunt. His repreſentative is entitled to it. *Deſire*, expreſſing the will of the teſtator, amounts to a legacy, and the word *leave* makes no difference; to leave or pay at her death being the ſame. The legacy being out of perſonal eſtate payable on a contingency, it is a clear demand, notwithſtanding the death of the legatee before the contingency.

Libel.

Rex v. Burke, 7 Term Rep. 4.

AN information need not charge the offence to have been committed *vi et armis;* for a libel is not in itſelf an actual breach of the peace, but only tends to it. Neither need it charge the libellous matter to be *falſe*, for it is not neceſſary to prove it to be falſe.

Limitation of Actions.

(A) Where the ſuing out a Writ will ſave the Bar of the Statute.

IF a party give in evidence *two* writs, and it be neceſſary in order to prevent the operation of the ſtatute to ſhew that the ſecond writ on which he has declared, is a continuation of the firſt writ, it is in that caſe incumbent upon him to ſhew that the firſt was returned, in order to warrant the iſſuing of the *alias* writ. But, if he give in evidence only *one* writ, he need not ſhew that it was returned. A writ regularly ſued out will have the effect of a bar, it ſeems, if the plaintiff declare upon it at any time within a year afterwards.

Harris v. Woolford, 6 Term Rep. 617. Parſons v. King, 7 Term Rep. 6.

(B) Of the Manner of pleading the Statute.

NON-*aſſumpſit infra ſex annos* to a bankrupt is no plea to an action at the ſuit of the aſſignees on an *aſſumpſit* to them.

Skinner v. Rebow, 2 Str. 919.

So, to an action brought by the aſſignees of an inſolvent debtor, to recover money owing to him before his inſolvency, in which the plaintiffs declared, that in conſideration of the money being due to the inſolvent, the defendant promiſed to pay it to them, as aſſignees, it is no plea to ſay "that the cauſe of action firſt accrued to the inſolvent before the plaintiffs became aſſignees, and "that ſix years had elapſed after the cauſe of action firſt accrued "to the inſolvent, and before the ſuing out of the writ of the "plaintiffs."

Kinder v. Paris, 2 H. Bl. 561. *Qu.* Whether in this caſe the defendant might have pleaded, that the money was firſt due to the inſolvent more than ſix years before the action was brought, and that he had made no *expreſs* promiſe to the plaintiffs within ſix years. *Qu.* alſo, Whether in ſuch an action the plaintiffs muſt not make an *expreſs* promiſe.

Maſter and Servant.

(A) Of the Manner of hiring and binding a Perſon Apprentice.

Jackſon v. Warwick, 7 Term Rep. 121.

BY the ſtatute of 8 *Ann. c.* 9. a duty is laid upon the maſter in conſideration of the premium received by him with the apprentice: it is incumbent upon him therefore to take care that the premium be inſerted in the indenture, and that it be properly ſtamped. If this be not done, he cannot ſupport any action for the apprentice fee, although he has in fact maintained the apprentice for ſome time, and until he abſconded.

(B) Who may ſerve, or are capable of binding themſelves Apprentices.

Ex parte Davis, 6 Term Rep. 715.

IF an infant bind himſelf for a term which will not expire till after he has attained twenty-one, yet he is entitled to be diſcharged upon his attaining that age.

(C) Of the Juriſdiction of Juſtices in binding out Apprentices.

Rex v. Barwick, 7 Term Rep. 33.

WHERE ſeveral perſons hold land in partnerſhip, ſome of whom actually reſide upon, and occupy it, and others reſide at a diſtance in another pariſh, the latter as well as the former are bound to take pariſh apprentices, if in other reſpects they are fit perſons to take them.

Merchant and Merchandize.

(A) Of Principals and Factors.

George v. Clagett, B. R. Tr. 37 G. 3.

IF a factor, who ſells under a *del credere* commiſſion, ſells goods as his own, and the buyer knows nothing of the principal, the buyer may ſet off any demand he may have on the factor againſt the demand for the goods made by the principal.

(B) Of Partners and Joint-Traders.

ONE partner cannot bind the other partners by deed. Even a general partnerſhip agreement under ſeal will not authoriſe the partners to execute deeds for one another, unleſs a particular power be given for that purpoſe. If this were permitted, it would extend to mortgages, and would enable a partner to give to a favourite creditor a real lien on the eſtates of the other partners. Harriſon v. Jackſon, 7 Term Rep. 207.

One of two partners applied truſt-money in the trade with the privity of the other partner: rhey afterwards ſeparated, and the partnerſhip effects were aſſigned over to the firſt, who took upon himſelf the debts. This is no payment in diſcharge of the other partner, but both are liable to make good the truſt-money. Creditors cannot be bound by any private arrangement among partners. Smith v. Jameſon, 6 Term Rep. 601.

In a ſuit by one partner againſt the others charging them with embezzling, it was moved to appoint a receiver of the partnerſhip ſtock and debts. But the court thought that a receiver of the ſtock of a ſubſiſting partnerſhip, whilſt the trade is going on, could not be appointed, unleſs upon the very groſſeſt abuſe; for it muſt deſtroy the trade. Oliver v. Hamilton, Anſtr. 453.

At the commencement of a partnerſhip between two perſons, they both lived in the ſame houſe, and entertained the cuſtomers jointly: afterwards one of them removed, when the whole expence of entertaining the cuſtomers (which was neceſſary in the trade) fell upon the other. There was no clauſe in the co-partnerſhip deed to provide againſt this circumſtance, and the accounts were annually made up without any allowance for this article of expenditure. A court of equity cannot make the allowance. Thornton v. Proctor, Anſtr. 94.

A. and *B.* ſhip agents at different ports, enter intó an agreement to ſhare, in certain proportions, the profits of their reſpective commiſſions, and the diſcount on the bills of tradeſmen whom they may employ in repairing the ſhips conſigned to them, *&c.* By this agreement they become liable as partners, to all perſons with whom either contracts as ſuch agent, though the agreement provides that neither ſhall be anſwerable for the acts or loſſes of the other, but each for his own. Waugh v. Carver, 2 H. Bl. 235.

(C) Of Marine Inſurances.

A Company of ſhip-owners engaged to inſure each others ſhips *ſeverally* (and *not jointly*) to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares; but in caſe of the inſolvency of any one of the members, all the others were to be reſponſible. This contract is void by *ſtat.* 6 *G.* 1. *c.* 18. § 12. Lees v. Smith, B. R. Tr. 37 G. 3.

A ſhip homeward bound to the port of *London* received a pilot at *Orfordneſs* as directed by 5 *G.* 2. *c.* 20. and dropped him before ſhe reached her moorings in the River *Thames*; after which, and before ſhe was ſafely moored, ſhe was by accident ſunk. Law v. Hollingſworth, 7 Term Rep. 160.

The underwriter on the ſhip and cargo was holden to be diſcharged, becauſe there was *no* pilot on board when the accident happened; though it did not appear that the loſs was imputable to want of ſkill in thoſe who navigated the veſſel. The queſtion, therefore, whether it was neceſſary to the aſſured's right to recover, that there ſhould be on board ſuch a pilot as is required by the ſtatute of 5 *G.* 2. that is, a pilot licenſed by the *Trinity-Houſe*, was left undecided.

Middlewood v. Blakes, 7 Term Rep. 162.

A ſhip inſured from *A.* to *B.* ſailed with an intent to touch at *C.*, an intermediate point: to a certain point the voyage was the ſame: from that point there were three tracks to *B.*, one by way of *C.*, the two others by different courſes: there were advantages and diſadvantages attending each; and the captain muſt elect according to circumſtances: the ſhip took the track by *C.* under directions from the inſured to put in there, but was taken before ſhe came to the point where ſhe muſt have turned out of the track to *B.* by the way of *C.*, for the purpoſe of putting into the harbour of *C.* The underwriter is diſcharged; for he was entitled to the advantage of the captain's judgment which of the three tracks it was beſt to purſue when he came to the firſt dividing point.

Burnett v. Kenſington, 7 Term Rep. 210.

If an inſurance be effected on fruit, and the policy contain the uſual memorandum, "corn, fruit, *&c.* warranted free from "average, unleſs general, or the ſhip be ſtranded," and the ſhip be in fact ſtranded in the courſe of the voyage, the underwriters are liable for an average loſs ariſing from the perils of the ſea, though no part of the loſs happened from the act of ſtranding.

Farmer v. Legg, 7 Term Rep. 186.

An action was brought on a policy of inſurance on a ſhip, engaged in the ſlave-trade "at and from *London* to the coaſt of "*Africa*, during her ſtay there, and thence to her port of diſ- "charge in the *Weſt Indies*." The loſs happened in conſequence of an inſurrection of the ſlaves. The principal queſtion was, Whether the ſhip had been navigated in the manner preſcribed by the 31 *G.* 3. *c.* 54., the 7th ſection of which enacts, "That it ſhall "not be lawful for any perſon to become a maſter, or take or "have the command or charge of any ſuch ſhip or veſſel at the "time he ſhall clear out from any port of *Great Britain* for pur- "chaſing or carrying ſlaves from the coaſt of *Africa*, unleſs ſuch "maſter or perſon taking or having the charge or command of "any ſuch ſhip or veſſel ſhall have made oath, and delivered in "to the collector or other chief officer of the cuſtoms, at the "port where ſuch ſhip or veſſel ſhall clear out, a *certificate at- teſted by the reſpective owner or owners* that he has already ſerved "in ſuch capacity during one voyage, or ſhall have ſerved as chief "mate or ſurgeon during the whole of two voyages, or either "as chief mate or other mate during three voyages, in purchaſ- "ing and carrying ſlaves from *Africa*, under pain that ſuch maſ- "ter or other perſon taking or having the charge or command "of any ſuch ſhip or veſſel, and alſo the owner or owners who "ſhall hire or employ ſuch perſon, ſhall for every ſuch offence "reſpectively forfeit and pay the ſum of 500 *l.*" The queſtion

was,

was, Whether the certificate therein required, ought to be atteſted by the owner of the ſhip upon the voyage inſured, or by the owner or owners of the ſhips during the reſpective voyages out of which the qualification aroſe? In the preſent inſtance, the captain had made oath that he had been two voyages in a ſhip engaged in the ſlave-trade, and the preſent plaintiff (the owner in the voyage inſured) had certified that that was true, to the beſt of his knowledge and belief. Lord *Kenyon*, before whom the cauſe was tried, being of opinion that ſuch certificate did not anſwer the requiſition of the ſtatute, nonſuited the plaintiff; and on a motion to ſet aſide the nonſuit, the other judges of the court of King's Bench concurred with his lordſhip in that opinion.

Where a mate of a ſhip or a ſailor is to receive ſomething at the end of the voyage in lieu of wages, for inſtance, ſlaves, he cannot inſure it; and of courſe cannot recover the value of it in an action againſt his agent for negligence in not procuring ſuch an inſurance. Webſter v. De Taſtet, 7 Term Rep. 157.

Mortgage.

(A) Of the Equity of Redemption and Foreclosure.

ON a motion to ſtay the proceedings in an ejectment brought by a mortgagee againſt a mortgagor, on the latter paying principal, intereſt, and coſts, it appeared that the mortgagor five years before, by agreement under ſeal, in conſideration of a certain ſum, had agreed to convey the eſtate to the mortgagee abſolutely, and that a ſum of money due from the mortgagor to the mortgagee ſhould be deducted out of the purchaſe-money ſo to be paid; and that ſeveral applications had been ſince made to the mortgagor to complete the purchaſe, which he had refuſed. It was contended therefore, that under the proviſo in the ſtat. 7 *G.* 2. *c.* 20. § 3 (*a*). the mortgagee had no right to the benefit of the ſtatute; and ſo thought the court. Goodtitle v. Pope, 7 Term Rep. 185.

(*a*) Vol. 5. pag. 98.

But in a former caſe, where the like objection was made to ſuch a motion, the court permitted the redemption, and that after time taken to conſider of it, becauſe it appeared that the mortgagee had not tendered to the mortgagor a deed of conveyance for execution, and that no bill in equity was brought. Skinner v. Stacy, 1 Wilſ. 80.

Huſband and wife, ſeiſed in fee in right of the wife, mortgaged for a term of years, and levied a fine to the uſe of the mortgagee, his heirs and aſſigns, ſubject to the proviſo for redemption. They afterwards conveyed the equity of redemption by leaſe and releaſe to the mortgagee. The mortgagee remained in poſſeſſion as com- Corbett v. Barker, Anſtr. 138. 755.

plete owner for more than twenty years, during the life of the huſband, tenant by the curteſy, from whom he had gotten the conveyance. The heir of the wife was allowed to redeem notwithſtanding this lapſe of time. By attending to the different rights of the mortgagee it appears, that he ſtood in the place of the tenant by the curteſy of the equity of redemption; for he claimed to hold under him by the laſt conveyance, and immediately upon taking it he entered into poſſeſſion: in that character it was his duty to keep down the intereſt of the mortgage: uniting theſe two characters, he is to be conſidered as having ſupported the different rights and diſcharged the duties of each. In the general caſe, a preſumption ariſes from no payment of the ſurplus rents being made, nor account delivered for ſo long a period of time as twenty years: here, the preſumption cannot ariſe, becauſe it was the ſame perſon to pay and to receive: the caſe does not therefore fall within the general rule.

Rees v. Parkinſon, Anſtr. 497. Where a mortgagee who had gotten poſſeſſion by ejectment, ſued at law on the covenant for non-payment, and was proceeding in a ſuit in equity to foreclose; a motion was made to reſtrain him from proceeding at law: but the court ſaid, the plaintiff is regular in his proceedings; we cannot deprive him of the benefit of his action, unleſs the defendant will bring in the money.

Lake v. Thomas, 3 Ves. jun. 17. In this caſe Lord Chancellour referred to a caſe before Sir Thomas Sewell. The title of the eſtate in that caſe had come into two different hands: the part in the hands of one family was held irredeemable: as to the other, the mortgagee had kept accounts, and there was a deviſe of it as a mortgage: the redemption was opened as to that after a great number of years. To a bill againſt the deviſee of mortgaged premiſes by the heir of the mortgagor, charging acknowledgments that the eſtate was holden in mortgage, and that accounts had been kept; the defendant put in a plea of poſſeſſion for fifty years, under conveyances from the mortgagee. The plea was ordered to ſtand for an anſwer, and the benefit of it ſaved to the hearing.

(B) Mortgagees and their Aſſignees, how to account, and what Allowances to make.

Ruſſel v. Smithies, Anſtr. 96. A MORTGAGEE is not bound, after great length of poſſeſſion, to leave the premiſes in as good repair as he found them.

Woolley v. Drag, Anſtr. 551. Money diſburſed by a mortgagee for the benefit of the eſtate, as, for the renewal of leaſes under which it is holden, ſhall carry the ſame intereſt with the money originally lent.

Lloyd v. Hatchett, Anſtr. 525. A mortgagee in poſſeſſion for thirty years brought his bill to foreclose. Some of the creditors of the mortgagor, who had obtained from him a conveyance of the equity of redemption for the uſe of the creditors at large, filed a bill to redeem. At the hearing it was, among other things, referred to the Deputy Remembrancer to take an account of what was due to the mortgagee upon a bond from the mortgagor of nearly equal date with the mortgage, which the conveyance from the mortgagor to the creditors

creditors had directed to be first paid. The Deputy Remembrancer reported the whole principal and interest for thirty-three years to be due thereon. Exception was taken to this report, that the sum reported due exceeded the penalty of the bond. The exception was allowed.

It is a settled rule, that nothing shall prevent interest from running on a mortgage but a proper tender and notice: for the mortgagee has a legal security for his debt, may bring an ejectment, and a bill for foreclosure at the same time, which the court will not prevent. If therefore there be a mortgage on one side, and open accounts on the other, and it be manifest, that upon the account more will be due than the principal and interest on the mortgage will amount to, and proposals be made to deduct, yet the interest shall not stop. However, as the mortgagee in such case has interest on his mortgage, the court will oblige him to answer as to the money in his hands, which will be due on the account. 2 Vez. 678.

Nonsuit.

THE plaintiff in a *qui tam* action on the 7 *G.* 2. *c.* 8. withdrew his record, because the broker who negotiated the illegal bargain for stock, refused to give evidence for fear of subjecting himself to a penalty on the same act. This was holden to be a sufficient reason to discharge a rule for judgment as in case of a nonsuit for not proceeding to trial; although the witness's liability to be sued would not be removed till after the three succeeding terms. Raynes v. Spicer, 7 Term Rep. 178.

Obligations.

(A) Of the Nature of this Security.

A Bond was dated on a day certain in a penal sum conditioned for the payment of a less sum generally, but no day of payment was expressly named, nor was interest reserved in terms. On motion to refer it to the Master under the statute of 4 and 5 *Ann.* *c.* 16. § 13. (*a*) to compute principal, interest, and costs thereon, and on payment thereof to stay the proceedings, it was objected, that this Farquhar v. Morris, 7 Term Rep. 124. (*a*) Vol. v. pag. 157.

this bond was not within the act, as not being payable on a day certain. But by the court—This bond is payable on a day certain; for it is payable on the day of the date, no other time being mentioned for payment. Intereſt alſo is payable from the time of payment, namely, from the date, though not expreſsly reſerved.

(B) Where there are ſeveral Obligors, and the Obligee's Remedy againſt all or every of them.

(a) Vol. 5. pag. 164.

IT is laid down in a preceding part of this work (*a*), that "if two "are bound jointly, and one dies, the ſurvivor only is liable in "*equity*;" in ſupport of which poſition, 2 *Vern.* 99. is referred to. But upon turning to that book we find that the court are not ſpeaking of the remedy in *equity*, but of that *at law*. The words are, "Where two are jointly bound, and one dies, you "muſt ſue the ſurvivors, and cannot maintain an action againſt "the executor or adminiſtrator of him that is dead." It is true, that from the form of the contract, the remedy *at law* is gone; but *in equity* both are conſidered as having undertaken to pay, and if the obligee cannot recover againſt the one, he ſhall againſt the other. This will appear from the following caſes.

1 Br. Ch. Rep. 29.

Simpſon v. Vaughan, 1740, cited in 2 Vez. 101.

Nutt and *Baker*, partners in trade, borrowed on their joint bond: *Nutt* died: *Baker*, the ſurviving partner, became bankrupt: the plaintiff, as executor of the bond-creditor, proved his debt, received ſatisfaction, in part, and brought a bill againſt *Vaughan*, as executor of *Nutt*, to have the deficiency ſupplied out of his aſſets. Lord *Hardwicke* held, that it was a ſum lent to both, of which both had the advantage; and a debt aroſe againſt both from the nature of the tranſaction: it was no lien on the partnerſhip in particular, becauſe the plaintiff might have had it againſt either of them. There was farther in this caſe reaſonable evidence of fraud or miſtake, for *Baker* filled up the bond.

Biſhop v. Church, 2 Vez. 100. 371.

Owen and *Church*, partners in trade, borrowed from *Biſhop* at two different times two ſums of 1000*l.* each; for which they gave two bonds, binding themſelves, and their heirs, executors, and adminiſtrators, with condition, that if they or either of them, their or either of their heirs, executors, or adminiſtrators, &c. *Church* broke off the partnerſhip, and died in 1740. *Biſhop* died in 1747; and his repreſentatives, *Owen* becoming bankrupt, brought a bill againſt the repreſentatives of *Church* for a ſatisfaction of this debt out of the real and perſonal aſſets. Lord *Hardwicke* ſet up the bond both againſt the perſonal repreſentatives and the heir of *Church*. His lordſhip ſaid, the bond is conſidered as an agreement in writing; and therefore though the obligation and penalty are gone by the legal demand being gone, yet the condition, taking it altogether, is conſidered as an agreement in this court to pay the money, and an agreement under hand and ſeal: therefore the court will ſet it up againſt executor and heir.

Slip v. Huey, 3 Atk. 91.

If an obligee in a bond make any variation in the original contract with the principal without the privity of the ſurety, as, if he

he change the nature of the ſecurity, or agree to poſtpone the day of payment, he thereby diſcharges the ſurety. It is the cleareſt and moſt evident equity not to carry on any tranſaction without the privity of him, who muſt neceſſarily have a concern in every tranſaction with the principal debtor.

Niſbet v. Smith, 2 Br. Ch. Rep. 579. Rees v. Barrington, 2 Vez. jun. 540.

(C) Of their Remedies againſt each other.

THERE were three obligors in a bond, and the obligee filed his bill againſt the principal, and the repreſentatives of one of the ſureties, ſtating that *A.* the third obligor was dead inſolvent. An objection was made for want of parties, becauſe the repreſentatives of the third obligor were not before the court. But by Lord *Hardwicke*—The general rule of the court, to be ſure, is, where a debt is joint and ſeveral, the plaintiff muſt bring each of the debtors before the court, becauſe they are entitled to the aſſiſtance of each other in taking the account (*a*). Another reaſon is, that the debtors are entitled to a contribution, where one pays more than his ſhare of the debt. A further reaſon is, if there are different funds, as, where the debt is a ſpecialty, and the plaintiff may ſue at law either the heir or executor for ſatisfaction, he muſt make both parties, as he may come in the laſt place againſt the real aſſets. But there are exceptions to this, and the exception out of the firſt rule is, that if ſome of the obligors are only ſureties, there is no pretence for the principal in the bond to ſay, that the creditor ought to bring the ſurety before the court, unleſs he had paid the debt. The exception out of the ſecond rule is, that if there are no perſonal aſſets at all, and this fact appears plainly in the cauſe, there is no reaſon to bring the repreſentative of that co-obligor before the court. But this is a ſpecial excepted caſe, and therefore not within the rule. But ſuppoſe it was a common caſe, and the bill had been brought by the repreſentatives of *B.*, one of the ſureties in the bond, whether it is neceſſary to make the repreſentative of *A.* a party. As to the taking of the account, it is quite out of the caſe by the admiſſion of the defendants, that the bond is not paid, nor any part of the principal and intereſt, ſo that here is no ground to make the repreſentative of *A.* a party, in order to aſſiſt him in taking the account. The other pretence is, in order for a contribution. It is admitted by all the anſwers, that *A.* is dead inſolvent; and therefore this differs from the caſe of *Aſhhurſt* v. *Eyre*, (2 *Atk.* 51. 3 *Atk.* 341.) determined before me upon a plea. For though there was an admiſſion of inſolvency in that caſe, yet it did not appear whether the principal and intereſt might not have been paid by the co-obligor, who was not before the court, and that was the reaſon of allowing the plea. His Lordſhip therefore overruled the objection for want of parties.

Madox v. Jackſon, 3 Atk. 405.

(*a*) *Sed vide* Collins v. Griffith, 2 P. Wms. 313.

Offices and Officers.

Vol. 5. pag. 180.

IT is obſerved in a former part of this work, that conſtant uſage hath not only ſanctioned the firſt eſtabliſhment of ſuch offices as have exiſted time out of mind, but alſo hath preſcribed and ſettled the manner in which they are to continue to exiſt, in what manner to be exerciſed, how to be diſpoſed of, *&c.* But a uſage ſhort of ſuch as may be legally ſet up as a preſcription will be ſufficient for this purpoſe. In offices in every court of *Weſtminſter-hall* new cuſtoms and new uſages grow up, and get firm root by continuance much ſhort of legal preſcription. Thus in the court of Chancery, ſince Lord *Northington*'s time, the regiſtrar's clerks have uniformly ſucceeded to be regiſtrars in regular ſucceſſion. The office itſelf is probably within the time of legal memory, and this practice has only prevailed ſince the time above mentioned: yet it ſhould ſeem to be now too firmly eſtabliſhed to be ſhaken; and the Duke of *St. Albans*, in whoſe gift the office is, would hardly venture to break through the ſucceſſion.

Per Macdonald, C. B. Anſtr. 624.

Ex parte Deverell, Anſtr. 483. 616.

It has been ſettled, that the Treaſurer's Remembrancer in appointing clerks to his office, is, by the uſage, limited to thoſe who have ſerved a clerkſhip in the office.

Colman v. Duke of St. Albans, 3 Vez. jun. 25.

Qu. Whether there can be a direct legal aſſignment of the office of regiſtrar of the court of Chancery.

Perjury.

Rex v. Croſsley, B. R. Tr. 37 G. 3.

IN an indictment for perjury (at common law) in an affidavit, it is not neceſſary to allege that the affidavit was uſed: neither is it neceſſary that it ſhould appear in the indictment, that the affidavit was filed on record.

Prerogative.

(A) Of the King's Prerogative in Ports and Havens.

IN a former part of this work we have ſatisfied ourſelves with ſtating my Lord *Hale*'s opinion with reſpect to the power of the crown in opening or ſhutting the ports. Other authorities, however, are not wanted in ſupport of this prerogative. It is admitted by Mr. *St. John*, one of the counſel for Mr. *Hampden*, in the caſe of ſhip-money. "The law (he ſays) doth entruſt "the king only with that, which being done, is moſt for his own "loſs, as in reſpect of the cuſtoms, this of prohibiting foreign "trade would be. But," he adds, "this cannot be done, but in "time of war and imminent danger." And Mr. *Holborne*, the other counſel for Mr. *Hampden*, in the ſame caſe, ſays, "For the "ſhutting of the ports, there is more difference in point of pre-"judice of the king than of the ſubject. The king cannot ſhut "the ports but to his own prejudice. Again, the ſhutting of the "ports without cauſe of neceſſity, the king hath the loſs as "well as we; for by that he loſeth his cuſtoms, and by ſhutting "them he can gain nothing at all. And beſides, there is no law "at all that hinders him from it." In a caſe prior in point of time, the great caſe of impoſitions in the 4th of *James* the Firſt, Mr. *Hakewill*, in anſwer to the arguments that had been uſed by the ſervants of the crown, ſaid, "For my part, I think that the "king cannot reſtrain the paſſage of merchants, but for ſome "ſpecial cauſe; wherein to define certainly and reſolutely for "what cauſes he may, and for what not, I will not undertake. "Only let me inform you, that there is not one of thoſe prece-"dents vouched by them to prove the king's power to reſtrain, "but they are upon ſpecial reaſons; as by reaſon of enmity "with ſuch a nation from which they are reſtrained, or becauſe "ſuch a commodity may not be ſhared within the kingdom. "Beſides, they are not reſtraints from all places, and of all man-"ner of merchandizes, but from certain places only, and for "certain ſorts of merchandizes. And for my part I think that "reſtraints in all theſe caſes, and of like nature, are by the "common law left to the king's abſolute power; for if it "ſhould be otherwiſe, it ſhould be in the power of a mer-"chant for a little private lucre to enrich the king's enemies, "or to furniſh them with munition to be employed againſt "the ſtate, or utterly ruin the commonwealth, by carrying out "a commodity which may not be ſpared, or by bringing in "ſome that may be hurtful. Nay, which is more, ſuch may "be the occaſion, that the king may, I doubt not, ſtop the paſ-

Vol. 5. P. 507.

1 St. Tr. 540.

Id. 586.

11 St. Tr. 504.

"ſages

" ſages of all merchants from all places for a ſhort time, as upon " the death of the late queen, it was put it in practice, to pre- " vent intelligence. There may likewiſe be ſuch neceſſary uſe of " their ſhips, as the want of them upon ſome ſudden attempts " may be the cauſe of the overthrow of the whole ſtate. In " ſuch caſes as theſe, if the common law did not give the king " leave to reſtrain their paſſage by his abſolute power, it were very " improvident in the higheſt points, which cannot be imagined of " ſo wiſe a law. And yet the kings of this realm have always been " ſparing in the practice of their abſolute power in this point; for " there are little leſs than thirty acts of parliament, touching the " opening and ſhutting up of the paſſage of merchants, moſt of " which, as I conceive, were made rather for the increaſe of " puniſhment, than for want of power in the king: for the " breach of a reſtraint by abſolute commandment is puniſhable, " as all other contempts, only by fine and impriſonment, and " not by forfeiture of the merchandizes."—Mr. *Yelverton* in his argument upon the ſame occaſion doth not ſo diſtinctly admit this prerogative, but refers the power rather to acts of parliament, at leaſt ſince the death of *E.* III. He ſaith, indeed, in one part, " He (the king) hath power to open and ſhut upon conſideration " of publick good to the people and ſtate."—" The ports in " their own nature are publick, free for all to go in and out; yet " for the common good this liberty is reſtrainable by the wiſdom " and policy of the prince, who is put in truſt to diſcern the times " when this natural liberty ſhall be reſtrained." Yet in a ſubſe- quent part, he adds, "Though it be admitted that the king may " reſtrain perſons and goods, yet it may well be denied that he " hath power of himſelf alone without aſſent of parliament " ſimply and indefinitely to reſtrain all traffick in general, or to " ſhut up all the havens and ports, and to bar the vent and " iſſuing of wares and merchandizes of the whole kingdom; as " it appeareth plainly, that this hath been done this three hun- " dred years, or thereabouts, by act of parliament only, and that " the kingdom of *England* made this matter of traffick ſo tender " a caſe to deal in as that it hath ever held it a matter fit for the " conſultation of the great council of the kingdom, and for no " other." He then adduces acts of parliament paſſed in every ſucceſſive reign from the time of *E.* III. for the purpoſe of im- poſing theſe reſtraints, whence he infers that the crown cannot do it of its proper authority. But it may be obſerved of all the ſtatutes which he has referred to, that they were paſſed, not where the neceſſity of the times called for immediate interpoſi- tion, but where it was found politick to impoſe reſtraints upon particular branches of traffick, or with particular countries *for a conſiderable length of time;* and the fair inference from them ſhould ſeem to be, rather that the prerogative in this reſpect is not illimitable in its exerciſe, than that there is no ſuch preroga- tive at all. The ſafety of the ſtate is the ground upon which the king is entruſted with the power of ſhutting the ports, or laying embargoes; *det operam rex, ne quid detrimenti capiat reſpublica:*

where

where therefore the danger is not imminent, the power ought not to be exerciſed: but, if the power is confined to times of imminent danger, legiſlative acts giving ſuch a power at other times imply no negative upon it. It may be added, that the legality of embargoes by the crown ſeems to be admitted by two very profound modern lawyers. See Mr. Hargrave's Preface to the 11th volume of the *State Trials*, and to the 1ſt volume of his *Collection of Tracts relative to the Laws of England*.

(B) Of his Prerogative in making War and Peace.

WE have ſeen before, that the ſtate of war may ſubſiſt otherwiſe than by ſolemn proclamation: that there may be an actual, though not a formal war. A war therefore may begin under letters of marque and repriſal, provided they be *general*; and in truth the late wars in *England* have uſually begun in that manner: for *general* letters of marque are for general injuries to the king's ſubjects, which is the cauſe of war; and the prizes taken under them accrue to the crown, which is a proof that it is a kind of war. But particular letters of marque will not create the ſtate of war, ſuch letters being granted for individual injuries, and the prizes taken under them becoming the property of thoſe to whom they are granted. 1 Vez. 162.

(C) How the Rules of Law differ with reſpect to the King and a private Perſon.

NOtwithſtanding what is ſaid in another part of this work, that the king cannot be ſeiſed to a uſe, becauſe there is no means to compel him to perform it; yet, if an eſtate liable to a truſt come to the king, the land will in equity be equally bound by the truſt in the hands of the king, as of a common perſon. Burgeſs v. Wheate, 1 Bl. Rep. 123.

In the private relations of life, the rules of law differ very widely in many points with reſpect to the king and a private perſon. The queen *conſort*, or the wife of the reigning king, is participant of divers prerogatives above other women. She is of ability to purchaſe lands, and to convey them, to make leaſes, to grant copyholds, and do any other act of ownerſhip without the concurrence of her lord. She is capable of taking a grant from the king; ſhe may ſue and be ſued alone, without being joined with him: ſhe may have a ſeparate property in goods as well as lands, and has a right to diſpoſe of them by will: ſhe pays no toll; nor is ſhe liable to any amercement in any court. Though an alien born, yet from the time of her marriage ſhe is, by operation of the law of the crown, (which is part of the common law,) to be deemed a natural-born ſubject, ſo as not to be diſabled by the act of the 12th *William* III. or by any other act, from holding or enjoying any office or place of truſt, or from 1 Bl. Com. c. 4. Lords' Journ. May 2d, 1765.

having any grant of lands, tenements, or hereditaments from the crown. In point of the ſecurity of her life and perſon, ſhe is put on the ſame footing with the king. It is equally treaſon (by the ſtatute 25 *E.* 3.) to compaſs or imagine the death of our lady the king's companion, as of the king himſelf: and to violate or defile her amounts to the ſame high crime; as well in the perſon committing the fact, as in the queen herſelf, if conſenting.

On the death of her lord, the law in ſome reſpects differs: it is no longer high treaſon to conſpire her death, or to violate her chaſtity. Yet ſtill, *pro dignitate regali*, no man can marry a queen dowager without ſpecial licence from the king, on pain of forfeiting his lands and goods: and though an alien born, ſhe is entitled to dower: and if ſhe be married again to a ſubject, ſhe does not loſe her regal dignity, as peereſſes dowager do their peerage when they marry commoners.

1 Bl. Comm. c. 4.

The heir apparent to the crown is uſually made Prince of *Wales* and Earl of *Cheſter*, by ſpecial creation and inveſtiture: but being the king's *eldeſt* ſon, he is by inheritance Duke of *Cornwall*, without any new creation. The earldom of *Cheſter* was alſo once limited like the duchy of *Cornwall* to the king's eldeſt ſon; this was by 21 *R.* 2. *c.* 9. by which this earldom was erected into a principality. But that whole parliament was repealed by 1 *H.* 4. *c.* 3.

Whether, during the minority of the duke, his majeſty is entitled to the revenues of the duchy, is a queſtion which has lately been diſcuſſed in parliament, but upon which there has been no parliamentary or judicial deciſion. Two little pamphlets, the one written by C. Watkins, the author of the *Law of Deſcents*, and a *Treatiſe on Copyholds*; and the other by John Nicholls, Eſq. one of the repreſentatives in the preſent parliament for the borough of *Tregony*, will be found of great aſſiſtance in the examination of this point.

The Prince of *Wales*, and his royal conſort, and the princeſs royal, or eldeſt daughter of the king, are under the peculiar protection of the laws. For it is high treaſon by the ſtatute 25 *E.* 3. to compaſs or conſpire the death of the former, or to violate the chaſtity of either of the latter.

Upon a queſtion referred to all the judges in 1718, by King *George* I. it was reſolved by the opinion of ten againſt the other two, that the education and care of all the king's grandchildren, while minors, did belong of right to his majeſty as king of this realm, even during their father's life. But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion, that this care and approbation extend alſo to the preſumptive heir of the crown; though to what other branches of the royal family the ſame did extend they did not find preciſely determined. The moſt frequent inſtances of the crown's interpoſition go no further than nephews and nieces; but examples are not wanting of its reaching to more diſtant collaterals. By ſtatute 12 *G.* 3. *c.* 11. no deſcendant of the body of King *George* II. (other than the iſſue of princeſſes married into foreign families) is capable of contracting matrimony, without the previous conſent of the king ſignified under the great ſeal; and

See 1 Bl. Comm. c. 4. notes *l*, *m*.

any marriage contracted without such consent is void. Provided, that such of the said descendants as are above the age of twenty-five, may, after a twelvemonth's notice given to the king's privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage.

(D) Of the King's Grants.

THE king may grant the duties of a port to a subject in consideration of his repairing it. Mayor of Hull v. Horner, Cowp. 108. See also Mayor of Exeter v. Trimlet, 2 Wilf. 95.; and Mayor of Yarmouth v. Eaton, 3 Burr. 1407.

Privilege.

How privileged Persons are to sue and be sued.

AN attorney plaintiff may sue by common process, and indorse his own name on the copy as the attorney, and may afterwards declare by another attorney. Jackson v. Barnard, 7 Term Rep. 35.

Scire Facias.

THE statute 8 & 9 *W.* 3. *c.* 11. which gives costs in all *suits* of *scire facias*, does not extend to a *scire facias* to repeal a patent prosecuted in the name of the king. Rex v. Miles, Tr. 37 G. 3.

Sheriff.

(A) Who are exempt from serving.

BY a resolution of the House of Commons of the 7th of *January* 1689, it is declared, "That the nominating any member of "that House to the king to be made a sheriff, is a breach of pri-

"vilege." The House therefore addressed the king to appoint another sheriff in the room of Sir *Jonathan Jennings*, High Sheriff of *Yorkshire*, which the king complied with. From this case Mr. *Hatsell* says, it seems to be settled, that it is not lawful for a member of the House of Commons to be appointed sheriff by the king: but where the sheriffs are elected by the people, as for *Middlesex*, it is still very customary; and indeed in the instance of *Middlesex*, the two services being both in the same county, are not, as in other cases, so incompatible with each other.

2 Hats. Pr. 34.

(B) Of the preceding and succeeding Sheriff.

IT is said by Sir *George Croke* in his argument in Mr. *Hampden's* case, that the *certiorari* which was directed in that case to the two that were late sheriffs at the time of the assessment, and not to the sheriff that was at the time of the *certiorari* awarded, who is the only immediate officer to return the writs, was not legal: for all writs are directed to some immediate sheriff, requiring him to demand of the former sheriffs, what they did on the former writ; and they are to return to him what hath been done, and he is to return the same to the court, whereunto he is an immediate officer; and the former are not any officers.

1 St. Tr. 662.

(C) Of his Responsibility for the Acts of his Officers.

IN an action of trespass against the sheriff for the wrongful act of his bailiff, it is not enough to prove the bailiff a general bailiff, and that he had given a bond of indemnity to the sheriff as such, and also to prove a copy of the warrant under which he entered and seized the plaintiff's goods; but the privity between the bailiff and sheriff must be established in the particular transaction, by proving the original warrant of execution directed by such sheriff to such bailiff, or, at least, by proving such notice to produce it, as will, in case of the non-production of it, let in secondary evidence to prove its contents.

Drake v. Sykes, 7 Term Rep. 113.

(D) Of his Duty in admitting Persons to Bail; and herein of Securities taken for Ease and Favour.

IF a sheriff's officer upon an arrest take an undertaking for the appearance of the party instead of a bail-bond without the plaintiff's assent, and bail above be not duly put in, the sheriff is liable to an action for an escape; and the court will not relieve him by permitting him to put in and justify bail afterwards.

Fuller v. Prest, 7 Term Rep. 109.

Stamps.

THOUGH it has been ſaid that one country will not take notice of the *revenue* laws of another; yet it hath been holden, that a party cannot give in evidence a written contract made in *Jamaica* which by the laws of that iſland was void for want of a ſtamp. Alves v. Hodgſon, 7 Term Rep. 241.

Statute.

Of the Rules to be obſerved in the Conſtruction of Statutes.

IN the conſtruction of ſtatutes according to the intention of the legiſlature, there is an eſſential difference between the expounding of modern and ancient acts of parliament. In early times the legiſlature uſed (and it was a wiſe courſe to take) to paſs laws in general and in few terms: they were left to the courts of law to be conſtrued ſo as to reach all the caſes within the miſchief to be remedied. But in modern times great care has been taken to mention the particular caſes in the contemplation of the legiſlature; and therefore the courts are not permitted to take the ſame liberty in conſtruing them, as they did in expounding the ancient ſtatutes. *Per* Buller, J. 5 Term Rep. 201-2.

Treſpaſs.

IN an action of treſpaſs for ſeizing goods, the court will ſtay the proceedings upon the defendant reſtoring them, or their value with coſts, provided the value be admitted by the parties, and there be no other queſtion between them to try, ſo that it will terminate the ſuit. Pickering v. Truſte, 7 Term Rep. 53. Anon P. 37 G. 3. *in Scac.*

Trial.

Goldſmith v. Lord Sefton, Anſtr. 808.

THE right of the courts to grant a new trial in queſtions of tort on account of exceſſive damages, that is, to protect a defendant from the injuſtice of a jury, has been aſſerted in a late caſe by the court of Exchequer.

Tythes.

(A) What ſhall be deemed a perſonal Tythe.

Hall v. Macket, E. 37 G. 3. *in Scac.*

A Mill, it is now clearly ſettled, is to be conſidered as a *predial* tythe, ſo far as reſpects its locality, and the perſon to whom it is payable; but in the mode of payment it is to be treated as a *perſonal* tythe. The conſequence of its being treated as a *perſonal* tythe in the mode of payment, is, that only a tenth part of the clear profits after deducting the rent and other incidental expences, is due for it. Where no conventionary rent is paid for it, as, where it is not in leaſe, in that caſe, an annual value or rent muſt be ſet upon it by the officer of the court.

(B) Of the Manner of ſetting out Tythes.

Hall v. Macket, E. 37 G. 3. *in Scac.*

ALL the hay cut down in a field at any one time muſt be tythed before any part of it can be carried away: but the quantity to be cut at each time is in the diſcretion of the farmer; and the court will not attempt to controul him, unleſs there appears a deſign to defraud or vex the tythe-owner under the pretext of convenience to himſelf.

Tr. 37 G. 3. The caſe of *Collyer* v. *Howſe*, *ſupra*, *tom.* vi. *page* 739. has been re-heard by the court of Exchequer, and the former decree has been reverſed. It appeared from the additional evidence introduced upon the re-hearing, that in the uſual courſe of huſbandry clover does get into the ſhape of cocks, ſo that the ground of the former deciſion failed. The court ſaid, that it was like the caſe of ſoft corn, which, it had been decided, was not tythable in the ſwathe.

(C) Of the Diſcharge of Payment of Tythes in Kind by Modus and Compoſition real.

A Modus payable by the *owners*, not the *tenants* of the land which is covered by it, is good. The common practice, to be ſure, is to make the occupier anſwerable: but, perhaps, the parties may have thought this mode more beneficial in point of ſecurity; and the courts are not nicely to weigh the validity of that judgment. And the land, in reſpect of which the modus is claimed, need not be ſet out by metes and bounds: that it conſiſts of about ſo many acres, parcel of an ancient eſtate called *R.* eſtate, conſiſting of ſo many acres, is a deſcription ſufficiently certain. Ord v. Clarke, Anſtr. 638. See alſo Scarr v. Trinity College, *Id.* 765.

A modus was claimed for hay. The terriers deſcribed the modus to be for all mowing graſs, "except clover and the like." It was objected, that as the article excepted was not known beyond time of memory, a modus containing that exception muſt be modern. But the court thought, that the expreſſion in the terrier was not to be taken as an exception to the modus, but merely as a memorandum that the modus covered natural hay only, and did not extend to modern artificial graſſes. Franklyn v. Spilling, Anſtr. 760.

It ſhould ſeem, that a modus of every tenth day's cheeſe, during twenty weeks from *Holyrood-day*, in lieu of tythe of milk, is good. Wake v. Ruſs, Anſtr. 295.

The court will not decree againſt a farm modus on the ground of *rankneſs*. For there is a very material difference between a farm-payment, and one for a particular ſpecies of produce. In the former, many reaſons may have prevented the tythes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman; or he may have wiſhed to pay for an exemption from tythes for the ſake of improvements. Beſides, it is hardly poſſible to aſcertain the comparative value of the land, or of the produce, in former times: and the court ſhould not be nice in judging of the value or the goodneſs of the bargain, where, by any probable circumſtances, the modus may have been a real agreement between the parties before time of memory. More eſpecially will they be extremely cautious in deciding ſuch a queſtion without the intervention of a jury, if the leaſt doubt ariſe as to the fact of rankneſs. Atkyns v. Lord Willoughby de Broke, Anſtr. 402.

A *compoſition real* is where an agreement is made with the incumbent of any church, together with the patron and ordinary, under their hands and ſeals, that the lands ſpecified ſhall be exempt from the payment of tythes for the conſiderations mentioned in the ſtipulation. Such compoſitions have ever been allowed to be a good diſcharge of the payment of tythes. But ſince the ſtatute 13 *Eliz. c.* 10. for preventing the alienation of eccleſiaſtical eſtates, no compoſition of this kind can be made; and ſuch as appear to be of later date are holden to be of no force. It ſeems, however, that there have been decrees made in courts of equity Deg. p. 2. c. 20. 1 Wilſ. 128.

to confirm compoſitions entered into by conſent of the parſon, patron, and ordinary, though ſubſequent to the ſtatute; but only where they have appeared to be for the benefit of the church. But it ſhould appear from later deciſions (*a*), that even compoſitions confirmed by ſuch decrees are not binding againſt the ſucceeding incumbent.

(*a*) Attorney-General v. Cholmley, 3 Burn's E. L. 416. Ambl. 510. 6 Br. P. C. 332.

Mortimer v. Lloyd, 7 Br. P. C. 493. Cartwright v. Knowlton, *Scac.* 24 Apr. 1779.

Sawbridge v. Benton, Anſtr. 372.

A compoſition real commencing within time of memory, its commencement muſt be ſhewn: but it is not neceſſary to produce the actual deeds under which it took place. Preſumptions are admitted in this as in other caſes: and the exiſtence of ſuch deeds may be inferred from other evidence. It is not neceſſary, that the conſent of all the parties ſhould be by the ſame deed. This may frequently not happen: in the caſe of the king, who conſents by letters patent, it never can take place.

Robertſon v. Appleton, *Scac.* 22 Feb. 1777. cited in Anſtr. 375.

But a compoſition real is not ſupported by evidence of immemorial payment.

Of a Suit in a Court of Equity for Tythes.

See 5 Ves. Jun. 221.

See the argument for the appellant in the caſe of Barnard v. Garmons, Dom. Proc. June 3, 1797.

THE right of a court of equity to decree an account and payment of tythes, at the ſuit of a perſon claiming ſuch tythes, muſt be grounded on a clear, unqueſtionable, legal right to tythes in the plaintiff, or in ſome perſon in truſt for him; *the right to the account being merely conſequential to the legal right to the tythes.* The courts of equity have therefore conſtantly made a diſtinction between thoſe caſes, in which the title of the plaintiff to the tythes claimed is not generally diſputed, but it is objected only that the lands from which they are claimed are exempt or diſcharged from payment of tythes; or, that the tythes claimed are not payable in kind, but are to be ſatisfied in ſome other manner, as by payment of a modus or compoſition real; and thoſe caſes, in which the title to the tythes claimed is denied to the plaintiff, and a title is ſet up in another perſon. In the firſt deſcription of caſes, the defendant claiming the benefit of an exemption, or diſcharge, or of a modus, or real compoſition, acknowledges the original title of the plaintiff, as alleged by him, but qualifies that title, either by an abſolute diſcharge from payment of the tythes demanded, or by a right to ſatisfy that demand, otherwiſe than by payment of the tythes in kind. In the ſecond deſcription of caſes, the exiſtence of that title to the tythes in queſtion is abſolutely and totally denied, and it is objected, that the title is in ſome other perſon: and in theſe caſes, if the perſon in whom the title is thus ſtated, has had the pernancy of the tythes claimed, the bill is in effect an ejectment bill; and where the legal title of the plaintiff is diſputed on bills, which may be properly called ejectment bills, it is not the ordinary practice of courts of equity,

to make any decree whatever, except for the purpoſe of aſſiſting the trial at law, where ſuch aſſiſtance may be neceſſary. Thus, where a bill was filed by Dr. *Scott*, as Rector of *Simonburne*, claiming tythes of corn and hay againſt the defendants, ſeveral of whom were occupiers of lands within the pariſh, and the *Aireys* were owners of part of the lands, and claimed the tythes of corn and hay of their own lands, and of thoſe occupied by the other defendants; and it appeared that the *Aireys*, and thoſe under whom they claimed, had received the tythes in queſtion, and made them the ſubject of ſettlement for above 160 years, although they could ſhew no original, lawful title to ſuch tythes; the court of Exchequer diſmiſſed the bill, refuſing to give the rector any relief, until he had eſtabliſhed his title to the tythes at law. And in *Edwards* v. Lord *Vernon*, *Hil.* 21 *G.* 3. where, to a bill by the ſpiritual rector, the defence ſet up was, a title to the tythes under family ſettlements, and poſſeſſion for ſeventy-one years, the court of Exchequer followed the authority of *Scott* v. *Airey*, and diſmiſſed the bill with coſts.

Scott v. Airey, Tr. 19 G. 3.

See alſo Strutt v. Baker, 2 Vez. jun. 625.

In a ſubſequent caſe, where Sir *Joſeph Mawbey* claimed, as impropriate rector, tythes of land, of which ſome of the defendants alſo claimed the tythes; it was objected, that the plaintiff's title was a legal title, and that he muſt firſt demand the tythes at law. The court of Exchequer ſaid, it was a queſtion of title, the evidence of poſſeſſion was doubtful, and a court of equity would therefore not make any decree till the right had been ſettled at law, the account prayed being merely conſequential to the right; and the proper tribunal for the trial of right, if the poſſeſſion was equivocal, and for conſtruction of deeds under which parties claimed, was a court of law: and although the counſel for the plaintiff preſſed to have an iſſue directed, in order to have the right tried at law, with the aſſiſtance of the court, the court refuſed it, and diſmiſſed the bill.

Mawbey v. Edmead, Hil. 24 G. 3.

To a claim by a vicar of the tythe of hay under an endowment, the defendants, the terre-tenants, ſet up a payment to the vicar in lieu of ſuch tythe. This was holden by the court of Exchequer to be a bad modus, and they thereupon gave judgment for an account of tythes, conſidering the vicar's claim as eſtabliſhed by the payments. But upon a writ of error the Houſe of Lords directed an iſſue to try the nature of the payments; Lord *Mansfield* declaring his opinion that on a vicar's title being diſputed, unleſs it is perfectly clear, a court of equity ought not to make a decree without having the fact aſcertained by a jury.

Travis v. Oxton, Anſtr. 308. 2 Raym. 762.

Where a vicar ſued for all ſmall tythes under an endowment, which he produced, and alſo gave in evidence a decree in the Exchequer for an account of all ſmall tythes in a ſuit by his predeceſſor, in the reign of *Charles* the Firſt, yet as the endowment was not ſupported by uſage, *&c.* the decree was not binding, the patron not being a party, and as it had never been acted under, the court of Exchequer thought the caſe not ſo clear as to warrant a decree in favour of the vicar, and directed an iſſue to try,

Carr v. Henton, Anſtr. 313.

Mar. 5, 1788. whether he was entitled under the endowment or not; and that decision was affirmed in the House of Lords.

See the case Garnons v. Barnard, Anstr. 296. and printed case in the House of Lords, June 3, 1797. Bantley v. Walters, 1 Wilf. 170.

The account being consequential to the legal title, and a rector having *primâ facie* the title to all the tythes in him, it should seem to follow, that in questions between the rector and vicar, a court of equity cannot make a decree in derogation of the rector's title, merely as consequential to the legal title of the vicar, until that title has been established by the decision of a jury, unless it be most clearly and satisfactorily made out. Perhaps it may be questioned, whether a court of equity can decide between rector and vicar, that the former has no title, however clear the proofs may be against it, without the intervention of a jury, if the rector insist upon referring it to that tribunal, any more than they can make a decree without reference to a jury, where the rector demands such a reference, in a question of modus between the rector and the owner or occupier of the land. For the *primâ facie* title which gives the rector a right to the discussion of the question in a court of law in the one case, should seem to give him the like right in the other case. A vicar should appear to be as much bound to make out his title against that of his rector by pleading and by evidence, as an occupier is to make out his exemption or qualification: they both alike claim in derogation of a common law right.

It has indeed been urged, that a decree in favour of the vicar for an account does not bind the right, and therefore it is not necessary for the court to direct an issue. But it may be very much doubted, whether such a decree would not in effect bind the right. For the distinction which has been set up between decrees binding the right, and decrees not binding the right, has been confined to a very different case, namely, where a defendant sets up a defence by way of modus to a bill for tythes, which prays an establishment of the right, as well as an account; and the defendant in his answer has made some mistake in laying the modus, so that the court cannot upon those pleadings direct an issue. There, the court, unable to direct an issue, for want of sufficient matter on the record, has made a decree for an account only, to give the defendant an opportunity of trying his title upon a future suit. And most clearly such a decree cannot be pleaded in bar to a bill for establishing the modus. But if the decree for an account does not in general bind the right, then this absurdity might follow, that the court might from time to time make similar decrees, without directing any issue to try the fact of title, upon the allegation that no one of such decrees actually binds the right.

Collins v. Gough, Dom. Proc. 16 Feb. 1785.

Canons of St. Paul's v. Crickett, 2 Vez. jun. 563.

A suit may be maintained in a court of equity for an account of tythes in *London*, notwithstanding the statute and decree of 37 *H.* 8. *c.* 12. for an act of parliament creating a special jurisdiction never ousts the jurisdiction of the courts of *Westminster-hall*. Nor is it true, that if a statute creates a new right, one can not go beyond it: for if a statute creates a new right, it creates a

new

new duty: if the performance of that duty requires the interference of a court of equity, the execution of the ſtatute muſt of courſe be with the neceſſary circumſtances.

In laying a modus in an anſwer, very great preciſion is not required: the courts are not over-curious, for this plain reaſon, that the defendant is obliged to put in his anſwer in a limited time, and perhaps may not be ſo far prepared as to be able to ſtate his right diſtinctly. It is ſufficient, therefore, if he ſo ſtate it, as to give the plaintiff notice of the general nature of his defence. A redundancy of expreſſion will not vitiate: unneceſſary words which would make it indefinite have been expunged. Atkyns v. Lord Willoughby de Broke, Anſtr. 397. Baker v. Athill, *Id.* 493. Ellis v. Saul, *Id.* 341. Clarke v. Jennings, *Id.* 498.

Of a Suit in a Court of Equity to eſtabliſh a Modus.

IF an action is brought by the leſſee of tythes for ſubtraction, it is a ſufficient ground for filing a bill to eſtabliſh a modus. Lord Stawell v. Atkyns, Anſtr. 564.

But a bill to eſtabliſh a modus will not lie where there has been no ſuit for tythes in kind. Lord Coventry v. Burſlem, Anſt. 567. *n.* Woolaſton v. Wright, *Id.* 801.

A bill to eſtabliſh a farm modus, ſetting forth the abuttals of the farm, and averring that the modus had immemorially been paid for the *ſaid* farm, is ſufficient, without expreſsly averring it to be an ancient farm. Lord Stawell v. Atkyns, Anſtr. 564.

But a bill to eſtabliſh a modus for every ancient farm, ſtating the whole pariſh to conſiſt of ancient farms, but not ſetting forth the abuttals of each, is bad. Scott v. Allgood, Anſtr. 36.

Verdict.

THE death of the defendant between the commiſſion day and day of trial will not affect the validity of the verdict, and of courſe is no ground for ſetting it aſide: for the verdict, though given on a ſubſequent day, refers to the commiſſion day: the whole time is in law but one day: it is therefore within the 17 *Car.* 2. *c.* 8. Jacobs v. Miniconi, 7 Term Rep. 31.

Viſne or Venue.

(A) In what Caſes Venue is neceſſary.

Neale v. De Garay, 7 Term Rep. 243.

IN a plea of abatement that another perſon ought to have been ſued with the defendant, it is not neceſſary to lay a venue. And ſuch plea being good without a venue, of courſe the laying the facts in a foreign country will not vitiate it.

(B) What ſhall be deemed a proper laying of the Venue.

Attorney-General v. Ferres, *Scac.* Hil. 37 G. 3.

THE venue of an information on the 24 *G.* 3. *c.* 19. for exerciſing the trade and miſtery both of a tanner and a ſhoemaker, need not be laid in the county where the offence was committed. For though this was originally prohibited by the 1 *Ja.* 1. *c.* 22., and by the 21 *Ja.* 1. *c.* 4., all offences againſt prior penal ſtatutes muſt be laid in their proper counties; and the 9 *Ann. c.* 11. and the 24 *G.* 3. *c.* 19., re-enact the proviſions of the 1 *Ja.* 1. *c.* 22.; ſo that the action ſhould in truth ſeem to be brought upon that ſtatute; yet the different views of the ſtatutes of 9 *Ann.* and 24 *G.* 3. their extended operation, difference of expreſſion, and new penalties, negative the idea of theſe latter ſtatutes being merely referable to the former, or merely a continuance of it, eſpecially too in a ſuit ſeeking a penalty under the laſt ſtatute.

(C) Of changing the Venue.

Calland v. Champion, 7 Term Rep. 205.

IF the venue be changed from *A.* to *B.* on the uſual affidavit that the cauſe of action aroſe wholly in *B.*, when in fact part of the cauſe of action aroſe in another county, the court will order the venue to be brought back to *A.*

Uſury.

Maddock v. Hammett, 7 Term Rep. 184.

IF a promiſſory note be given for the payment of a ſum lent with uſurious intereſt, and the note, when due, be taken up, and another note be ſubſtituted for it, the offence of uſury is not thereby committed, nor is the penalty incurred till the latter note be paid.

A. re-

A. reſiding at *Portſmouth*, drew a bill for 600 *l.* on *S.* in *London*. The bill was payable to the defendants, who were bankers in *Portſmouth*, or order, thirty days after date, and immediately after it was drawn, it was taken to the defendants, who gave their note for 600*l.* payable three days after ſight at a houſe in *London*. For this the defendants received a diſcount of 5 *l. per cent.* calculating on the thirty days the bill had to run, but making no deduction on account of the three days the note had to run after ſight, or of the three days grace which the bankers took thereon. Lord *Kenyon* ſaid, he was clearly of opinion, that this was a uſurious contract, whether the perſon diſcounting the bill choſe to receive a note or money. If *A.* choſe to have a note payable in town, the defendants ſhould not have taken intereſt for the time that note had to run, but ſhould have computed their intereſt from the time it was payable. Matthews v. Griffiths, Peake's Ni. Pri. Caſ. 200.

Warrant of Attorney.

IT ſhould ſeem from a late deciſion, that the court will in no caſe allow of any infringement of the rules which require the preſence of defendant's attorney, when he executes a warrant of attorney in cuſtody. Hutſon v. Hutſon, 7 Term Rep. 7.

But theſe rules do not extend to warrants of attorney executed by perſons in execution. Their object was the protection of perſons in cuſtody on *meſne proceſs*, from the conſequences of an act by which in conſideration of being releaſed from immediate impriſonment, they might ſubject themſelves to the payment of a larger ſum than was really due from them. But when they are charged in execution, that miſchief is not to be apprehended; and therefore the rules do not apply to ſuch a caſe. Crompton v. Steward, 7 Term Rep. 19.

A TABLE

A

TABLE

OF THE

NAMES OF THE CASES,

ALPHABETICALLY DISPOSED.

☞ *The* Numerals *refer to the* Volume, *and the* Figures *to the* Page.

A.

ABBOT *v.* Chapman, vol. i. p. 42.
—— *v.* Plumbe, i. 442.
—— *v.* Smith, i. 19. v. 375.
Abdy's caſe, i. 685. v. 610.
Abergavenny's caſe, ii. 700. v. 862.
Aberyſtwith's caſe, iv. 514.
Ablet *v.* Skinner, vii. 28.
Abney *v.* Miller, vii. 345.
Abraham *v.* Bubb, ii. 557. vii. 287. 290.
Abrahams *v.* Bunns, vii. 213.
Aby *v.* Buxton, vi. 420.
Acherley *v.* Acherley, vii. 142.
—— *v.* Vernon, vii. 322, 323.
Acheſon *v.* Fountaine, iv. 709.
Ackland *v.* Ackland, iv. 253.
Ackroyd *v.* Smithſon, iv. 390. vii. 142. 144.
—— *v.* Twigg, ii. 543.
Ackworth *v.* Ackworth, iv. 382.
—— *v.* Kempe, vi. 156.
Acton *v.* Baldwin, iii. 247.
—— *v.* Hare, v. 750.
—— *v.* Pierce, v. 34.
Adam *v.* Richards, vii. 386.
Adams, *ex parte*, i. 454.
—— *v.* Adams, i. 317. vii. 120.
—— *v.* Broughton, vi. 679.
—— *v.* Buckland, iii. 56.
—— *v.* Cole, i. 480.
—— *v.* Freeman, vi. 610.
—— *v.* Hewitt, iv. 54.
—— *v.* Hutton, vi. 688.
—— *v.* Ruſh, i. 605.
—— *v.* Savage, iii. 38. v. 727. vii. 127.
—— *v.* Tomlinſon, vi. 420.
—— *v.* Weare, i. 109.
Adderley *v.* Wiſe, i. 151.
Addis *v.* Clement, iv. 241.
Addiſon *v.* Gray, i. 283.
Adlam *v.* Greenaway, vii. 421.
Agard *v.* Standiſh, vi. 392.
Aggas *v.* Pickerell, v. 91.
Aglionby *v.* Towerſon, v. 344. 408.
Aier *v.* Redgwit, vi. 226.
Aileſbury's (Lord) caſe, vii. 336.
Ailoffe *v.* Scrimſhire, v. 423. 683.
Ailſbury *v.* Harvey, v. 433.

Aiſcough,

Aiſcough, *ex parte*, i. 515.
Aiſh *v.* Geriſh, vi. 232.
Akerry *v.* Williams, i. 440.
Alanſon *v.* Brookbank, iii. 476.
Alban *v.* Pritchett, vii. 455.
Albany *v.* Manny, v. 698.
Alchin *v.* Wells, iii. 122.
Alcinbrook *v.* Hall, i. 276. iii. 343.
Alcock's caſe, vi. 511.
Alcock v. Sparhawk, iv. 283. vii. 138.
Alden's caſe, ii. 221.
Alderſon *v.* Dodding, vi. 462.
——— *v.* Temple, i. 436.
Aldred *v.* Mathew, vi. 643.
Aldrich's caſe, iv. 53.
Aldrich *v.* Welthal, v. 362.
Aldridge *v.* Snowden, vi. 118.
——— *v.* Strafford, vii. 58.
Aleberry *v.* Walby, i. 501. v. 337. 340.
Aleworth *v.* Roberts, ii. 394.
Alexander *v.* Alexander, i. 317. iv. 340.
——— *v.* Comber, i. 123. vi. 682.
——— *v.* Dyer, ii. 338.
——— *v.* Graham, iii. 59.
——— *v.* Maccaulay, ii. 528.
——— *v.* Vaughan, i. 393.
Allam *v.* Heber, iii. 462. iv. 316.
Allan *v.* Hartley, i. 460.
—— *v.* Tapp, ii. 635.
Allanſon *v.* Clitherow, iv. 265.
Allen's caſe, i, 662. vi. 617. vii. 120.
Allen, *ex parte*, i. 456.
—— *v.* Allen, iv. 248.
—— *v.* Andrews, vi. 452.
—— *v.* Dockwra, iv. 726.
—— *v.* Dundas, i. 261. iii. 34.
—— *v.* Eaton, vi. 215.
—— *v.* Grey, v. 403. vi. 638.
—— *v.* Griffiths, i. 59.
—— *v.* Harris, i. 43. vi. 702.
—— *v.* Holden, iii. 466.
—— *v.* Maxey, ii. 45.
—— *v.* Naſh, v. 786.
—— *v.* Palmer, v. 729.
—— *v.* Papworth, i. 507.
—— *v.* Poulton, i. 726.
—— *v.* Randall, v. 342.
—— *v.* Rivington, v. 797.
—— *v.* Sayer, iii. 213. 587.
—— *v.* Walter, ii. 389.
—— *v.* Wittingham, ii. 422.
Alleſley *v.* Manduit, vi. 211. 240.
Alleſton *v.* Moor, vi. 213. 217.
Alleyn *v.* Alleyn, iv 379
Allgood *v.* Withers, vii. 176.
Almanzor *v.* Davilack, i. 329.
Alſept *v.* Eyles, vii. 454.
Alſop's caſe.
Alſop *v.* Brown, ii. 459.
——— *v.* Patten, i. 120.
——— *v.* Pine, iv. 152.
——— *v.* Price, i. 425. 452.
——— *v.* Senior, i. 208.
Alſtone *v.* Hutchinſon, vi. 613. 622.
Altham's caſe, ii. 384.
Altham (Lord) *v.* Angleſea (Lord), ii. 592. iii. 231.
Alves *v.* Hodgſon, vii. 515.
Alwaies *v.* Brown, vi. 452.
Ambroſe *v.* Ambroſe, vii. 143.
——— *v.* Clendon, i. 402.
——— *v.* Hogſon, i. 109.
Amcot *v.* Amcot, iii. 293.
Amcotts *v.* Catherick, ii. 372.
Amhurſt's caſe, iv. 509.
Amhurſt *v.* Dowling, iii. 654, 655. v. 104.
——— *v.* Litton, i. 16.
Amies *v.* Stephens, i. 555.
Amion *v.* Shore, i. 244.
Amner *v.* Luddington. vii. 303.
Amos *v.* Hamar, iv. 418.
Amſon *v.* Walcot, v. 395.
Ancaſter (Duke of) *v.* Mayer, iii. 85. v. 28.
Ancell *v.* Sloman, ii. 52.
Ancher *v.* Bank of England, iv. 712.
Anderſon's caſe.
Anderſon *v.* Anderſon, v. 449.
——— *v.* Collard, i. 186.
——— *v.* Edie, iv. 674.
Anderton *v.* Cooke, iii. 85.
Andrée *v.* Fletcher, i. 262. iv. 660. 670.
Andrew *v.* Clark, iii. 67.
——— *v.* Southouſe, iv. 252.
Andrews's caſe.
Andrews, *ex parte*, i. 438.
——— *v.* Blake, ii. 276.
——— *v.* Brown, iv. 484.
——— *v.* Cradock, iii. 412. 620.
——— *v.* Franklin, iv. 697.
——— *v.* Partington, iv. 443.
——— *v.* Sharpe, i. 284.
——— *v.* Shovell, i. 300.
Angel *v.* Draper, v. 36.
Anger *v.* Wilkins, ii. 270.
Angier *v.* Angier, i. 494. 505.
Ankerſtein *v.* Clarke, i. 501.
Annandale (Marchioneſs), *ex parte*, iii. 529. 531. 541.
Annandale *v.* Harris, i. 112. ii. 647.
Anniſon *v.* Bofield, vi. 223.
Anſel *v.* Evans, vii. 393.

Anſley *v.* Chapman, iv. 251.
Anſley *v.* Dowſing, vii. 330.
Anthorne *v.* Fiſher, i. 139, 140.
Aplyn *v.* Brewer, iii. 31.
Appleby *v.* Biddulph, iv. 697.
Appleford's caſe, ii. 28.
Appleton *v.* Sweetapple, iv. 726.
Appleyard *v.* Wood, vii. 316.
Apſey, *ex parte*, i. 463.
Archbold *v.* Cooke, iv. 196.
Archer's caſe, iv. 260. 331. v. 747.
Archer *v.* Bennet, iii. 398.
——— *v.* Moſſe, vii. 381.
Archdeacon *v.* Frowde, iii. 617.
——— *v.* Jennor, vii. 254.
——— *v.* Snapp, iv. 221.
Arden *v.* Lamley, ii. 462. vi. 425.
Argent *v.* Dean and Chapter of St. Paul's, ii. 11.
Argol *v.* Chemay, vii. 88.
Argyle *v.* Hunt, ii. 246.
Arkley, *ex parte*, i. 414.
Armiger *v.* Norwich (Biſhop) and Holland, iv. 72.
Armington's caſe, iii. 442.
Armiſtead *v.* Philpot, ii. 715.
Armory *v.* Delamere, vi. 685.
Armſtrong, *ex parte*, iii. 532.
——— *v.* Eldridge, iii. 679.
Arnitt *v.* Breame, i. 235.
Arnold *v.* Arnold, vii. 366.
——— *v.* Baas, v. 175.
——— *v.* Blencowe, iii. 43.
——— *v.* Chapman, i. 596. vii. 142. 144.
——— *v.* Jefferſon, vi. 701.
——— *v.* Kempſtead, ii. 383. iii. 716.
——— *v.* Pole, i. 217.
Arras's caſe, ii. 6.
Arris *v.* Stukeley, i. 260. v. 205.
Arthington *v.* Coverley, iii. 416.
Artis, *ex parte*, i. 417.
Arundel's (Lady) caſe, ii. 376.
Arundel *v.* Arundel, iii. 217.
——— *v.* Knight, iii. 468.
——— *v.* Sanders, v. 391.
——— *v.* Trevil, iv. 485. vi. 73.
——— *v.* Wytham, ii. 515.
Aſcue *v.* Saunderſon, vi. 702.
Aſh *v.* Aſh, vi. 666.
—— *v.* Gallen, vi. 121.
Aſhburner *v.* Macguire, iv. 356. 360. 425.
Aſhburnham *v.* Bradſhaw, i. 594.
Aſhby *v.* White, i. 92. ii. 120. v. 626.
Aſhcomb *v.* Elthorn Hundred, iii. 512.
Aſhenhurſt *v.* James, v. 110.
Aſhfield *v.* Aſhfield, iv. 134.
Aſhley *v.* Aſhley, vi. 664.
——— *v.* Baillie, ii. 580. v. 73.
——— *v.* Kell, i. 438.
Aſhmead *v.* Ranger, vi. 592.
Aſhpole's caſe, iii. 510.
Aſhton *v.* Aſhton, i. 494. iv. 271. 356. 425. vii. 176.
——— *v.* Dawſon, iv. 338.
Aſkew *v.* Poulterers' Company, iii. 649.
Aſlin *v.* Parkin, vi. 625.
Aſpey, *ex parte*, vii. 395.
Aſplin *v.* Conſtable, ii. 45.
Aſſer *v.* Finch, ii. 39.
Aſſimwall *v.* Leigh, vii. 288.
After *v.* Mazeen, ii. 85.
Aſtley *v.* Reynolds, i. 262.
—— *v.* Tankerville (Earl), i. 497.
Aſton *v.* Aſton, iii. 649. iv. 420. vii. 292. 297.
Aſtry's caſe, vi. 645.
Aſtry *v.* Balard, vi. 117.
Atherford *v.* Beard, iii. 335.
Atherton *v.* Pye, iv. 291. v. 820.
Athrington *v.* Cheſter (Biſhop), iii. 394.
Atkin *v.* Barwick, i. 438.
Atkins *v.* Atkins, iv. 326.
——— *v.* Gardener, ii. 15. 724. vi. 104.
——— *v.* Hiccocks, iv. 398.
——— *v.* Hill, iv. 446.
——— *v.* Taylor, vi. 478.
——— *v.* Waterſon, ii. 255.
——— *v.* Wheeler, vi. 701.
——— *v.* Willoughby de Broke, vii. 517. 521.
——— *v.* Yelton, vii. 455.
Atkinſon, *ex parte*, i. 425. v. 448.
——— *v.* Atkinſon, v. 175.
——— *v.* Coatſworth, v. 430.
——— *v.* Folkes, iv. 97.
——— *v.* Hunter, vi. 599.
——— *v.* Hutchinſon, iv. 310.
——— *v.* Jackſon, ii. 42.
——— *v.* Jameſon, iii. 476.
——— *v.* Leonard, v. 524.
——— *v.* Maling, i. 435.
——— *v.* Treſdale, i. 625.
——— *v.* Webb, iv. 367.
Atterſon *v.* Vernon, i. 425.
Attorney-General *v.* Andrews, ii. 712. 735.
——— ——— *v.* Baden, v. 230.
——— ——— *v.* Baxter, i. 582.
——— ——— *v.* Bayley, iv. 312.
——— ——— *v.* Blood, iii. 751.
——— ——— *v.* Boultie, vii. 415.

Attorney-

Attorney-General v. Bowles, i. 595.
——— v. Breton, i. 581.
——— v. Brown, vi. 291.
——— v. Browſe, vii. 51.
——— v. Buckland, iv. 350.
——— v. Buckley, i. 14.
——— v. Bury, iv. 350.
——— v. Caldwell, i. 596.
——— v. Chelſea Water Works (Governors), vi. 382. vii. 347.
——— v. Cheſter (Biſhop), i. 586. 593.
——— v. Chomley, vi. 744. vii. 518.
——— v. Clark, i. 584.
——— v. Cock, iii. 484.
——— v. Coventry (Mayor), i. 587.
——— v. Criſpin, iv. 346.
——— v. Crofts, v. 37.
——— v. Day, i. 116, 117. ii. 16. vi. 10.
——— v. Doughty, iii. 651.
——— v. Downing, i. 583. vii. 321.
——— v. Dupleſſis, i. 132. v. 565.
——— v. Farmer, v. 495.
——— v. Farnham Town, v. 474.
——— v. Ferres, vii. 522.
——— v. Freeman, v. 229.
——— v. Gill, iv. 260.
——— v. Glegg, i. 586.
——— v. Goulding, i. 587. vii. 415.
——— v. Graves, i. 596.
——— v. Guiſe, i. 582.
——— v. Harrow School Governors, i. 588.
——— v. Hartley, i. 592.
——— v. Hartwell, i. 592.
——— v. Heathe, v. 234.
——— v. Henderſon, vii. 390.
——— v. Herrick, i. 584.
——— v. Hickman, i. 586.
——— v. Hindlay, vii. 186.
——— v. Hird, iv. 386.
——— v. Hutchiſon, vi. 398.
——— v. Hyde, i. 595.
——— v. Johnſon, i. 587.
——— v. Iſlington Overſeers, v. 110.
——— v. Lock, ii. 28.
——— v. London City, i. 588.
Attorney-General v. Loyd, vii. 353.
——— v. Meyrick, i. 595.
——— v. Middleton, ii. 28.
——— v. Milner, iv. 408.
——— v. Naſh, i. 595.
——— v. Oglander, i. 589.
——— v. Oxford (Biſhop), i. 587. vii. 415.
——— v. Panther, iii. 540.
——— v. Perkin, iv. 356. 358.
——— v. Rance, i. 584.
——— v. Randall, vii. 183.
——— v. Read, vi. 140.
——— v. Rigby, i. 587.
——— v. Rocheſter Corporation, i. 584.
——— v. Sands, vii. 81. 123. 186.
——— v. Sawtell. i. 583.
——— v. Scott, ii. 361.
——— v. Senior, i. 437.
——— v. Smith, iv. 240.
——— v. Stawell, v. 605.
——— v. Stephens, i. 588.
——— v. Straite, vi. 768.
——— v. Sutton, iv. 268.
——— v. Syderfin, i. 585.
——— v. Talbot, i. 3. ii. 29.
——— v. Thompſon, iv. 436.
——— v. Thruxton, v. 497.
——— v. Tonna, i. 587.
——— v. Tyndall, i. 590. 595.
——— v. Vincent, vi. 767.
——— v. Weeden & Shales, i. 104.
——— v. Weymouth (Lord), i. 565. vii. 419.
——— v. Wheeden, v. 564.
——— v. Whitchurch, vii. 415.
——— v. Williams, i. 595.
——— v. Winchelſea (Earl) i. 587.
Atterton v. Harwood, vi. 156.
Atwood's caſe, ii. 582.
Avarello v. Rogers, vi. 243.
Aubert v. Hardcaſtle, vi. 670.
Aubrey v. James, i. 247. v. 399.
Audley's (Lady) caſe, v. 447.
——— Lord) caſe, ii. 578.
Audley v. Dudley, iii. 530. iv. 83.
——— v. Halſey, i. 436.
Avery v. Hoole, vii. 43.
Avis v. Gennis, vi. 623.
Auriol v. Thomas, iv. 731. vii. 196.

Auſtin v. Bennett, iii. 491.
—— v. Dodwell's executors, v. 111. vi. 450. 459.
—— v. Hilliars, ii. 275.
—— v. Jervoiſe, i. 280.
—— v. Lucas, vi. 722.
—— v. Pigot, vi. 765.
—— v. Roſs, vi. 470.
—— v. Taylor, iv. 276.
—— v. Whitehead, vii. 405.
Avelyn v. Ward, iv. 425.
Ayer v. Aden, vi. 691.
—— v. Ome, iv. 124.
Aylesford's (Earl) caſe, i. 121.
Aylett v. Dodd, i. 589.
—— v. Harford, i. 415. 420.
—— v. Jewel, vi. 669.
—— v. Lowe, ii. 287. v. 350.
Ayliffe v. Murray, vii. 180.
Aylor v. Chep, iii. 677.
Ayre v. Aden, ii. 735.
Ayres v. Falkland, v. 722.
—— v. Hardreſs, vi. 107.
—— v. Willis, ii. 383. iii. 716.
Ayton v. Ayton, iv. 343.

B.

Babington v. Greenwood, i. 113.
—— v. Warner, iii. 578.
—— v. Wood, vi. 192.
Bache v. Proctor, v. 171.
Backhouſe v. Middleton, ii. 626. vii. 185.
—— v. Wells, iv. 273.
Backwell v. Child, iv. 359, vii. 378.
Bacon v. Bryant, i. 480. iii. 55.
—— v. Clerk, v. 110.
—— v. Dubarry, i. 208. 223.
—— v. Hill, iv. 251. v. 789.
—— v. Searles, iv. 721.
—— v. Waller, iv. 59.
Baddeley v. Adams, i. 338.
—— v. Leppingwell, iv. 252.
Badger v. Floyd, vi. 419.
Badham v. Odell, v. 106, 107.
Badrick v. Stevens, iv. 360.
Bage v. Bromwell, i. 52.
Bagg's caſe, ii. 19 21. 25. iv. 500. 521.
Bagley v. Jenner, vi. 333.
Bagnall v. Sacheverell, vii. 23.
—— v. Tucker, v. 832.
Bagot v. Oughton, i. 497. iii. 86. iv. 147.
Bagſhaw v. Boſsley, vi. 192.
—— v. Goward, vi. 680.
Bagſhaw v. Playn, ii. 276.
—— v. Spencer, iv. 270. vii. 177.
Bailes v. Wenman, iv. 182.
Bailey v. Bourn, iv. 510.
—— v. Bunning, v. 428. vi. 590.
—— v. Dillon, i. 331.
—— v. Garford, v. 168.
—— v. Leominſter Corporation, iv. 237.
—— v. Mundy, iv. 91.
—— v. Murin, iv. 67. vi. 382.
—— v. Raby, vi. 507.
—— v. Robſon, v. 83.
—— v. Vivaſh, vi. 482.
—— v. Warburton, iv. 150.
—— v. Wilkinſon, v. 142.
—— v. Worrall, vi. 766.
Baillie's (Joan) caſe, iii. 12.
Baillie v. Modigliani, iv. 640.
—— v. Willon, iv. 587.
Baillis v. Gale, iv. 283.
Bainbridge v. Pickering, iii. 595.
Bainton's caſe, iii. 758.
Baker's caſe, i. 457. v. 128. 416. 466. vi. 731.
Baker v. Andrews, vi. 621.
—— v. Bailey, vii. 185.
—— v. Beresford, ii. 243.
—— v. Blackman, v. 392.
—— v. Dumareſque, v. 524.
—— v. Fairfax, ii. 592.
—— v. Fox, iii. 467.
—— v. Gough, i. 5.
—— v. Hacking, iv. 250. v. 855.
—— v. Hall, iv. 333.
—— v. Lenthal, v. 625.
—— v. Lloyd, iii. 314.
—— v. Miles, vi. 661.
—— v. Morſeu, vi. 216.
—— v. Morley, iv. 553.
—— v. Mounford, vi. 191.
—— v. Paine, ii. 654.
—— v. Pierce, vi. 235. 240.
—— v. Rocheſter, i. 230.
—— v. Rogers, vi. 191. 200. 639.
—— v. Sweet, vi. 717.
—— v. Thompſon, ii. 490.
—— v. Wall, iv. 333. v. 745.
Balch v. Waſtall, v. 231.
Baldee v. Eler, v. 174.
Balder v. Blackbourn, iv. 142.
Baldwin's caſe, iii. 159, 160. 685.
Baldwin v. Baniſter, v. 89.
—— v. Boulter, i. 109.
—— v. Cole, vi. 696.
—— v. Foote, vi. 427.

Baldwin v. Geery, vi. 762. 766.
——— v. Johnſon, iii. 695.
——— v. Karver, iv. 345.
——— v. Rochford, iii. 30-.
——— v. Tudge, vii. 438.
——— v. Wiſeman, v. 786.
Bale v. Coleman, iv. 275. vii. 179.
—— v. Newton, iii. 313.
—— v Smith, iii. 68.
Balfour v Scott, vii. 462.
Ba.guy v Hamilton, iv. 311.
Ball v. Bridges, vi. 233.
——— v Cobus, iv. 573.
—— v Dunſterville, v. 160.
—— v. Herbert, iii. 494. vi. 583.
—— v. Smith, iii. 75.
Ballantine v Goulding, i. 457.
——— v Irwin, vi. 149.
Ballard v. Ballard, i. 709.
——— v Gerrard, iii. 126.
——— v. Oddie, vii. 194.
Ballet v Spranger, v. 31.
Ballow's caſe, vi. 552.
Balls v. Atwood, i. 66.
Bally v. Wells, ii. 70.
Balry v. Johnſon, ii. 520.
Balſh v Hyham, vii. 180.
Balſton v. Baxter, i. 42.
Balſtrode v. Bradley, v. 107.
Baltinglaſs's caſe, vi. 646.
Bamford v Baron, i. 395. 434.
Bampfield v. Popham, vii. 349.
——— v Wyndham, iii. 85.
Banbury v. Liſſett, iv. 636. 698.
Baniſter v Kennedy. ii. 471.
Bankers' (the) caſe, ii. 482. v. 580.
Bankes, *ex parte*, i. 461.
—— v. Allen, vi. 216.
——— v. Colwell, iv. 707.
Barbe v. Parkere, vii 213.
Barber v. Dennis, iv. 582.
——— v. Fletcher, iv. 654.
——— v. Fox, ii. 69.
——— v Nunn, iii. 193.
——— v. Palmer, v. 479 625. vii. 399.
——— v. Pomrey, ii. 496. v. 350.
Barber-Surgeons of London v. Pelſon, i. 260.
Barbuit's caſe, i. 144.
Barclay—See Berkley.
Barefoot v Fry, iii. 652.
——— v. Reynolds, i. 246.
Barham's caſe, vi. 209. 233. 249.
Barham v. Dennis, vi. 561.
Barjeau v. Walmſley, i. 276. iii. 343.
Bark v. Zouch, vii. 377.
Barker v. Boucher, iii. 59.
——— v. Braham, iii. 296.
——— v. Butler, i. 306.
——— v. Cocker, ii. 235.
——— v. Dumeres, iii. 83.
——— v Giles, iii 687.
——— v Hargreaves, vii. 422.
——— v. Holder, i. 114.
——— v Keate, iii. 231. v. 697.
——— v. Suretees, iv. 295.
——— v. Talcot, iii. 20.
——— v. Taylor, ii. 329.
——— v. Vanſommer, vii. 196.
Barkham v. Dorwine, iv. 369.
Barkhouſe's caſe, iv. 219.
Barkley—See Berkley.
Barlow v Bateman, iv. 419.
——— v. Evans, vi. 118.
——— v. Grant, iii. 410. iv. 396. 441.
Barn's caſe, v. 738.
Barnard's (Lord) caſe, iii. 650.
Barnard v. Large, vii. 159.
——— v. Saul, vii. 214.
——— v Simon, i. 265.
——— v Woodcock. iii. 246.
Barnardiſton v. Carter, vii. 366.
——— — v. Fane, i. 643.
——— — v. Fowler, i. 213.
——— — v Lingood, iii. 307.
——— — v Middleſex Sheriff, i. 341.
Barnehurſt v. Yelvertone, ii. 723. iii. 51.
Barnes v. Allen, i. 250. iv. 395.
——— v. Cary, ii. 509.
——— v. Crow, vii. 325.
——— v. Edgar, ii. 37.
——— v. Fletcher, v. 620.
——— v. Foley, i. 558.
——— v. Freeland, vii. 405.
——— v. Gary, vi. 167.
——— v. Hill, vi. 105.
——— v. Otway, vi. 424.
——— v. Peterſon, ii. 419.
——— v. Ranſom, v. 177.
——— v. Rich, ii. 390.
——— v Studd, vi. 228.
——— v. Trompowſky, vii. 456.
——— v. Ward, i. 298.
Barneſley, *ex parte*, iii. 525. 528.
——— v. Powell, i. 304. vii. 380.
Barnet v. Gomeſerra, i. 120.
——— v. Tomkins, i. 487.
Barney v. Tubb, vii. 439.
Baron v. Bury, ii. 591.
Barr, *ex parte*, i. 407.
Barraſs v. London Aſſurance Company, iv. 638.

Barrell *v.* Sabine, v. 8.
Barrett *v.* Barrett, vii. 251.
—— *v.* Beckford, iv. 379.
—— *v.* Buck, i. 144.
—— *v.* Reynell, vi. 189.
—— *v.* Scrimſhaw, vi. 66.
—— *v.* Wells, iii. 299. v. 82.
Barrington's (Sir Francis) caſe, v. 494.
Barrington *v.* Crane, vii. 96.
—— *v.* Potter, vii. 449.
—— —— *v.* Regem, v. 245. 247.
—— —— *v.* Turner, vi. 576.
—— —— *v.* Venables, v. 615.
Barrow *v.* Foſter, i. 394.
—— *v.* Gameam, iv. 325.
—— *v.* Gray, i. 274.
—— *v.* Greenough, vii. 139, 140.
—— *v.* Haggett, iii. 290. 292.
Barry *v.* Barry, vi. 117.
—— *v.* Bebbington, ii. 636.
—— *v.* Edgeworth, iv. 253, 254.
Bartholomew *v.* Belfield, iii. 210.
—— —— *v.* May, iii. 86.
—— —— *v.* Sherwood, i. 389.
Barthrop *v.* Weſt, v. 35.
Bartlett, *ex parte*, i. 425.
—— *v.* Holliſter, iv. 345.
—— *v.* Robins, ii. 36.
Barton's caſe, iii. 243. 245. v. 776.
Barton *v.* Bell, vi. 238.
—— *v.* Etherington, vii. 398.
—— *v.* Slattery, v. 15.
—— *v.* Wolliford, iv. 679.
Barwell *v.* Brookes, i. 386. 505.
—— *v.* Ward, i. 417. 439.
Barwicke *v.* Foſter, vi. 16.
—— —— *v.* Reede, i. 250.
Barwis *v.* Keppel, i. 97.
Barzillay *v.* Lewis, iv. 670.
Baſeley *v.* Clarkſon, vi. 481.
Baſkerville *v.* Brown, vi. 137.
Baſket *v.* Pierce, iii. 214.
Baſpole's caſe, i. 216. iv. 670.
Baſpole *v.* Long, v. 865.
Baſſe *v.* Firmen, ii. 57.
—— *v.* Grey, i. 113.
Baſſet *v.* Baſſet, vii. 287.
—— *v.* Clapham, vii. 155.
—— *v.* Godſchal, i. 88.
—— *v.* Morgan, vi. 638.
—— *v.* Perceval, iii. 86. v. 30.
—— *v.* Prowe, vii. 205.
—— *v.* Salter, ii. 516.
Baſtard *v.* Hancock, vi. 771.
—— *v.* Proby, iv. 272.
Batchelor *v.* Bigg, ii. 41. iv. 553.
Batchelor *v.* Gaze, ii. 85.
—— *v.* Searl, ii. 655. iii. 69. 71.
Bate, *ex parte*, i. 452.
—— *v.* Amherſt, iv. 330.
—— *v.* Crane, vi. 472.
Bateman's caſe, iii. 516. vi. 593.
Bateman, *ex parte*, i. 515.
—— *v.* Aiſtrup, vi. 716, 717.
—— *v.* Allen, v. 812.
—— *v.* Bateman, v. 33.
—— *v.* Fowler, vi. 598.
—— *v.* Murray, iv. 234.
—— *v.* Roach, iv. 399.
—— *v.* Woodcock, v. 395. 433.
Bates's caſe, ii. 364.
Bates *v.* Barry, i. 329.
—— *v.* Bates, v. 732.
—— *v.* Dandy, i. 479. 481.
—— *v.* Graham, iv. 629.
—— *v.* Graves, iii. 298. 322.
—— *v.* Lockwood, i. 13.
Bateſon *v.* Green, i. 621.
Bath (Earl of) *v.* Abney, i. 734.
—— *v.* Montague, iv. 150.
—— *v.* Sherwin, iii. 632.
Bath and Wells, Biſhop's caſe, iv. 173.
Bath and Wells (Biſhop of) *v.* Hippeſley, i. 208. iii. 603.
Batſon, *ex parte*, i. 435. 462.
—— *v.* Lindegreen, iii. 59. vii. 160.
Batt *v.* Beadley, vi. 622.
Baud's caſe, iii. 550.
Baudier, *ex parte*, i. 460.
Baugh *v.* Haines, iv. 69.
—— *v.* Phillips, vii. 26.
—— *v.* Read, iii. 350. 364. 382.
Bawderick *v.* Mackeller, vi. 188. 190.
Bawdes *v.* Amherſt, i. 119.
Bawdry *v.* Buſhel, vi. 750.
Baxter's caſe, i. 612.
Baxter *v.* Broome, iv. 297.
—— *v.* Dodſwell, i. 531.
—— *v.* Faulam, iv. 560. vi. 360.
Bayle *v.* Scarborough, v. 428.
Bayley—See Bailey.
Baylis *v.* Attorney-General, i. 585.
Baynes *v.* Belſon, iv. 149. 153.
Baynham *v.* Mathews, ii. 48. vii. 209.
Bayntine *v.* Sharp, vi. 600.
Baynum *v.* Baynum, vi. 440.
Bazing *v.* Skelton, vii. 51.
Beachcroft *v.* Broome, iv. 297.
Beachey *v.* Bowes, vi. 426.
Beake *v.* Kent, v. 400. vii. 23.
Beale *v.* Beale, i. 220. iv. 349.
—— *v.* Moor, ii. 39.

Beale *v.* Shephard, iv. 263.
Beamond—See Beaumont.
Bean *v.* Bloom, v. 335.
—— *v.* Newbury, i. 212. 216.
—— *v.* Stuport, iv. 668.
Bear *v.* Ballingſham, ii. 240.
Bearcroft, *ex parte*, i. 301.
—— *v.* Burnham and Stone Hundred, i. 167. iii. 517.
Beard *v.* Beard, i. 482. 508. vii. 366.
—— *v.* Nuthall, iii. 721.
Bearderſley *v.* Baldwin, iv. 657.
Beardmore *v.* Carrington, vi. 668.
—— *v.* Gilbert, vi. 742.
Beaſley *v.* Smith, iii. 422.
Beatniff *v.* Smith, iii. 301.
Beatſon *v.* Howard, iv. 662.
Beauclerk *v.* Dormer, iv. 306.
Beaudley *v.* Brooke, iii. 387.
Beaufage's caſe, vi. 182. 374.
Beaufort *v.* Barnes, iii. 411.
—— *v.* Bertie, iii. 411.
—— *v.* Dundonald, iv. 352.
Beaufoy, *ex parte*, i. 421.
Beaumont *v.* ——, vii. 221.
—— *v.* Dean, ii. 374.
—— *v.* Fell, vii. 456.
—— *v.* Haſtings, vi. 213. 232.
—— *v.* Long, ii. 723. iv. 331. v. 744.
—— *v.* Pine, vi. 358.
—— *v.* Wigſton Hoſpital, ii. 191.
Beavers *v.* Hides, vi. 229.
—— *v.* Lane, i. 501.
—— *v.* Spratley, vi. 738.
Beayne *v.* Beale, vi. 642.
Becher, *ex parte*, iii. 410.
Beck *v.* Bobley, iv. 735.
—— *v.* Nichols, ii. 41.
—— *v.* Phillips, iv. 210.
—— *v.* Welſh, i. 430.
Becket *v.* Ball, iii. 85. iv. 415.
—— *v.* Cordley, v. 47.
—— *v.* Taylor, i. 225.
Beckford *v.* Cloſe, v. 91.
Beckman *v.* Legrainge, vii. 422.
Beckwith's caſe, ii. 458. vii. 88. 124.
Beckwith *v.* Shordike, vi. 585.
Bedam *v.* Clarkſon, i. 213. 219.
Bedel's caſe, i. 472. 680. v. 421. vii. 93. 99.
Bedel *v.* Bedel, vii. 276.
—— *v.* Lull, v. 380.
Bedford's (Earl) caſe, iv. 19. vi. 62. vii. 78. 80.
Bedford *v.* Backhouſe, v. 77.
Bedford (Earl) *v.* Smith, vii. 257.
—— (Mayor) *v.* Fox, i. 547.
Bedingfield's caſe, vii. 95.
Bedingfield *v.* Aſhley, vii. 199.
—— *v.* Beak, vi. 732. 734.
Bedo *v.* Sanderſon, vii. 207.
Beecher's caſe, ii. 459. iii. 181. v. 141.
Beedle *v.* Clerk, iii. 701.
Beeſley *v.* Walker, v. 363. 445.
Beeton *v.* Darking, iii. 74.
Belch *v.* Harvey, v. 94.
Belchier, *ex parte*, i. 411. iii. 31. vii. 183.
—— *v.* Ganſell, i. 329.
Belfield *v.* Rous, ii. 392.
Belfour *v.* Weſton, ii. 65. vi. 50.
Belifante *v.* Levy, i. 329.
Bell *v.* Burrows, i. 258.
—— *v.* Harwood, ii. 585.
—— *v.* Hyde, i. 505.
—— *v.* Jackſon, vi. 121.
—— *v.* Knight, iii. 745.
—— *v.* Read, vi. 768.
—— *v.* Simpſon, i. 233.
Bellamont's (Lord) caſe, vi. 644.
Bellamy's caſe, v. 432.
Bellamy *v.* Balthorp, vi. 759.
—— *v.* Burrow, v. 196.
—— *v.* Player, vii. 13.
—— *v.* Ruſſell, ii. 87. iv. 627.
Bellaſis *v.* Ermine, iv. 416.
—— *v.* Frankland, vii. 141.
—— *v.* Heſter, iv. 686.
—— *v.* Uthwaite, iv. 374.
Bellett, *ex parte*, i. 515.
Bellew's caſe, vi. 551.
Bellew *v.* Aylmer, vi. 125.
Bellingham *v.* Alſop, i. 470.
Bellis *v.* Mitford, i. 346.
Belmore *v.* Anderſon, i. 139.
Belſhaw *v.* Porter, i. 59. vii. 53.
Belvidere *v.* Rochfort, iii. 86. v. 23.
Bemiſh *v.* Hilderſley, ii. 67.
Bempde *v.* Johnſtone, vii. 462.
Bengough *v.* Roſſiter, vi. 182.
Benion *v.* York Sheriffs, ii. 520. vi. 163.
Benjamin *v.* Porteus, vii. 455.
Benn *v.* Denn, ii. 440.
Bennett, *ex parte*, i. 413, 414. 419.
—— *v.* Bachelor, iii. 67.
—— *v.* Box, vii. 81.
—— *v.* Coker, ii. 48.
—— *v.* Davis, i. 432. 482.
—— *v.* Edwards, v. 108.
—— *v.* Honywood, iv. 347.
—— *v.* Jenkins, vi. 749.

Bennett v. Lee, iii. 615.
—— v. Mellor, iii. 665.
—— v. Pilkins, v. 387.
—— v. Read, vi. 746.
—— v. Shortwright, vi. 776.
—— v. Talbot, v. 416.
—— v. Vade, iii. 305. 322. 525. vii. 362. 379, 380.
—— v. Wade—See Bennett v. Vade.
—— v. Whitehead, i. 33.
Bennington v. Goodtitle, ii. 419.
—— v. Taylor, ii. 241.
Benns v. Parre, iv. 621
Benſon v. Baron, iii. 243. iv. 25. v. 863.
—— v. Benſon, ii. 442.
—— v. Frederick, vi. 668.
—— v. Port, ii. 635.
—— v. Scott, i. 716. ii. 398. vii. 442.
—— v. Watkins, vi. 719. 723. 736. 740.
—— v. Welby, vi. 376.
Bent v. Baker, ii 505. 585. 591.
— v. March, ii. 491.
Bentham v. Haincourt, v. 46.
Bentley's (Dr.) caſe, vii. 60.
Bentley v. Delamore, v. 779, 780.
—— v. Ely (Biſhop), ii. 27. 29.
Benwell v. Black, vi. 119.
Bercholt v. Candy, ii. 150.
Berens v. Rucker, iv. 642.
Berkley's (Lord) caſe, v. 533. 579.
Berkley v. Howard, vi. 765.
—— v. Hunt, i. 326.
—— v. Parkes, i. 634.
—— v. Walters, ii. 150. v. 614.
—— v. Warwick (Counteſs), ii. 454. iii. 700
Berks v. Maſon, vi. 663, 664.
Bermon v. Woodbridge, iv. 671.
Bern v. Bern, v. 477.
Bernardi v. Motteux, iv. 670.
Berney v. Chambers, i. 171.
Berrington v. Maſon, vii. 138.
—— v. Parkhurſt, ii 424.
Berry v. Aſkam, iv. 286.
— v. Bentley, iii. 391.
— v. Goodman, vi. 566.
— v. Green, i. 724.
Berrysford v. Milward, v. 46.
Bertie v. Clutterbuck, ii. 481.
—— v. Falkland (Lord), i. 643. iii. 454. iv. 412.
Berwick's caſe, v. 590.
Berwick (Mayor) v. Ewart, i. 58.
Beſt v. Stamford, i. 114. iv. 209.
Beſton v. Buller, i. 332.
Bethel v. Stanhope, iii. 314.
Betniff v. Popple, vi 254.
Betteſworth v. Bell, iii. 447.
—— v. Dean and Chapter of St. Paul's, i. 110 vii 489.
Betts v. Lowe, vi. 201.
Bettyworth's caſe, iii 152.
Bevan v. Bevan, i. 100. 237.
—— v. Chapman, iv. 482.
—— v. Delanay, ii. 234. 343.
—— v. Proteſk, iii. 441.
Beverley's caſe, iii. 196. 410. 537. v. 161. vii. 65. 67.
Beverley v. Beverley, ii. 725. v. 221. 791. vii. 185.
—— v. Cornwal, ii. 506. v. 226. 256.
—— v. Farrer, i. 587.
—— v. Pine, v. 395.
Beverſham v. Springhold, iii. 652.
Bevill's caſe, ii. 352. vi. 75.
Bevis v. Lindſell, iv. 740.
Bewdly v. Brookby, vii. 104.
Bewicke v. Whitfield, vii. 288.
Bibb v. Thomas, vii. 349.
Bickerdike v. Bollman, i. 400. iv. 729.
Bickham v. Freeman, iii. 59.
Biddeford v. Onſlow, vi. 567.
Biddle v. Biddle, ii. 249.
Bidlesford v. Onſlow, i. 54.
Bidmead v. Gale, iii. 344.
Bidwell v. Cotton, iii. 97.
Bigg v. Benſley, iv. 314.
—— v. Wharton, vi. 636.
Biggon v. Bridge, vi. 16.
Biggot v. Smith, v. 758.
Biggs v. Lawrence, i. 276.
—— v. Riches, i. 380.
Billingham v. Minors, vi. 251.
Billinghurſt v. Walker, iii. 86.
Billon v. Hyde, i. 443.
Billon v. Sanders, iv. 437.
Bindon v. Suffolk, iii. 684.
Bingham v. Garnault, i. 245.
—— v. Smeathwicke, vii. 67.
Bingley v. Maddiſon, i. 402. 422.
Binion v. Evelin, v. 63.
Binſted v. Collins, v. 673.
—— v. Colman, i. 120.
Birch v. Baker, iv. 359.
—— v. Bellamy, vi. 395.
—— v. Ellames, v. 53.
—— v. Holt, iii. 652.
—— v. Sparland, i. 298.

Birch v. Wilſon, v. 373.
—— v. Wright, i. 183. ii. 439. iv. 181. v. 15.
Birchel, *ex parte*, iii. 410.
——— v. Slocock, iv. 732.
Bird v. Aſtcock, vi. 679.
—— v. Hooper, vii. 348.
—— v. Jones, i. 456.
—— v. Mayor, i. 392.
—— v. Orme, ii. 500.
—— v. Oſſulton Hundred, iii. 513.
—— v. Randall, i. 87.
—— v. Sedgwick, i. 392.
—— v. Smith, ii. 48.
Birkhead v. Coward, iv. 389.
Birt v. Barlow, iv. 552. vi. 665.
—— v. Manning, vi. 191.
—— v. Maſon, vi. 397.
Birtch v. Wilſon, ii. 287.
Biſhop's caſe, ii. 470.
Biſhop v. Burton, vii. 315.
——— v. Chicheſter, vi. 759.
——— v. Chitty, iv. 715.
——— v. Church, i. 444. vii. 506.
——— v. Fitzherbert, vi. 233.
——— v. Fountaine, iv. 249.
——— v. Hayward, iv. 735.
——— v. Lloyd, v. 612.
——— v. Montague, vi. 678.
——— v. Sharpe, v. 90.
——— v. Staples, iii. 336.
Biſhops' (the) caſe, vi. 372.
Biſket v. Jenkins, i. 438.
Biſſe v. Harcourt, v. 475. 616.
Biſſex v. Biſſex, i. 233.
Biſſon, *ex parte*, i. 415.
Bixby v. Eley, i. 725.
Bize v. Dixon, i. 444. iv. 603.
—— v. Fletcher, iv. 653.
Black v. Allen, v. 294.
—— v. Peele, iv. 719.
Blackall v. Eale, vii. 42.
Blackamore's caſe, vi. 589.
Blackborough v. Davis, iii. 55.
Blackburn v. Grove, i. 19.
Blacket v. Anſley, ii. 182. iv. 611.
——— v. Finn, vi. 746.
——— v. Finney, iii. 653. 764. vi. 769.
Blackhall v. Combes, i. 456.
Blackhouſe v. Moor, vi. 699.
Blackler v. Webb, iv. 378.
Blacklock v. Barnes, v. 103.
Blackman v. Cobbet, ii. 271.
Blackmore v. Cumberford, vii 45.
——— v. Tidderley, i. 246. iv. 469.
Blackſhaw v. Stevens, vi. 257.
Blackſtock v. Payne, i. 59. vii. 53.
Blackſtone v. Moorland, v. 59.
Blackwell v. Aſhton, v. 165.
——— v. Harper, iii. 651.
——— v. Naſh. i. 110 v. 337.
——— v. Symes, v. 81.
Blackwood v. Morris. i. 507.
——— v. S. S. Company, ii. 265.
Blacquiere v. Hawkins, ii. 247.
Blades v. Blades, iii. 302.
Blagrave v. Blagrave, i. 481.
Blake's caſe, vii. 286.
Blake v. Blake, vii. 139.
——— v. Grove, i. 245. v. 448.
——— v. Lanyon, vii. 386.
——— v. Leigh, iii. 408.
Blakeway v. Strafford (Earl), iv. 484. vii. 138.
Blakey v. Dimſdale, ii. 355. vi. 564.
Blakitt v. Criſſop, vi. 58.
Blance v. Harriſon, vii. 191.
Bland's caſe, i. 77.
Bland, *ex parte*, i. 408.
——— v. Bland, vii. 140.
——— v. Haſelrig, iv. 484. vii. 23.
——— v. Inman, vi. 18.
Blanden v. Barker, v. 705.
Blandford v. Foote, i. 457.
——— v. Tackerell, i. 596.
Blankark v. Yald, v. 195.
Blankenhagen, *ex parte*, i. 461.
Blankley v. Winſtanley, iii. 799.
Blatch v. Archer, ii. 528. vi. 93.
——— v. Wilder, iii. 59.
Blaxton v. Pye, i. 270. iii. 343.
Blayer v. Baldwin, vi. 107.
Blefard v. Hirſt, iv. 727.
Bletſon v. Sawyer, i. 508.
Bligh v. Darnley, vi. 134.
Blinkhorn v. Feaſt, iii. 68. 71.
Bliſs v. Chandler, vi. 739.
Bliſſet v. Hart, i. 84.
Blitheman v. Blitheman, vii. 101.
Blizard v. Barnes, ii. 40.
Blockley v. Slater, v. 336.
Blois v. Hereford, i. 480.
Blonwell v. Edwards, iii. 379.
Bloome v. Wilſon, ii. 287.
Bloſs v. Cutting, v. 170.
Blount—See Blunt.
Bloxman v. Pell, iv. 605.
Bloyes v. Bloyes, iv. 362.
Bluat v. Needs, iii. 334.
Blunden v. Baugh, ii. 332.
——— v. Euſtace, vi. 217.

Blunt's (Sir H.) case, ii. 186.
Blunt v. Comyns, ii. 654.
—— v. Grimes, iii. 330.
—— v. Millar, ii. 38.
—— v. Snedstone, vi. 402.
Blythman's case, ii. 364.
Boardman, *ex parte*, i. 420.
Boats v. Edwards, v. 437.
Bodens v. Watson, iv. 289.
Bodily v. Bellamy, vii. 197.
Body v. Taffell, vii. 200.
Boer v. Landall, iv. 600.
Bohun's case, iii. 221.
Bohun v. Morgan, v. 448.
Boisloe v. Baily, vii. 49.
Bold, *ex parte*, i. 449.
—— v. Waters, vi. 76.
—— v. Wynston, v. 774. vii. 99. 106. 112.
Bole v. Horton, vii. 388.
Bolland's case, iii. 285.
Bollard v. Spencer, vii. 463.
Bolston v. Holmes, vi. 656.
Bolton v. Fenner, i. 269.
—— v. Williams, i. 186, 187, 188. vii. 411.
Bolton School, *ex parte*, i. 589.
Bon v. Smith, iv. 328. vii. 303.
Bonafous v. Walker. ii. 280. 525. 527. 529. iii. 94.
Bond, *ex parte*, i. 460, 461.
—— v. Edmunds, vii. 97.
—— v. Gonsales, iv. 635, 636.
—— v. Isaac, i. 345. iii. 422. vi. 122.
—— v. Kent, v. 83.
—— v. Nutt, iv. 668.
—— v. Palmer, vi. 656.
—— v. Seawell, vii. 309.
—— v. Spark, vi. 656.
Bone v. Andrews, vi. 464.
Bones v. Booth, iii. 343.
Bonham's case, i. 402.
Bonham v. Newcomb, v. 100.
Bonithon v. Hockmore, v. 103.
Bonner v. Hall, i. 28.
—— v. Stukeley, v. 231.
—— v. Walker, vi. 81.
Bonny's case, vi. 26.
Boone v. Eyre, i. 640. ii. 93. v. 338.
Boot v. Cooper, i. 95.
Booth v. Atherton, vii. 423.
—— v. Beard, ii. 472.
—— v. Booth, ii. 730 iii. 656. v. 101. 807. vi. 106.
—— v. Cook, vii. 209.
—— v. Franklyn, vi. 743.
Booth v. Hodgson, iv. 631. vii. 396.
—— v. Holt, vii. 421.
—— v. Porter, vi. 191. 196.
Boothby v. Vernon, v. 769.
Boothman v. Surry (Earl), i. 366. ii. 519.
Boraston's case, iv. 143. 281. 303. v. 793.
Borough's case, vi. 433.
Borough v. Hale, vi. 699.
—— v. Skinner, i. 261.
Borrett v. Boys, iii. 88.
Borthwick v. Carruthers, iii. 612.
Bosanquet v. Dashwood, iii. 306. vii. 203.
Boscawen v. Cooke, ii. 86. v. 340.
—— v. Herle, ii. 80.
Bosewell v. Irish, ii. 57.
Boson v. Sandford, i. 50. iv. 585. 612.
Bostock v. Blakeney, vii. 183.
—— v. Saunders, i. 95.
Bosvil v. Brander, i. 432. 480.
Bosworth v. Hearne, i. 550.
—— v. Limbrick, vi. 715.
—— v. Ridgley, v. 436.
Bott v. Brabalon, vi. 729.
Botterill, *ex parte*, i. 415, 416.
Bottimley v. Brook, i. 249. v. 163. vi. 136.
Bottle v. Wood, iv. 482.
Bottomley v. Harrison, vi. 730.
Boucher v. Friend, ii. 412.
—— v. Lawson, v. 477.
—— v. Wiseman, ii. 736. vi. 161.
Bouchier v. Taylor, i. 480. iii. 55.
Bovey's (Sir Ralph) case, v. 384.
Bovey v. Skipwith, v. 56. 69.
—— v. Smith, iii. 213. vii. 153. 307.
Boughton v. Boughton, iii. 313. v. 65.
—— v. Wright, vi. 738.
Boulston's case, vi. 576. 584.
Boulsworth v. Pilkington, vi 667.
Boulter v. Clark, i. 243.
Boulton's case, v. 781. vi 687.
Boulton v. Canon, ii. 73.
Bourn's case, iii. 424.
Bourn v. Carrington, vii. 39.
—— v. Church, vi. 651.
—— v. Cooling, ii. 511.
—— v. Dodson, i. 434.
—— v. Mattaire, vi. 70.
—— v. Whitmore, ii. 622.
Bouteflower v. Coats, i. 456.
Bowater v. Ely, vii. 161. 185.
Bowden v. Dellow,

Bowdler v. Smith, iv. 284.
Bowdman v. Reeve, iii. 86.
Bowen v. Edwards, v. 6.
Bower v. Owen, vi. 334.
Bowers v. Littlewood, iii. 74, 75.
——— v. Mann, ii. 472.
Bowington v. Parry vi. 482.
Bowles's (Lewis) case, ii. 555. vii. 289.
Bowles v. Edwards, v. 472.
——— v. Johnson, ii. 595.
——— v. Langworthy, i. 442.
——— v. Lassels, vi. 180.
——— v. Poole, ii. 567. vi. 77.
——— v. Poor, iii. 161. v. 417.
——— v. Nicholls, vi. 362.
Bowyer v. Bampton, iii. 338. 343.
——— v Rivett, iii. 465.
Box v Bennett, ii. 452.
—— v. Day, i. 675. v. 172.
—— v. Reed, i. 59. vii. 53.
Boyce v. Whitaker, v. 381. vi. 398.
Boycot v Cotton, iv. 402.
Boyle v. Boyle, v. 673. vi. 200.
Boynton v. Boynton, ii. 383.
Boys v. Boys, vi. 256.
—— v. Ellis, vi. 729.
—— v. Twist, vi. 649.
Boyter v. Dodsworth, v. 199.
Brace v. Marlborough (Duchess), v. 57. 59.
Bracebridge v. Cook, iv. 206.
Bracy's case, i. 407, 408. 612.
Bradburn v. Taylor, ii. 490.
Bradford's case, i. 394.
Bradley v. Banks, i. 196.
——— v. Clark, vii. 405.
——— v. Stratchy, vii. 286.
——— v. Wyndham, vii. 458.
Bradlin v. Milbank, iii 465.
Bradshaw's case, vi. 65.
Bradshaw v Eyre, i. 628.
——— v. Salmon, v. 340.
——— v. Swanton, ii. 173.
Bradston v. Buck, iv. 167.
Bradwin v Harpur, ii. 657.
Brady v. Cubit, vii. 364.
——— v. Johnson, ii. 427.
Bradyll v. Ball, i. 418.
Bragner v. Langmead, vi. 130.
Brain's case, v. 126.
Braithwaite's case, ii. 22.
Braithwaite v. Bradford, vii. 423.
——— v. Braithwaite, v. 90.
——— v. Cooksey, ii. 343.
Bramer v. Thornton, vi. 758.
Brampton v. Barker, v. 73.
Brander v. Robson, vii. 400.
Brandon v. Nesbitt, i. 5. iv. 599. 658.
——— v. Pate, vii. 405.
——— v. Payne, i. 27.
Brangwin v. Perrott, ii. 84.
Bransby v. Kerridge, vii. 381.
Brantham v. East Burgold, vii. 415.
Brasier v. Beale, ii. 75.
Brassbridge v. Woodroffe, ii. 655. iii. 68.
Bray v. Haines, vi. 219.
—— v. Tracy, vii. 273.
Brayhrook's case, v. 832.
Brecknock Navigation v. Pritchard, vii. 424.
Breden v. Harman, i. 67. ii. 292.
Bredon's case, ii. 573. v. 850.
Bredon v. Gill, v. 665.
——— v. Pierce, ii. 346.
Breerton v. Evans, iv. 192.
—— v. Jones, v. 58.
Brend v. Brend, v. 34.
Brenen v. Corrict, vi. 696.
Brent's case, v. 773.
Brest v. Offley, iv. 339.
Brett v. Cumberland, ii. 62.
—— v Prettyman, iii. 545.
—— v Rigden, iii. 454. iv. 334.
—— v Shepherd, v. 455.
—— v. Ward, ii. 633.
Bretton v. Bretton, iv. 348.
Brewer v. Hill, vi. 758. vii. 424. 486, 487.
Brewin v. Brewin, iv. 442.
Brewster v Capper, v. 354.
——— v. Kidgill, ii. 78.
Briant's case, v. 208.
Briant v. Cawsen, v. 779, 780. 788.
—— v. Holloway, ii. 47.
Brideoak's case, ii 30.
Bridge v. Abbot, vii. 494.
——— v. Langford, vi. 221.
Bridgeman's case, ii. 180.
Bridgeman v. Charlton, iii. 153. iv. 25.
——— v. Dove, iii. 85 iv. 353.
——— v. Green, iii. 305.
——— v. Holt, i. 528.
——— v. Jennings, ii. 637.
Bridgenorth Bailiffs' case, iv. 517.
Bridges v. Abbot, iv. 393.
——— v. Chandois (Duchess), vii. 369. 373.
——— v. Enion, v. 706.
——— v. Hitchcock, ii. 78. iv. 289.
——— v. Horner, ii. 269.

Bridges *v.* Williamſon. vi. 478.
Bridgewater *v.* Betheway, vi 621.
——— *v.* Bolton, iv. 253.
——— *v.* Bythway, v. 396.
——— *v.* Egerton, v. 722.
Bridgham *v.* Frontee, i. 135.
Briers *v* Goddard, iii. 14.
Bright *v.* Purrier, i. 326.
——— *v.* Smith, ii. 253.
Brind *v.* Torris, vi. 648.
Bringlo *v.* Morris, i. 320.
Briſco *v.* Cartwright, i. 725.
—— *v.* Kennedy, i. 507. v. 250.
Briſtol (Biſhop) *v.* Proctor, v. 454.
—— (Countels) *v.* Hungerford, vii. 142.
—— (Earl) *v.* Hungerford, iii. 68. v. 62.
Briſtow *v.* Towers, iv. 658.
——— *v.* Ward, vii. 450.
Britiſh Caſt Plate, &c *v* Meredith, i. 78.
Britridge's caſe, vi. 236. 239.
Britton *v.* Cole, v. 227. vi. 178. 589. 591. 610. 693.
Broadfoot's caſe, v. 129. 533.
Broadhead *v.* Marſhall, vi. 671.
Broby *v.* Lumley, ii 516.
Brochman's caſe, ii. 622.
Brock *v.* Richardſon, vii. 31.
Brodeck *v.* Briggs, i. 140.
Broderick *v.* Briggs, i. 140.
——— *v.* Broderick, iii. 300. vii. 310.
Brodie *v.* Chandois (Duke), i. 595.
Brograve *v.* Watts, ii. 138. vi. 126.
Broker's caſe, ii. 442.
Broker *v.* Smith, vi. 77.
Broking *v.* Came, iv. 587.
Bromfield's caſe, vii. 95.
Bromfield, *ex parte*, iii. 531.
——— *v.* Williamſon, ii. 71.
——— *v.* Wytherley, vii. 182.
Bromley *v.* Child, i. 419.
——— *v.* Goodere, i. 419. 451.
——— *v.* Greathead, vii. 391.
——— *v.* Hammond, v. 88.
——— *v.* Jefferies, i. 110. iv. 362.
——— *v* Munden, i. 394.
Bronſdon *v.* Winter, iv. 357. 426.
Brook's caſe, iii. 158.
Brook, *ex parte*, i. 416.
Brook *v.* Biddulph, iii. 247.
——— *v.* Briant, vii. 399.
——— *v.* Ewers, iv. 510.
——— *v.* Gally, iii. 612.
——— *v.* Hertford, iii. 606. 615.
——— *v.* Manning, i. 296.
Brook *v.* Montague, vi. 224.
——— *v.* Reynolds, iii. 649.
——— *v.* Smith, i. 634.
——— *v.* Stroud, iii 32.
——— *v.* Willett, vii. 422.
Brookes *v.* Lloyd, i. 423.
——— *v.* Maſon, i. 302.
——— *v.* Moravia, vii. 439.
——— *v.* Rogers, i. 422.
——— *v.* Warren, i. 364.
Broome *v.* Berkley, v. 819.
——— *v.* Car, v. 788.
——— *v.* Rice, vii. 46.
Brothers *v.* Bence, v. 68.
Brotherton *v.* Hatt, ii. 580. v. 74.
Brough *v.* Perkins, iv. 712.
——— *v.* Whitmore, iv 639. 641.
Broughton's (Lady) caſe, iii. 353.
Broughton *v.* Errington, ii. 383. iii. 716. iv. 368.
——— *v.* Harper, ii. 578.
——— *v.* Mulloe, vi. 573, 574.
——— *v.* Randal, ii. 366. vi 641.
Brown's caſe, v. 122. 624. vi. 246.
—— (Sir George) caſe, ii. 325, 326.
—— (Sir Hugh) caſe, v. 472.
Brown *v.* Adams, vi. 182.
——— *v.* Allen, iv. 426.
——— *v.* Barkham, iv 334. v. 15. 108.
——— *v.* Barnes, ii. 69.
——— *v.* Beſt, i. 84.
——— *v.* Blunden, ii. 77.
——— *v.* Brookes, iii. 370.
——— *v.* Brown, iv. 328.
——— *v* Bullen, i. 258.
——— *v* Chapman, i. 402.
——— *v.* Corniſh, v. 402.
——— *v* Cutter, iv. 258.
——— *v.* Davis, iv. 708.
——— *v.* Dawſon, iv. 362.
——— *v.* Dixon, i. 51. v. 330.
——— *v.* Dunnery, vi. 77.
——— *v.* Ellis, vii. 28.
——— *v.* Fulſby, vii. 200.
——— *v.* Gibbons, ii. 40.
——— *v.* Goodman, i. 234.
——— *v.* Hagan, vi. 464.
——— *v.* Harraden, iv. 728.
——— *v.* Heathcote, i. 435.
——— *v.* Higden, i. 15.
——— *v.* Hodges, vi. 701. 707.
——— *v.* Holyoak, vi. 136.
——— *v.* Jones, i. 412.
——— *v.* Kinman, iv. 53.
——— *v.* Leeſon, i. 18.
——— *v.* Litton, vii. 182.

Brown *v.* Lowe, vi. 232. 244.
——— *v.* Marſden, i. 218.
——— *v.* Meredith, vii. 28.
——— *v.* Mitchell, vi. 230.
——— *v.* Nicholls, iii. 398.
— — *v.* Pitcher, vi. 674.
——— *v.* Quilter, ii. 65. vi. 50.
——— *v.* Rands, v. 406.
——— *v.* Selwin, iii. 71. vii. 337.
——— *v.* Seymour, ii. 275. iv. 487.
——— *v.* Smith, ii. 394.
——— *v.* Stephens, ii. 496.
——— *v.* Thompſon, vii. 363.
——— *v.* Williams, v. 821.
——— *v.* Wotton, v. 440.
Browning *v.* Beeſton, vi. 566. vii. 66.
——— *v.* Litton, v. 418.
——— *v.* Morrice, i. 262. vii. 204.
Brownlow *v.* Hewley, vi. 11.
Brownſall, *ex parte*, i. 306.
Brownſword *v.* Edwards, iv. 295.
Bruce's (Lord) caſe, ii. 21.
Bruce *v.* Bruce, vii. 462.
—— *v.* Rawlins, vi. 668.
—— *v.* Roſs, iii. 335.
Brucker *v.* Fromont, iv. 587.
Bruckſhaw *v.* Hopkins, i. 61. vii. 53.
Brudenel *v.* Boughton, vii. 361.
——— *v.* Roberts, ii. 70.
Bruen *v.* Bruen, iv. 362.
Bruerton's caſe, iii. 104. 488.
Brugis *v.* Warneford, vii. 34.
Brunetti *v.* Lewin, vii. 42.
Brunker, *ex parte*, v. 523, 524.
Brunkhard *v.* Segar, vi. 211.
Brunſden *v.* Stratton, iii. 318.
——— *v.* Woolridge, iv. 350.
Bryant *v.* Bryant—See Briant.
Brymer, *ex parte*, i. 422.
——— *v.* Atkins, ii. 186.
Bryſon *v.* Wylie, i. 435.
Buchanan *v.* Parnſhaw, i. 82.
Buck's caſe, ii. 640.
Buck *v.* Andrews, iii. 673.
—— *v.* Warren, vi. 470.
Buckeridge *v.* Brown, vii. 216.
——— — *v.* Ingram, ii. 363.
Buckholden *v.* Hampton, vi. 475.
Buckhurſt's (Lord) caſe, vii. 247.
Buckingham's (Duke) caſe, vi. 98.
——— (Sheriff) caſe, iii. 749.
Buckingham *v.* London Sheriffs, ii. 721.
——— *v.* Ward, i. 108.
Buckinghamſhire (Earl) *v.* Drury, iii. 608.
Buckler's caſe, ii. 571. iii. 148. 160.
Buckley *v.* Buckley, ii. 413.
——— *v.* Campbell, iv. 686.
——— *v.* Collier, i. 481.
——— *v.* Taylor, i. 413. ii. 346.
——— *v.* Wood, vi. 205. 225, 226. 252.
Bucknal *v.* Solwood, ii. 722.
Buckworth *v.* Thirkell, ii. 223.
Buddle *v.* Wilſon, v. 353. 375. vii. 385. 414.
Buffar *v.* Bradford, iii. 68. iv. 392.
Buggin *v.* Bennett, iv. 621.
Bulkeley's caſe, v. 409.
Bull *v.* Stewart, ii. 510.
—— *v.* Wyatt, iii. 61.
Bullayn and Grant's caſe, vii. 81.
Bullock *v.* Dommitt, vii. 423.
——— *v.* Noke, vi. 448.
Bulwer's caſe, i. 60.
Bunter *v.* Cook, iv. 248.
Bunting *v.* Williamſon, v. 273.
Burchell *v.* Slocock, iv. 696.
Burchett *v.* Durdant, iii. 449. iv. 331. v. 743. vii. 80. 121. 124.
Burchin *v.* Vaughan, v. 159.
Burdeaux *v.* Lancaſter, iii. 121.
Burdet *v.* Hopegood, iv. 347.
——— *v.* Newell, v. 651.
——— *v.* Willett, iv. 601.
Burdon *v.* Burdon, ii. 386. v. 353.
——— *v.* Dean, vii. 404.
Burford *v.* Dodwell, ii. 275.
——— *v.* Lea, iv. 306.
Burgeſs *v.* Aſhton, v. 651.
——— *v.* Burgeſs, vii. 28.
——— *v.* Pollamounter, vi. 470.
——— *v.* Spark, ii. 237.
——— *v.* Reeves, vi. 249.
——— *v.* Wheate, ii. 361. v. 497. vii. 137. 511.
Burgh's caſe, vii. 101.
Burgoyne *v.* Fox, vii. 361.
Burke *v.* Brown, i. 6.
—— *v.* Morgan, vii. 380.
—— *v.* Vickars, iii. 655.
Burkit *v.* Burkit, vii. 312.
Burleigh *v.* Harris, ii. 487.
Burleton *v.* Humphrey, iii. 456.
Burley's caſe, iv. 260.
Burman *v.* Shepherd, vi. 470.
Burn *v.* Cole, i. 137. vii. 462.
Burnett *v.* Holgrave, iv. 388.
——— *v.* Kenſington, vii. 502.
——— *v.* Mann, iii. 75. 583.
Burr *v.* Atwood, ii. 462.
Burrell, *ex parte*, i. 462.

Burridge *v.* Fortescue, vi. 467.
Burroughs *v.* Jamineau, iii. 651. iv. 721.
——— *v.* Willis, iv. 721.
Burry *v.* Perry, ii. 40.
Burt *v.* Moore, ii. 354.
Burton's case, vii 192, 193.
Burton, *ex parte*, i. 395. 457. 459.
——— *v.* Chapman, v. 366.
——— *v.* Hastings, i. 113. vii. 164. 167.
——— *v.* Hinde, ii. 509.
——— *v.* Pierrepoint, i. 482.
——— *v.* Thompson, vi. 663.
Burtonshaw *v.* Gilbert, vii. 353.
Burwell *v.* Coates, vi. 746.
——— *v.* Corrant, iii. 59.
Bury *v.* Cross, v. 656.
——— *v.* Nugent, iv. 164.
Busby *v.* Greenslate, iv. 335.
Buscall *v.* Hog, i. 388.
Bush's case, ii. 508. vi. 167.
Bush, *ex parte*, i. 303.
——— *v.* Cole, ii. 67.
——— *v.* Gower, vi. 123. vii. 208.
——— *v.* Ralling, ii. 582.
——— *v.* Western, iii. 652.
Bushby *v.* Cross, vii. 58.
Bushel's case, vi. 413. vii. 8.
Bushel *v.* Burland, vii. 91.
——— *v.* Miller, vi. 681.
Bushnan *v.* Pell, i. 412.
Bustard's case, i. 703. ii. 379.
Busting *v.* Stonard, v. 70.
Busy *v.* Child, vi. 251.
Butcher *v.* Andrews, i. 280.
——— *v.* Cole, vii. 394.
——— *v.* Easto, i. 395. 401.
——— *v.* Stukeley, i. 121.
Butchers' Company *v.* Morey, i. 550.
Bute *v.* Stuart, iv. 339.
Butler and Baker's case, iv. 246.
Butler, *ex parte*, i. 431.
——— *v.* Archer, iii. 672. 688.
——— *v.* Bartlett, vi. 255.
——— *v.* Cooke, i. 442.
——— *v.* Davidson, i. 21.
——— *v.* Duncombe, v. 819.
——— *v.* Fincher, iv. 51.
——— *v.* Freeman, iii. 411. iv. 437.
——— *v.* Grubb, i. 217.
——— *v.* Hedges, vi. 605, 606.
——— *v.* Malissey, iv. 732. v. 477.
——— *v.* Rashfield, v. 643.
——— *v.* Stratton, iv. 348. 350.
——— *v.* Swinnerton, ii. 82.
Butt's case, i. 183. ii. 342.
Butterfield *v.* Burroughs, i. 82.
Butterfield *v.* Butterfield, iv. 320. vii. 493.
Button *v.* Downham, vii. 198. 205.
——— *v.* Long, vi. 772.
Buxendine *v.* Sharp, vii. 43.
Buxton *v.* Hutchinson, vi. 712.
——— *v.* Ince, iv. 646.
——— *v.* Lister, i. 108.
——— *v.* Singleton, ii. 143. 217.
Byas, *ex parte*, i. 412.
Byde *v.* Byde, iv. 365.
Byers *v.* Dobey, i. 55.
Byrchley's case, vi. 217.
Byron *v.* Byron, iii. 38.
Bythal *v.* Harris, v. 236. vi. 405.

C.

Cabel *v.* Vaughan, i. 19.
Cadee *v.* Oliver, iii. 383. iv. 15.
Cadogan *v.* Kennett, ii. 715. iii. 312.
Cadwallader *v.* Batley, vii. 421.
Cæsar *v.* Curseney, vi. 213.
Cage *v.* Acton, v. 162.
——— *v.* Russel, i. 642.
Caghill *v.* Fitzgerald, i. 208.
Cailland *v.* Estwick, vii. 461.
——— *v.* Troward, v. 530.
Calcot, *ex parte*, i. 452.
Calcraft *v.* Gibbs, iii. 330. vi. 675.
——— *v.* Swan, i. 457.
Caldicot *v.* Smyth, iii. 74.
Caldwell *v.* Ball, iv. 683.
Call *v.* Shawelly, vii. 449.
Callady *v.* Pilkington, vi. 389.
Callard *v.* Callard, iii. 149.
Callen *v.* Meyrick, i. 454.
Callow, *ex parte*, vii. 403.
——— *v.* Mine, ii. 592.
Calmady *v.* Calmady, i. 482. 508.
Calthorp's case, v. 751.
Calvert *v.* Kitchen, vi. 190. 197.
Calvin's case, i. 126. ii. 482. iii. 750. v. 520. vi. 504. 542.
Calye's case, iii. 662. 665.
Cambell's case, vi. 50.
Cambridge University's case, v. 354.
Camden *v.* Anderson, iv. 747.
——— *v.* Cowley, iv. 638.
——— *v.* Edie, ii. 497.
Cameron *v.* Gray, vii. 54.
——— *v.* Reynolds, vi. 157. 178.
Campart *v.* Campart, iii. 9.
Campbell's case, vi. 50.
Campbell *v.* Bordieu, iv. 663.
——— *v.* Campbell, iii. 681.

Campbell *v.* Cuming, vii. 458.
——— *v.* French, vii. 454.
——— *v.* Hall, i. 261.
——— *v.* Jones, v. 338. vii. 425.
——— *v.* Leach, i. 106. 110.
——— *v.* Radnor (Earl), i. 596.
Campion's caſe, vi. 530.
Camplin *v.* Bulmer, vi. 281.
Candell *v.* Shaw, i. 505.
Cane's caſe, iii. 549.
Cann *v.* Cann, i. 111.
—— *v.* Read, i. 412.
Cannel *v.* Buckle, i. 109. 118. iii. 603.
Canning *v.* Canning, iv. 252, 253.
——— *v.* Davis, v. 331.
Cannon *v.* Pack, v. 82.
Canterbury, Archbiſhop's caſe, vi. 755, 6, 7. 764.
Canterbury (Abp.) *v.* Fuller, ii. 39.
——————— *v.* Kemp, v. 455.
——————— *v.* Willis, iii. 47.
——— ——— (Mayor) *v.* Wood, ii. 415.
Cantillon *v.* London Aſſurance Company, iv. 647.
Cantle *v.* Morris, iv. 371.
Cantrel *v.* Graham, i. 457.
Capel's caſe, iii. 236 vi. 9. 486.
Caponhurſt *v.* Caponhurſt, ii. 81.
Capot, *ex parte*, i. 414, 415.
Capper *v.* Davenant, iii. 612.
——— *v.* Dickenſon, i. 269.
——— *v.* Harris, i. 107.
Capron *v.* Archer, vi. 118.
Car *v.* Bedford, iv. 350.
—— *v.* Car, vii. 447.
—— *v.* Colman, iv. 711.
—— *v.* Elliſon, i. 726. ii. 442.
—— *v.* Shaw, vii. 422.
—— *v.* Singer, i. 710.
Cardigan *v.* Montague, iv. 159.
Cardwell *v.* Mackrill, vii. 171.
Careſwell *v.* Vaughan, i.
Carew *v.* Carew, iii. 721. vii. 287.
——— *v.* Stafford, i. 112.
Carey—See Cary.
Carleton *v.* Brightwell, vi. 725. 746.
——— *v.* Griffin, vii. 319.
——— *v.* Mortagh, ii. 471.
Carlian *v.* Miller, i. 89.
Carliſle *v.* Meyrick, v. 656.
Carnan *v.* Bowles, iii. 651. v. 601.
Carne *v.* Oſgood, vi. 213. 248.
Carney's caſe, v. 848.
Caroon's (Sir Upwell) caſe, i. 138. iii. 6.
Carpenter's caſe, vi. 559, 560.
Carpenter *v.* Carpenter, vii. 185.
——— *v.* Collins, iv. 142.
Carpenrer *v.* Smith, vii. 103.
——— *v.* Starr, vii. 15.
Carpenters' Company *v.* Hayward, ii. 590.
Carrell *v.* Paſk, vii. 57.
Carrick *v.* Errington, v. 280.
Carrington's caſe, ii. 497.
Carrington, *ex parte*, i. 385.
——— —— *v.* Warren, v. 447.
Carruthers *v.* Lamb, ii. 42.
Carſlake *v.* Mapledoram, vi. 212.
Cart *v.* Cart, vii. 346.
Carter *v.* Barnardiſton, iii. 198. 230, 242.
—— *v.* Bletſoe, iv. 399.
—— *v.* Boehm, iv. 631. 652.
—— *v.* Carter, i. 109. 113. 725.
—— *v.* Cawthorp, ii. 269.
—— *v.* Claypole, iv. 78. 125. vii. 202.
—— *v.* Crawley, iii. 74.
—— *v.* Croſs, ii. 39.
—— *v.* Fiſh, ii. 40.
—— *v.* Hunt, vi. 209.
—— *v.* Kingſted, vii. 99.
—— *v.* Muſcot, v. 319.
—— *v.* Uppington, vi. 651.
Carteret *v.* Carteret, vii 159.
Carthew *v.* Edwards, vi. 725.
Cartwright *v.* Doleſworth, v. 154.
Carvick *v.* Vickery, iv. 706. 740.
Carwardine *v.* Carwardine, iv. 292.
Cary's caſe, vi. 216.
Cary *v.* Bacchus, v. 334.
—— *v.* Edenſon, i. 125.
—— *v.* Goodinge, iii. 12. 68.
—— *v.* Holt, v. 211.
—— *v.* Jenkins, v. 448.
—— *v.* King, iv. 649. 673.
—— *v.* Pile, iv. 361.
—— *v.* Stephenſon, iv. 479.
—— *v.* Yeo, vi. 191.
Caſborne *v.* Searſe, ii. 224.
Caſe *v.* Barber, i. 44. v. 406.
Caſs *v.* Rudele, i. 109.
Caſſon *v.* Dade, vii. 310.
Caſtel *v.* Bambridge, i. 356, 357.
Caſtle's caſe, iii. 544. vi. 393.
Caſtle *v.* Dodd, ii. 568.
—— *v.* Hobbs, vii. 7.
—— *v.* Litchfield, ii. 105. vii. 56. 60.
—— *v.* Richardſon, i. 600.
Caſtledon *v.* Turner, ii. 652.
Caſtlemain (Lord) *v.* Lord Craven, vii. 294.
Caſtleton *v.* Fanſhaw, iv. 426. 429 485.
Caſwell, *ex parte*, i. 424. 426.
——— *v.* Norman, ii. 54,

Cates *v.* Knight, i. 66.
Catling *v.* Bowling, vi. 483.
——— *v.* Skoulding, iv. 478.
Caton, *ex parte*, i. 415.
Cator *v.* Charlton, v. 84.
Catton *v.* Barwick, i. 598.
Caulter—See Coulter.
Cauſer *v.* Wilcox, vi. 695.
Cavan (Counteſs Dowager) *v.* Doe, ii. 503.
——— ——— ——— *v.* Pulteney, vii. 449.
Cave *v.* Cave, iv. 402.
Cavendiſh *v.* Cavendiſh, iv. 351.
Cawdry's caſe, ii. 3. iii. 478. v. 527. vi. 391.
Cawdry *v.* Chickley, vi. 215. 248.
Caweth *v.* Phillips, v. 686.
Cawly's caſe, ii. 562.
Cawthorne *v.* Campbell, v. 569. 614. 622.
Cazalet *v.* Barbe, iv. 651.
Cecil *v.* Juxon, i. 482.
—— *v.* Sutton, vii. 197.
Ceely *v.* Hoſkins, vi. 234.
Chadock *v.* Cowly, iv. 257. v. 786. vii. 109.
Chadwick *v.* Allen, iv. 698.
——— *v.* Dolman, iv. 349.
Chaffin's caſe, iv. 108.
Chafin *v.* Betteſworth, v. 335.
Challis *v.* Caſborn, iii. 59. v. 88.
Challoner *v.* Bowier, v. 738.
Chaloner *v.* Marſhal, vii. 419.
Cham *v.* Matthew, iii. 749.
Chamberlain's caſe, iii. 303.
Chamberlain *v.* Chamberlain, iii. 580.
——— ——— *v.* Delarive, iv. 698. 736.
——— ——— *v.* Dummer, vii. 293.
——— ——— *v.* Ewer, iv. 205.
——— ——— *v.* Greenfield, vi. 602.
——— ——— *v.* Harvey, vi. 571.
——— ——— *v.* Hewitſon, v. 679.
——— ——— *v.* Hewſon's wife, i. 482.
——— ——— *v.* Thorpe, ii. 246.
——— ——— *v.* Turner, iv. 256.
——— ——— *v.* White & al. vi. 240.
Chambers *v.* Chambers, i. 113. vii. 165.
——— *v.* Harveſt, iii. 59.
——— *v.* Jennings, v. 666.
——— *v.* Robinſon, i. 329.
——— *v.* Robinſon, ii. 623. vi. 666.
Champernoon *v.* Hill, i. 52.
Champion, *ex parte*, i. 451.
——— *v.* Gilbert, i. 326.
——— *v.* Nicholas, iv. 620.
Champion *v.* Skipwith, v. 170.
Chance *v.* Adams, vi. 369. 395. 398.
——— *v.* Wynn, vi. 618.
Chancey's caſe, iv. 368.
Chancey *v.* Fenhoulet, iv. 411.
——— *v.* Tahourdin, iv. 411. vii. 205.
——— *v.* Wootton, iv. 368.
Chandler *v.* Lopus, i. 81.
——— *v.* Roberts, vi. 125.
——— *v.* Sunning Hundred, iii. 514.
Chandois (Duke) *v.* Talbot, i. 249. iv. 209. 399.
Chandos's (Lord) caſe, v. 602.
Chantrell *v.* Randall, iv. 175.
Chaplin *v.* Chaplin, ii. 361. iii. 237. iv. 368. vii. 137. 418.
——— *v.* Homer, i. 113.
Chapman's caſe, ii. 470.
Chapman *v.* Allen, iii. 661.
——— *v.* Bacon, iii. 247.
——— *v.* Bliſſet, iv. 251. 299.
——— *v.* Brown, iv. 267. 317.
——— *v.* Butcher, vi. 58.
——— *v.* Derby, iv. 601.
——— *v.* Emery, iii. 313.
——— *v.* Gardner, i. 442. vii. 409.
——— *v.* Gibſon, i. 725. vii. 418.
——— *v.* Hart, iv. 353.
——— *v.* Lamb, vi. 281.
——— *v.* Monſon, vi. 744. 746. 748. 750. 752.
——— ——— *v.* Pickerſgill, i. 98.
——— ——— *v.* Pointon, ii. 593.
——— ——— *v.* Tanner, i. 414.
Chapple *v.* Chapman, i. 301.
——— *v.* Fletcher, i. 298.
Charles *v.* Andrews, ii. 383. iii. 716.
——— *v.* Rowley, iv. 230.
Charleton *v.* Charleton, vi. 751. 766, 7.
——— *v.* King, i. 452.
——— *v.* Low, vii. 122.
Charnel's caſe, vi. 238.
Charnock's caſe, vi. 512.
Charnock *v.* Worſley, ii. 230. v. 355.
Charter *v.* Jacques, i. 326.
——— *v.* Peter, vi. 206. 426.
Chaſe *v.* Box, ii. 252.
Chatham *v.* Tothill, iv. 321.
Chavany *v.* Vanſommer, iii. 651.
Chattel *v.* Pound, ii. 648.
Chauncy *v.* Graydon, i. 249.
Cheap *v.* Harley, i. 261.
Cheetham *v.* Hampſon, i. 77.
Cheney's caſe, i. 636. ii. 277. iv. 202. vii. 84. 342.
Cheney *v.* Hall, vii. 465.

Cheney *v.* Sell, i. 677.
Cherrington *v.* Abney, i. 49.
Chesman *v.* Nainby, i. 646.
Chester's case, ii. 411. iv. 73.
Chester, *ex parte*, i. 186. 188.
——— *v.* Chester, iv. 326.
——— *v.* Wilkins, iii. 694.
——— *v.* Willis, iv. 208.
Chesterfield (Earl) *v.* Bolton, vi. 50. iii. 298. 307.
——— ——— *v.* Cromwell (Lady), iii. 603. v. 108.
——— ——— & al. *v.* Janssen, vii. 193. 199.
Cheval *v.* Nichols, v. 78.
Chevely *v.* Morris, ii. 267.
Chevney — See Cheney.
Chichester (Bishop) *v.* Bickerstaff, i. 114.
——— ——— *v.* Freeland, v. 185.
——— ——— *v.* Harward, i. 287.
——— ——— *v.* Philips, i. 529.
Chidley *v.* Lee, iv. 377.
Child, *ex parte*, i. 414.
——— *v.* Bailey, ii. 543. iv. 306.
——— *v.* Danbridge, iii. 304.
——— *v.* Gibson, vii. 182.
——— *v.* Greenhill, v. 319.
——— *v.* Sands, ii. 177.
——— *v.* Sloper, iii. 774.
——— *v.* Stevens, iii. 462.
Childers *v.* Saxby, iii. 656.
Chilliner *v.* Chilliner, i. 111.
Chilly *v.* Reeves, vi. 739.
Chilton *v.* Whiffen, i. 401. 425.
Chippendale *v.* Tomlinson, i. 438.
Chitty *v.* Selwin, iv. 638.
Cholmley's case, v. 825. 844.
Cholmley *v.* Broome, vi. 384.
——— *v.* Humble, i. 648.
Chomley *v.* Oxford (Countess), v. 101.
Chorley *v.* Boicot, i. 50.
Christian *v.* Corren, v. 527.
Christie *v.* Manucaptor of Anstruther, i. 333.
Christopher *v.* Christopher, vii. 364.
Chubbs *v.* Billington, i. 312.
Chudleigh's case, v. 747. 757. vii. 69. 78. 81. 82. 86. 111. 132. 185. 231.
Church *v.* Brunswick, v. 413.
——— *v.* Church, i. 111. 271.
——— *v.* Wyat, iii. 583. iv. 246.
Churchey *v.* Ross, i. 298.
Churchil *v.* Grove, v. 44.
——— *v.* Hobson, iii. 31. vii. 183.
Churchman *v.* Harvey, v. 813.
Churley *v.* Hill, vi. 229. 236.
City *v.* City, ii. 254.
Clagg *v.* Lampley, iv. 49.
Clanrickard's case, v. 853. vii. 90.
Clanrickard (Lord), *ex parte*, i. 421.
Clanrickard *v.* Lisle, ii. 477.
Clapcot *v.* Davy, i. 232.
Clapham's case, iii. 444.
Clapham *v.* Lenthal, i. 2.
Claphamson *v.* Bowman, i. 326.
Clare's case, vii. 80, 81.
Clare *v.* Bedford (Earl), iii. 301.
——— *v.* Brook, ii. 296.
Clark *v.* Bedford, ii. 636.
——— *v.* Blake, vii. 469.
——— *v.* Capron, vii. 408.
——— *v.* Clement, ii. 719. 725. vii. 458.
——— *v.* Donovan, i. 301.
——— *v.* Glubbo, vi. 189.
——— *v.* Guise, vii. 449.
——— *v.* Lucy, vii. 360.
——— *v.* Norris, i. 504.
——— *v.* Othery, ii. 41.
——— *v.* Periam, i. 113.
——— *v.* Pister, i. 507.
——— *v.* Ross, iv. 408.
——— *v.* Ryal, i. 439.
——— *v.* Sarum (Bishop), iv. 506.
——— *v.* Sewell, iv. 378.
——— *v.* Shee, i. 262. ii. 583. 586. iv. 583.
——— *v.* Shepherd, iii. 746.
——— *v.* Sydenham, v. 749.
Clarke's case, ii. 25. iv. 108. vi. 520.
Clarke and Coghlan, *ex parte*, i. 403.
Clarke *v.* Berkley, iv. 415. vii. 360. 361.
——— *v.* Candle, iv. 175.
——— *v.* Clark, iii. 679.
——— *v.* Corke, v. 668.
——— *v.* Gilbert, vi. 240.
——— *v.* Lucas, vi. 598.
——— *v.* Martin, vii. 17.
——— *v.* Pigot, iv. 704.
——— *v.* Prince, vi. 253.
——— *v.* Rowell and Phillips, iii. 215.
——— *v.* Smith, ii. 304. iii. 462. iv. 315. v. 730.
——— *v.* Sprigg, ii. 464.
——— *v.* Stevenson, vi. 670.
——— *v.* Tucker, i. 551.
——— *v.* Tyson, vi. 448.
——— *v.* Udall, vi. 658.
——— *v.* Withers, i. 13.
——— *v.* Wright, i. 118. 121.
Clarkson *v.* Bowyer, v. 102.
——— *v.* Hanway, ii. 654. iii. 305.
——— *v.* Physick, vi. 421.
——— *v.* Woodhouse, i. 622.

Claſon *v.* Simmond, iv. 662.
Clatche's caſe, iv. 291. v. 778. 819.
Clavering's caſe, vi. 432. 440.
Clavering *v.* Clavering, iii. 313.
Clavey *v.* Haley, i. 395.
Claxmore *v.* Searl, ii. 413.
Claxton's caſe, vi. 441.
Claxton *v.* Claxton, vii. 287.
—— *v.* Swift, iv. 702.
Clay's caſe, i. 699. iii. 700. vi. 154.
Clay *v.* Snelgrave, v. 649.
— *v.* Willan, i. 556.
Clayton *v.* Adams, vii. 410.
—— *v.* Andrews, i. 123.
—— *v.* Aſhdown, iii. 599.
—— *v.* Jennings, iii. 343.
Clearke *v.* Angier, i. 502.
Cleaver *v.* Spurling, ii. 253.
Clecott *v.* Dennys, v. 209.
Cleere's (Sir Edward) caſe, i. 319.
Cleere *v.* Peacock, v. 781.
Cleeve *v.* Vere, ii. 724.
Clegg's caſe, ii. 24.
Clegg *v.* Molineux, ii. 38.
Cleland *v.* Cleland, i. 480.
Clemens—See Clement.
Clement *v.* Scudamore, i. 532. ii. 301.
Clement (St.) Inhabitants *v.* Andrews (St.) Inhabitants, vi. 373.
Clench *v.* Cudmore, i. 713. iii. 408.
Clere—See Clare.
Clergymen's Sons Corporation *v.* Swainſon, iii. 49.
Clerk—See Clark and Clarke.
Clever *v.* Curteis, ii. 205.
Cliffe & al. *v.* Gibbons & al., iv. 253. vii. 336.
Clifford's caſe, ii. 495. v. 643.
Clifford *v.* Aſhley, vii. 186.
Clifton's caſe, vii. 267.
Clifton *v.* Burt, iii. 86.
—— *v.* Grey, vi. 671. MS.
—— *v.* Swezeland, v. 621.
—— *v.* Webb, vi. 181.
Clinch's caſe, iii. 286.
Clinton *v.* Hooper, i. 497. 508.
Cliffold *v.* Cliffold, i. 59.
Clitheroe *v.* Franklin, iii. 232.
—— *v.* Higgs, vi. 627.
Clive *v.* Vere, ii. 495.
— *v.* Walſh, iv. 443.
Clixby *v.* Dines, i. 26.
Cloberie's caſe, iv. 393.
Cloberry *v.* Symonds, v. 106.
Clotworthy *v.* Mitchel, vi. 81.
Cloudſly *v.* Pelham, iv. 283. vii. 138.
Clowes, *ex parte*, i. 461.
Cloyne (Biſhop) *v.* Young, ii. 655. iii. 67.
Clugas *v.* Penaluna, i. 276.
Clun's caſe, vi. 15. 23.
Clyat *v.* Battiſon, v. 32.
Clymer *v.* Littler (MS.), vi. 674.
Coachman *v.* Halley, vi. 636.
Coan *v.* Bowles, iii. 619. vi. 390.
Coates *v.* Hewitt, i. 669. ii. 281.
Cobb *v.* Prior, i. 636.
Cobden *v.* Kendrick, ii. 580.
Cock *v.* Croſs, iii. 10.
—— *v.* Honeychurch, i. 43.
—— *v.* Townſon, iv. 662.
—— *v.* Wartham, ii. 586.
Cockain *v.* Witnam, vi. 441.
Cockerel *v.* Armſtrong, vi. 620.
Cockerill *v.* Allanſon, ii. 39.
———— *v.* Kinaſton, ii. 47.
———— *v.* Ouſton, i. 343. 458.
Cocking *v.* Pratt, iii. 306.
Cockings *v.* Fraſer, iv. 647.
Cockman *v.* Ferrer, ii. 498.
Cockram *v.* Welby, ii. 720. iv. 472.
Cockran *v.* Love, i. 393. 401.
Cockroſt *v.* Smith, i. 247.
Cockſedge *v.* Fanſhaw, ii. 232.
Cockſhot, *ex parte*, i. 420.
———— *v.* Bennett, i. 262. 267. 455. iii. 305. 612.
Cockſon *v.* Ogle, i. 219.
Coddington *v.* Wilkins, v. 416.
Codron *v.* Hayman, v. 299.
Coe *v.* Chambers, vi. 229.
Cogan *v.* Cogan, v. 800.
—— *v.* Ebden, vii. 47.
Coggs *v.* Barnard, i. 266. 374. vi. 564. 685.
Coke's caſe, iii. 766. iv. 122.
Coke *v.* Bullock, vii. 357.
—— *v.* Heathcote, vi. 478.
—— *v.* Hodges, vi. 113.
—— *v.* Licence, v. 669.
—— *v.* Parſons, iii. 615.
—— *v.* Roberts, ii. 544.
Colbert's caſe, i. 142.
Colborne *v.* Stockdale, v. 176. 372.
Colcheſter *v.* Arnot, iv. 128.
Cole's caſe, ii. 497.
Cole, *ex parte*, i. 293.
—— *v.* Bellaſis, vi. 24.
—— *v.* Buckland, vi. 118.
—— *v.* Davies, i. 398.
—— *v.* Gibbons, iii. 307.
—— *v.* Gibſon, iv. 541.

Cole v. Goring, i. 59.
—— v. Goving, vii. 53.
—— v. Green, ii. 504 vii. 251. 295.
—— v. Hawkins, i. 285.
—— v. Hindſon, vi. 609, 610.
—— v. Knight, v. 712.
—— v. Lawe, ii. 450.
—— v. Moore, vii. 185.
—— v. Rawlinſon, ii 656.
—— v. Walton, vi. 460.
Coleman v. Baker, vi. 717.
—— v. Barton, v. 739.
—— v. Coleman, iv. 356. 360.
—— v. Seymour, iv. 342.
—— v. Sherwin, ii. 66.
—— v. St. Alban's (Duke), vii. 508.
—— v. Wince, v. 83.
Coles v. Hancock, vii. 377.
—— v. Haviland, vi. 223.
Coleſworth v. Brangwin, iii. 68.
—— v. Freeman, i. 393.
Colket v. Falch, i. 394.
—— v. Freeman, i. 393.
Collet v. Collet, i. 113.
—— v. De Golls, i. 430. 440.
—— v. Dorſels, v. 76.
—— v. Jacques, vi. 7.
—— v. Powell, i. 221.
—— v. Maſterman, v. 369.
—— v. Munden, v. 84.
Collier's caſe, iv. 251.
Collier v. Burrell, vi. 236.
—— v. Gaillard, ii. 40.
—— v. Hague, i. 326.
—— v. Morris, vi. 656.
Collin's caſe, iv. 501.
Collingwood v. Pace, i. 132. ii. 275.
Collins v. Blantern, i. 646.
—— v. Emet, iv. 732. 738.
—— v. Forbes, i. 436. vii. 406.
—— v. Gibbs, i. 279.
—— v. Goodall, vi. 464.
—— v. Harding, v. 708.
—— v. Man, vi. 442.
—— v. Metcalf, iv. 396.
—— v. Muxworthy, ii. 465.
—— v. Plummer, v. 812.
—— v. Powell, i. 330.
—— v. Sutton, vii. 384.
—— v. Vaughan, iv. 91.
Collinſon v. Wright, iv. 295. v. 783.
Collis v. Malin, vi. 218. 245.
Colliſſon v. Loder, vi. 253.
Collop v. Brandon, i. 2.
Collyer v. Howes, vi. 739.
Colſon v. Colſon, iv. 277. v. 747.
Colſton v. Gardener, vii. 120.
—— v. Roſs, ii. 514.
Colt v. Netterville, i. 107. 392.
Colton v. Goodridge, v. 175.
—— v. Smith, ii. 239.
Colwell v. Shadwell, i. 113.
Combe's caſe, iv. 140.
Combe v. Pitt, i. 24, 25. 67. v. 428.
Comber v. Hill, iv. 291.
—— v. Watton, ii. 290. iii. 464.
Comberford's caſe, iv. 145.
Combs v. Bradley Hundred, iii. 512.
Comer v. Baker, vii. 421.
Comerford v. Price, i. 9.
Coming, *ex parte*, i. 414.
Commiſſioners of Sewers for Whitechapel—See Whitechapel.
Commons v. Marſhal, iv. 157.
Commyn v. Kincto, ii. 417.
Company (Dutch W. I.), v. Moſes, i. 58.
—— (South Sea), v. Duncomb, i. 257.
Compoſt's caſe, vi. 742.
Compton's caſe, iii. 514.
Compton v. Bedford, i. 396.
—— v. Beſt, i. 263.
—— v. Collinſon, i. 505. 726.
—— v. Frankland, vii. 141.
—— v. Ireland, ii. 516.
—— v. Oxendon, iv. 209.
Cone—See Coan.
Congalton, *ex parte*, i. 439.
Congreve v. Congreve, iv. 346.
Conier's caſe, v. 520.
Conier v. Frank, v. 407.
—— v. Smith, ii. 83. v. 339.
Coningham v. Melliſh, vii. 146.
Coningſby (Lord) v. Jekyll, i. 170.
—— v. Ruſkey, iv. 15.
Connor v. Martin, i. 499.
—— v. Weſt, ii. 420.
Conny v. Jacob. ii. 511.
Conſtable's caſe, ii. 177. v. 499. 512.
Conſtable v. Cloberry, v. 390.
Conway's caſe, iii. 262.
Conway v. Conway, v. 819.
—— v. Longville, iv. 436.
—— v. Shrimpton, v. 95.
Conyers—See Coniers.
Cook's caſe, vii. 258.
Cook, *ex parte*, i. 460.
—— v. Abraham, i. 725.
—— v. Beal, ii. 275.
—— v. Booth, ii. 79. iv. 229.
—— v. Bromehill, iv. 156.
—— v. Colehan, iv. 697.

Cook v. Colehan, iv. 697.
— v. Dobree, i. 326.
— v. Duckenfield, i. 585. vii. 145.
— v. Fountain, iv. 203.
— v. Holgate, vi. 483.
— v. Jones, vi. 123. vii. 208.
— v. Latimer, v. 615.
— v. Marſhal, vii. 417.
— v. Oakley, iv. 351.
— v. Oxley, i. 271.
— v. Parker, i. 122.
— v. Sayer, iv. 553.
— v. Schmoll, i. 101.
— v. Toombs, vii. 388.
— v. Tucker, vi. 219. 708.
— v. Whaley, vii. 287.
— v. Whorwood, ii. 281.
— v. Winford, iii. 650.
— v. Wingfield, vi. 210. 256.
— v. Younger, v. 185.
Cooker v. Child, iv. 627.
Cookes v. Bellamy, i. 249.
—— v. Maſcall, i. 118.
Cookman v. Farrer, iii. 193.
Coombes v. Gibſon, i. 725.
Coomes v. Ellin, ii. 251.
Coope v. Eyre, iv. 605.
Cooper v. Andrews, vi. 694. 745.
—— v. Chitty, i. 440. vi. 179.
—— v. Chitty (M. S.), vi. 691.
—— v. Cooper, i. 725. v. 59.
—— v. Denne, i. 111.
—— v. Forbes, iv. 347. vii. 469.
—— v. Foſter, iv. 464. vi. 74.
—— v. Franklin, ii. 546. vii. 95.
—— v. Ginger, ii. 55.
—— v. Hurſt, i. 224.
—— v. Iles, iii. 123.
—— v. Le Blanc, iv. 739.
—— v. Pepys, i. 420. 445.
—— v. Robins, ii. 55.
—— v. Sherbrooke, vi. 64. 85.
—— v. Smyth, vi. 206.
—— v. Thornton, iv. 431.
—— v. Tiffin, ii. 57.
—— v. Witham, i. 98.
Coote v. Barty, vi. 629.
—— v. Bond, ii. 655.
—— v. Boyd, ii. 656. iv. 361.
—— v. Lightworth, vi. 571.
—— v. Lynch, ii. 722.
Cope v. Cooke, i. 326, 327.
—— v. Cope, iii. 85, 86.
—— v. Glover, i. 711.
Copeman v. Gallant, i. 436. vi. 381.
Copendale v. Bridgen, i. 396.
Copland, *ex parte*, i. 460.
—— v. Pyot, ii. 325.
—— v. Wheeler, iii. 615.
Copleſtone v. Boxwell, v. 7.
Copley v. Copley, iv. 363.
Coppin v. Fernyhough, v. 72. vii. 321.
Coppring v. Cook, v. 104.
Copwood's caſe, v. 757.
Corbet's caſe, i. 648. iii. 240. iv. 285.
Corbet v. Barker, vii. 503.
—— v. Cleer, iv. 72.
—— v. Hill, vi. 249.
—— v. Maydwell, v. 818.
—— v. Palmer, iv. 394.
—— v. Poelnitz, i. 386. 505.
—— v. Stone, iv. 199. v. 742.
Corbyn v. Brown, v. 367. vii. 15.
Cordage v. Cole, ii. 92.
Cordell's executors v. Clifton, vii. 73.
Cordwell v. Mackerill, i. 113.
Cornbury v. Middleton, vii. 66. 185.
Cornforth v. Boon, iv. 351.
Cornhill's caſe, ii. 484.
Corniſh v. Cawſey, iv. 170.
—— v. Mew, v. 31.
—— v. Roſs, vii. 401.
Cornu v. Blackburn, i. 139.
Cornwallis v. Savery, v. 172. 409.
—— v. Spalding, vi. 755.
Corſellis v. Corſellis, ii. 393.
Cort v. Birkbeck, ii. 236.
—— v. Biſhop of St. David's, i. 529.
Cortiſos v. Mienoz, iv. 757.
Cory v. Cory, i. 111.
—— v. Hinton, vii. 16.
Coryton v. Thomas, ii. 736.
Cotes v. Harriſon, iv. 478.
—— v. Sadler, iv. 557.
Cotford v. Peaſe, vi. 745.
Cothay v. Sydenham, iv. 244.
other v. Merrick, iv. 31.
Cotſworth v. Bettiſon, vi. 88.
Cotter v. Layer, i. 483.
Cotterell, *ex parte*, i. 412.
—— v. Harrington, vii. 193.
—— v. Hooke, i. 417. 425.
—— v. Matthews, vi. 241.
—— v. Purchaſe, i. 35. v. 8.
—— v. Tolly, ii. 42.
Cottingham v. King, ii. 421.
Cottington v. Fletcher, v. 272. vii. 61. 139.
Cotton's caſe, i. 392.
Cotton v. Cotton, vii. 320.
—— v. Daintry, vi. 426. 661. 673.

Cotton *v.* Johnſon, ii. 192.
—— *v.* Iſles, v. 40.
—— *v.* Layer, iv. 244.
—— *v.* Lee, i. 118.
—— *v.* Vale, vi. 181.
—— *v.* Wiſeman, ii. 243.
Cottrell—See Cotterell.
Coventry *v.* Apſley, iv. 475.
—— *v.* Burſlem, vii. 521.
—— *v.* Coventry, iii. 86. iv 80 153. v. 25.
—— *v.* Hall, i. 34.
—— *v.* Wortley, vi. 213.
Coulter's caſe, iii. 10. 25.
Counden *v.* Clerk, vii. 77.
Coupledike *v.* Coupledike, ii. 47.
Court *v.* Gilbert, i. 306.
Courteen's caſe, i. 137. v. 515.
Courtney *v.* Collet, vi. 557. 595.
—— *v.* Strong, i. 279.
Coux *v.* Lowther, i. 299.
Cowan *v* Phillips, vii. 466.
Cowden *v.* Clerk, iv. 316. 330.
Cowleigh *v* Edwards, v. 394.
Cowper *v.* Baſingſtoke Hundred, iii 511.
—— *v.* Clerk, i. 736.
—— *v.* Milburn, i. 302.
—— *v.* Price, ii. 485.
—— *v.* Scott, ii. 253, 254. vii. 447.
Cox's (Lady) caſe, i. 113.
Cox's creditors caſe, iii. 59.
Cox *v.* Belitha, v. 705.
—— *v.* Chubby, i. 329.
—— *v.* Liotard, i. 423.
—— *v.* Peele, i. 107. 117.
—— *v.* Phillips, i. 285.
—— *v.* Wright, i. 187.
Coxall *v.* Sharp, i. 203.
Coxe's caſe, iv 97.
Coxe *v.* Cropwell, v. 454.
—— *v.* Croſwell, vii. 15.
—— *v.* Hart, iii. 441.
—— *v* Robinſon, vi. 465. 472.
Coxiter *v.* Parſons, vi. 253. 257.
Coyegame, *ex parte*, i. 412.
Crabb's caſe, vi. 656.
Crabdell's caſe, vi. 443.
Cracraft *v.* Gledowe, v. 254.
Craft *v.* Winter, vii. 49.
Cragg *v.* Norfolk, i. 254. v. 198.
Craigrave *v* Perroſt, iv. 340.
Cramborne *v.* Dalmahoy, i. 17.
—— *v.* Quennell, vi. 423.
Cramlington's caſe, vi. 92.
Cranburn's caſe, vi. 541.
Cranden *v.* Walden, vi. 215.
Crane *v.* Holland, iii. 733.
—— *v.* Taylor, iv. 45.
Cranley *v.* Kingſmill, vi. 458.
Cranmer's caſe, iv. 368. 373. v. 829.
Cratchrode *v.* Seward, i. 329.
Craven *v.* Knight, i 463.
Crawford *v.* Caines, vii. 392.
—— *v.* Middleton, vi. 225. 229.
—— *v.* Powell, iv. 511.
—— *v.* Whittal, i. 258. 278. iii. 94. 95.
Crawley's caſe, vii. 40.
Crawley *v.* Lidgeat, v. 168.
—— *v.* Marrow, ii. 553.
—— *v.* Moreton, vii. 40.
—— *v.* Phillips, vi. 391.
Cray *v* Mansfield, iii. 307.
—— *v.* Rooke, i. 112.
Creagh *v.* Wilſon, iv. 412.
Creak *v.* Pitcairne, v. 654, 655. 658.
Creamer *v.* Wickett, iv. 49. i. 24.
Creſley *v.* Darling, i. 344.
Creſpigny *v.* Wittenoom, i. 189.
Creſſit *v.* Burgis, ii. 270.
Creſsley *v.* Carrington, i. 241.
—— *v.* Clare, iv. 350.
Creſwell *v.* Houghton, vi. 183. vii. 421.
Crew *v.* Bailie, v. 624.
—— *v.* Saunders, ii. 635.
Crickett *v.* Dolby, vii. 497.
Crickmere *v.* Paterſon, v. 808.
Crinſoz, *ex parte*, i. 416.
Cripps *v.* Bainton, i. 277. v. 339.
—— *v.* Durden, iii. 334. 476.
—— *v.* Read, vii. 395.
—— *v.* Webb, ii. 104. vii. 57.
Criſp, *ex parte*, i. 401.
—— *v.* Bellwood, ii. 239.
—— *v.* Pratt, i. 387. 431. iii. 661. vii. 37.
Crockat *v.* Crockat, iv. 355, 356.
Crockay *v.* Martin, vi. 472.
Croford *v.* Bliſſe, vi. 231.
Croft *v.* Boite, i. 151.
—— *v.* Pawlet, vii. 308. 315.
—— *v.* Powell, v. 7.
—— *v.* Pyke, ii. 445.
Crofton's caſe, vi. 393.
Crogate's caſe, vi. 618, 619.
Crokat *v.* Jones, v. 364.
Croke *v.* Watt, iii. 55.
Croker *v.* Kelſey, iv. 35.
Crompton's caſe, iii. 514.
Crompton *v.* Bearcroft, iv. 537.
—— *v.* North, ii. 655.

Crompton *v.* Philpot, vi. 237.
——— *v.* Sale, iv. 373.
——— *v.* Steward, vii. 523.
——— *v.* Ward, ii. 517.
Cromwell's caſe, i. 666. vii. 91. iii. 209. vi. 99. 224. 241. 252.
Cromwell *v.* Andrews, ii. 464, 465. 487. vi. 31.
——— *v.* Grunſden, vii. 26.
Crooke *v.* Brooking, vii. 139.
Crookhay *v.* Woodward, vi. 642.
Crookſhank *v.* Thompſon, i. 425.
Crop *v.* Hambleton, vi. 445. 451.
—— *v.* Norton, vii. 143.
Croſby's (Braſs) caſe, i. 354.
Croſier *v.* Ogilby, vi. 707.
——— *v.* Tomlinſon, ii. 344.
Croſley *v.* Shaw, i. 8. v. 620.
Croſſe's caſe, v. 232.
Croſſe *v.* Addenbroke, i. 113.
——— *v.* Diggs, ii. 178.
——— *v.* Fauſtenditch, iv. 149. vii. 99.
——— *v.* Fox, i. 442.
——— *v.* Gardiner, i. 79.
——— *v.* Hunt, v. 389.
——— *v.* Kaye, vii. 389. 399.
——— *v.* Liggs, v. 511.
——— *v.* Salter, i. 86.
——— *v.* Scudamore, v. 421.
——— *v.* Skipwith, iii. 746.
——— *v.* Stanhope, vi. 399.
Croſſeing *v.* Honor, iii. 644.
——— *v.* Scudamore, vii. 100.
Croſsley, *ex parte*, i. 421.
Croſsley, in the matter of, vii. 397.
——— *v.* Arkwright, i. 187.
Croſſman *v.* Hume, vii. 65.
Crotch *v.* Crotch, v. 434.
Crouch *v.* Fryer, vi. 751.
——— *v.* Haines, vi. 417.
Croucher's caſe, vi. 393.
Croucher *v.* Collins, vi. 723.
Crow *v.* Baldwere, vii. 417.
—— *v.* Ballard, iii. 307.
—— *v.* Brown, vii. 208.
—— *v.* Ramſey, vi. 374.
Crowder, *ex parte*, i. 460.
Crowther *v.* Oldfield, i. 628.
Cruſee *v.* Berry, ii. 59.
Crumpe *v.* Barne, vi. 219.
Crunden *v.* Walden, vi. 253.
Cruſe *v.* Barley, vii. 142.
Cruſoe *v.* Bugby, iv. 220.
Crutchfield *v.* Scott, ii. 47. vi. 474.
Cuddington *v.* Wilkins, vi. 210. 250.
——— *v.* Williams, vi. 250.
Cullen *v.* Duke of Queenſberry, i. 107.
Culley *v.* Hicklin, iii. 657.
Cullford *v.* Blandford, iv. 468.
Culpepper *v.* Aſton, iii. 86.
Cumber *v.* Wane, i. 41.
Cumberland's caſe, v. 604.
Cumberland (Ducheſs) *v.* Praed, i. 187.
Cuming *v.* Munro, ii. 276.
Cunliffe *v.* Cunliffe, vii. 140.
Cunlip *v.* Randle, vii. 269.
Cunningham *v.* Houſton, ii. 503.
——— *v.* Lawrence, i. 260.
——— *v.* Moody, i. 113. ii. 220. 442.
Cuppledike's caſe, v. 837.
Curenden (Inhabitants of) *v.* Leland (Inhabitants of), vi. 360.
Curle's (Auditor) caſe, vi. 216.
Curling *v.* May, i. 113.
Curry *v.* Edenſor, vii. 362.
Curtins *v.* Padley, v. 475.
Curtis's caſe, v. 128.
Curtis *v.* Collingwood, i. 270.
——— *v.* Curtis, i. 34. ii. 396.
——— *v.* Marſh, i. 651.
——— *v.* Vernon, iii. 26.
——— *v.* Woolverſton, i. 639. v. 808.
Cuſack *v.* Cuſack, i. 113. vii. 164.
——— *v.* Jones, ii. 414.
Cuſt, *ex parte*, i. 463.
Cutforthy *v.* Taylor, ii. 224. iv. 26. v. 349. vi. 601.
Cuthbert *v.* Peacock, ii. 653. iv. 372.
Cutler *v.* Brewſter, ii. 83.
—— *v.* Dixon, vi. 226.
Cutlers (Corporation of) *v.* Buſſin, ii. 50.
Cutter *v.* Powell, iv. 617.
Cutterback *v.* Smith, iii. 59.
Cutting *v.* Darby, iii. 706.
——— *v.* Williams, v. 351.

D.

Dacoſta *v.* Dacoſta, iii. 616.
——— *v.* Firth, iv. 649. 651. 659.
——— *v.* Jones, i. 18. 285. iii. 335.
——— *v.* Ledſtone, v. 142.
——— *v.* Newnham, iv. 622. 649.
——— *v.* Scandret, iv. 652. 655.
Dacre's caſe, ii. 419. iii. 558.
Dacy *v.* Clinch, vi. 228. 246.
Daer *v.* Johnſtone, ii. 125.
Daggliſh *v.* Weatherby, iv. 729.
Dalbury (Inhabitants of) *v.* Foſton, vi. 388.
Dale *v.* Eyre, v. 141.

Dale v. Hale, i. 555.
—— v. Lubbock, iv. 739.
—— v. Phillipſon, vi. 601.
Dalley v. Smith, i. 387.
Daly v. King, iv. 254.
Dalmer v. Barnard, vii. 387. 392.
Dalſton v. Reeve, vi. 9.
Dalton's caſe, vii. 200.
Dalton v. Hammond, i. 736.
Daly v. Bellamy, ii. 45.
Damer v. Barker, i. 57.
Danby (Earl's) caſe, i. 354.
Danby v. Hodgſon, vi. 610.
Dand v. Sexton, ii. 36.
Dande v. Currer, vii. 210.
Dandy v. Turner, iv. 679.
Daniel v. Adams, i. 107.
——— v. Phillips, i. 570.
——— v. Upley, vii. 281.
——— v. Waddington, iii. 697. iv. 132.
Dannet v. Collingdell, vi. 600.
Danny v. Lucy, i. 247.
Danſen v. Hawes, ii. 250.
Danvers v. Clarendon, iv. 349.
——— v. Manning, iv. 353.
——— v. Thiſtlewaite, iii. 339.
Darby v. Coſens, v. 663.
—— v. Wilkins, vi. 478.
Darcett's caſe, iv. 169.
Darcy's caſe, v. 604.
Darcy v. Allen, v. 578.
—— v. Aſhwith, vii. 262.
—— v. Beardſham, iv. 248.
—— v. Hall, v. 59. 89, 90.
—— v. Jackſon, v. 846.
—— v. Lee, ii. 229.
Darly v. Darly, i. 482. vii. 362.
Darrel v. Wilſon, iii. 61. vi. 23.
Darroſe v. Newbolt, v 468.
Darwent v. Walton, vi. 128.
Davenant v. Hardis, i. 548.
——— v. Rafter, i. 2.
——— v. Saliſbury (Biſhop), iv. 73.
Davenhill v. Barritt, vi. 461.
Davenſh v. Baines, vii. 139.
Davenport's caſe, v. 862.
Davenport v. Oldys, iv. 291. v. 821.
——— v. Tyrrell, i. 530.
Davers v. Dewes, iii. 75. iv. 341.
Davie v. Beardſham, i. 113.
Davies's caſe, vi. 210. 220, 221.
Davies v. Auſten, iv. 433.
——— v. Bridges, iv. 19.
——— v. Clerk, v. 377.
——— v. Daverell, vi. 671.
Davies v. Davis, iv. 428.
——— v. Doe, i. 285.
——— v. Gardner, iii. 87. iv. 286. vi. 256.
——— v. James, ii. 45.
——— v. Jordan, i. 74.
——— v. Kemp, iv. 335.
——— v. Leckie, i. 330.
——— v. Levinz, iii. 110.
——— v. Mannington, iii. 606.
——— v. Mazzinghi, i. 327.
——— v. Miller, vi. 248.
——— v. Pepys, iii. 465.
——— v. Percie, iv. 339.
——— v. Pierce, i. 531. ii. 505. 663.
——— v. Powell, ii. 343.
——— v. Price, vi. 699.
——— v. Rayner, iv. 446.
——— v. Speed, v. 795. vii. 129.
——— v. Symonds, i. 111.
Davila v. Almanza, i. 236.
——— v. Herring, ii. 45.
——— v. Peacock, iii. 654.
Davis v. Gildart, iv. 661.
Daviſon v. Barnard Pitt, vii. 197.
Dauſley v. Weſtbrowne, ii. 586.
Daw v. Pitt, iv. 320.
Dawes v. Ferrers, iv. 331. v. 746.
Dawkes v. Cavenagh, vi. 578. 689.
——— & Ux v. Delorane, iv. 695. 698.
Dawkins v. Burridge, iv. 239.
——— v. Read, i. 337.
Daws v. Boughton, vi. 209.
Dawſon v. Killett, i. 250. iv. 410.
——— v. Lee, v. 236.
——— v. London Sheriffs, v. 232.
——— v. Parrott, vii. 181.
——— v. Wilkinſon, i. 605.
Dawtrice v. Dee, vi. 568.
Day v. Auſtin, vii. 257.
—— v. Biſbitch, vii. 257.
—— v. Buller, vi. 216.
—— v. Edwards, vi. 557.
—— v. Guildford, i. 308.
—— v. Muſket, vi. 596, 597.
—— v. Peckwell, v. 104.
—— v. Pitts, v. 652.
—— v. Sampſon, vi. 651.
—— v. Savage, vi. 640.
—— v. Searle, iv. 621.
Dayrell v. Champneſs, iii. 650. vii. 287.
——— v. Thynn, ii. 469.
Dayrolles v. Howard, i. 624.
Dean's caſe, iii. 511.
Dean v. Crane, iv. 483.

Dean v. Dalſon, iii. 67.
—— v. Delever, ii. 252.
—— v. Guiſe, iv. 758.
—— v. Tidmarſh, iii. 200.
Dearne v. Grimp, ii. 46.
De Balf v. Mackenzie, i. 330.
Debeze v. Mann, ii. 653. iv. 381.
Debray v. Adair, i. 258.
Decius's (Lord) caſe, iii. 578.
Deck v. Strutt, iv. 446.
Decoſta v. Cartaret, v. 448.
—— v. De Pas, i. 581.
Deering v. Moor, vi. 401. 607.
—— v. Torrington, iii. 58.
Deerly v. Mazarine, vi. 662.
Deeze, *ex parte*, vi. 695.
Deg v. Deg, vii. 142, 143.
De Garron v. Galbraith, iv. 648.
De Gols v. Ward, i. 402, 403.
De Gray v. Glaggett, iv. 669.
—— v. Richardſon, ii. 224.
D. Greve v. Hedges, ii. 182.
De Guilder v. Depeiſter, iv. 679.
D'Eguine v. Bewicke, iv. 669.
Dekers v. Harriat, iv. 703.
Delacour v. Read, i. 330. vii. 400.
Delamar v. Barnard, vii. 75.
Delamotte's caſe, v. 612.
Delancy v. Dymock, i. 81.
—— v. Wallis, iii. 655.
Delaney v. Stoddart, iv. 663. 675.
Delaporte v. Cook, vi. 224.
De la Preuve v. Biron (Duc de), i. 58
Delattre v. Mango, v. 471.
Delmada v. Motteux, iv. 658.
Deloraine v. Smith, iv. 474. vii. 65.
Demandray v. Metcalf, i. 370. v. 81.
De Moranda v. Dunkin, ii. 519. vi. 157.
Denbawd's caſe, vii. 220.
Denn v. Abingdon, ii. 712.
—— v. Barnard, ii. 660.
—— v. Dolmer, vii. 391.
—— v. Fulford, ii. 414.
—— v. Gaſkin, iii. 679.
—— v. Gillott, ii. 550.
—— v. Hobſon, ii. 551.
—— v. Miller, iv. 252, 253.
—— v. Shenton, iv. 261.
—— v. Slater, iv. 291.
—— v. Spray, ii. 632.
—— v. Sybourn, vii. 444.
Dennis v. Dennis, vi. 647.
—— v. Drake, vi. 105.
—— v. Fletcher, vii. 53.
—— v. Payne, v. 423.
Denny v. Eakinſtall, iv. 116.
Denny v. Parnell, ii. 443.
—— v. Trapnell, vi. 151.
Dent v. Hertford Hundred, vi. 668.
—— v. Lingwood, ii. 503.
—— v. Oliver, v. 335.
—— v. Parſo, vii. 46.
—— v. Salvin, vi. 725.
Denton v. Stewart, i. 108.
Depaiba v. Ludlow, iv. 658.
Deply v. Spratt, iv. 759.
Derby's caſe, ii. 239. v. 556.
Derby (Earl of) v. Athol (Duke of), i. 3.
Deriſley v. Cuſtance, iii. 465.
Derrier v. Arnaud, v. 418.
De Rutland's (Counteſs) caſe, v. 279.
Derwentwater's (Lord) caſe, v. 275.
Deſbordes v. Horſey, i. 333. vi. 415.
Deſbrough v. Crombie, vi. 131.
Dethick v. Bradburn, ii. 226. vi. 415.
Dethwicke v. Caravan, iii. 59.
Deveniſh v. Baines, i. 118. iii. 302.
Devereux v. Barlow, ii. 285.
Deveſe v. Pontet, iv. 368.
Devine, *ex parte*, i. 418.
Deviſme v. Mello, iv. 346.
Devon v. Watts, i. 396.
Deux v. Jefferies, v. 683.
Dewar v. Span, vii. 190.
Dewberry v. Chapman, i. 262.
Dias v. Freeman, vi. 60.
Dibben v. Cook, ii. 45.
Dick, *ex parte*, v. 618.
—— v. Allen, iv. 646.
—— v. Milligan, i. 241.
Dickenſon v. Fiſher, vii. 53.
—— v. Holcroft, i. 263. iv. 530.
—— v. Watſon, i. 243.
Dicker v. Mollard, vii. 31.
Dickon v. Clifton, i. 51.
Dickſon—See Dixon.
Digby v. Cornwallis, vii. 185.
—— v. Langworth, vii. 186.
—— v. Legard, vii. 142. 144.
—— v. Wray, iii. 51.
Digge's caſe, iii. 209. vii. 115.
Dighton v. Granville, ii. 479.
—— v. Greenville, iii. 208. 211. iv. 203.
—— v. Stratford (Mayor of), iv. 500.
Dike v. Brown, v. 663. vi. 763, 764.
Dillon v. Fraine, vii. 94. 121.
—— v. Harper, v. 621.
—— v. Leman, vii. 464.
Dilly v. Doig, v. 601.
Dimmock's caſe, iv. 115.
Dimmock v. Atkinſon, i. 507.

Dimmock v. Chandler, ii. 182. iv. 611.
Dingwall v. Dunſter, iv. 720.
Diſmo v. Shirley, ii. 472.
Diſplain v. Spratt, vi. 660.
Dive v. Manningham, vi. 181.
Dix v. Brooks, vi. 626.
Dixe's (Walſton) caſe, v. 835.
Dixon's caſe, v. 604.
Dixon v. Adams, ii. 725.
—— v. Allen, vii. 477.
—— v. Bird, vii. 391.
—— v. Cooper, ii. 586.
—— v. Evans, vi. 137. vii. 408.
—— v. Harriſon, vii. 84.
—— v. Heſlop, vi. 122.
—— v. Lawſon, iii. 221.
—— v. Pawlett, iii. 339.
—— v. Plant, i. 301.
—— v. Saville, ii. 361.
—— v. Terry, v. 712.
—— v. Willoughs, vi. 449.
Dixy's caſe, vii. 206.
Dixy v. Brown, v. 648.
Dobitoſh v. Curween, vi. 734.
Dobs v. Edmonds, vi. 598.
Dobſon, *ex parte*, i. 418.
—— v. Crew, i. 646.
—— v. Dobſon, ii. 392. 394. v. 477.
—— v. Douglaſs, v. 397. vi. 621.
—— v. Stevens, iii. 746.
Docminique v. Davenant, v. 459.
Dockwrae v. Dickenſon, vi. 683.
Dodd v. Coke, vii. 29.
—— v. Dickenſon, iv. 320.
—— v. Dodd, i. 113. vii. 169.
—— v. Ellington, v. 421.
—— v. Engleton, vi. 740.
—— v. Joddrell, ii. 53.
—— v. Robinſon, vi. 215.
Dodſon v. Oliver, vi. 740.
Dodſworth v. Anderſon, vi. 379.
—— v. Bowen, vii. 399.
Doe v. Alſton, ii. 57, 58. 414. iii. 620.
—— v. Andrews, ii. 580.
—— v. Applin, iv. 268.
—— v. Barber, iv. 90.
—— v. Baylis, vii. 443.
—— v. Bracebridge, ii. 477. vi. 423.
—— v. Butcher, iv. 126.
—— v. Carleton, iv. 293.
—— v. Chapman, iv. 253. 255.
—— v. Clare, iv. 136.
—— v. Clark, iv 246.
—— v. Copeland, ii. 411.
—— v. Davies, vii. 421.
—— v. Davy, vii. 324.
Doe v. Dawſon, i. 343.
—— v. Denton, ii. 421.
—— v. Dorvell, v. 820.
—— v. Freeman, v. 751.
—— v. Fyldes, iv. 252. 291.
—— v. Hellier, i. 745.
—— v. Holmes, iv. 292.
—— v. Jones, i. 126. iii. 207.
—— v. Kerſey, vii. 335.
—— v. Kett, iv. 335.
—— v. Laming, iv. 264.
—— v. Law, ii. 440.
—— v. Martin, iv. 324. v. 74. vii. 417.
—— v. Morgan, iv. 292. vii. 419. 442.
—— v. Mulgrave, iv. 280.
—— v. Odiarne, ii. 328.
—— v. Pegge, vii. 122.
—— v. Pilkington, ii. 412.
—— v. Porter, iii. 92.
—— v. Pott, vii. 122.
—— v. Reaſon, iv. 263.
—— v. Richards, iv. 252.
—— v. Rivers, vii. 441.
—— v. Roach, ii. 396.
—— v. Robinſon, i. 2.
—— v. Roe, i. 2. vii. 443.
—— v. Routledge, i. 485. iii. 320.
—— v. Skeggs, iv. 220.
—— v. Snowden, ii. 234.
—— v. Staple, ii. 430. iv. 245. vii. 122.
—— v. Sybourn, vii. 122. 456.
—— v. Wainwright, v. 820.
—— v. Watton, iv. 56.
—— v. Whitehead, iii. 210.
—— v. Williams, ii. 585. iii. 393.
Dolin v. Coltman, v. 33.
Dolly v. Davis, vi. 714.
Don Diego Servienti de Acuna v. Bingley, i. 141.
Done's caſe, v. 323.
Doniſthorpe v. Porter, iv. 208.
Donne v. Merrifield, iv. 309.
Dorcheſter v. Proby, vi. 100.
—— v. Webb, iii. 89. 468. v. 381. 686.
Doriſon v. Weſtbrooke, i. 107.
Dormer's caſe, iii. 227.
Dormer v. Forteſcue, i. 33, 34. ii. 581.
—— v. Parkhurſt, vi. 674.
—— v. Thurland, vii. 310. 316.
Dorney v. Cuſford, v. 335.
Dorrel's caſe, vi. 507.

Dorrel v. Moleſworth, iv. 391.
Dorrington v. Edwin, i. 332. vi. 418.
Dorſton v. Orford, iii. 83.
Dotten v. Ford, vi. 245.
Dottin's caſe, i. 306.
Dove v. Smith, vi. 681.
—— v. Williot, v. 863.
Dover's (Lord) caſe, v. 282.
Dover v. Hodgſon, ii. 50.
Dovillieres, *ex parte*, i. 415.
Dovor v. Robinſon, ii. 41.
Doughty v. Laſcelles, i. 27. v. 353, 354. vii. 385.
Douglaſs v. Clay, iii. 649.
——— v. Hall, i 244. vi. 598.
——— v. Kendal, i. 623.
——— v. Patrick, vi. 461.
——— v. Ray, vi. 648.
Doulſon v. Mathews, i. 53.
Douſe v. Earl, ii. 77. iv. 282.
—— v. Jefferies, v. 422.
Dowdale's caſe, vii. 20. 38, 39.
Dowling's caſe, iii. 221.
Dowman's caſe, vii. 91.
Downes v. Hopkins, iii. 159.
—— v. Parkhurſt, i. 186.
Downham v. Button, vii. 205.
Downing v. Seymour, i. 478.
Dowſe—See Douce.
Dowſet v. Sweet, ii. 657.
Dowſland v. Thompſon, vi. 137.
Dowſe's caſe, ii. 531. iii. 274.
Doyley v Tolferry, iv. 429.
Doyly v Perfull, i. 479.
Draddy v. Deacon, iv. 628.
Drage v Brand, ii. 84.
Drake, *ex parte*, i. 463.
—— v Beare, ii. 107. v. 359.
—— v. Cooper, v. 330.
—— v. Exeter (Mayor of), i. 413. 438.
—— v. Munday, iii 62. vi. 19.
—— v. Pruet, ii. 362.
—— v. Robinſon, i. 725.
—— v. Sykes, vii. 514.
Draper v. Borlace, iii. 301. v. 47.
—— v. Brightwell, ii. 479.
—— v. Crowther, vii. 57.
—— v. Glaſſop, ii. 292.
—— v. Hill, vi. 246.
—— *et al*" v Jennings, v. 102.
Drapers' Company v. Davis, i. 303.
——— ——— v. Yardley, iii. 213. v. 68.
Draycote v. Curzon, i. 4.
Drew v. Merry, iv. 250.
Dring v. Reſpaſs, iv. 576. v. 363. 398.
Drinkwater v. London Aſſurance Company, iv. 675.
——— ——— v. Falconer, iv. 425.
——— ——— v. Goodwin, iv. 601.
Driver v. Edgar, iii. 241. iv. 262.
Drury's caſe, i. 313. ii. 52. v. 250.
Drury v. Drury, iii 598.
—— v. Kent, iv. 87.
—— v Man, i. 431. 735.
—— v. Smith, iv. 338.
Drybutter v. Bartholomew, i. 498.
Dryer v. Mills, vi. 627.
Duberley v. Gunning, vi. 667.
Dublin (Archbiſhop) v. Dublin (Dean), ii. 55.
——— (Dean, &c. of) caſe, iv. 506.
——— v Dowgatt, iv. 522. 523.
Duck v. Addington, iii. 800.
—— v. Vincent, ii. 90. v. 405. 412.
Ducker v. Wood, vi. 668.
Ducfield v. Warden, i. 23. v. 440.
Dudly v. Byron, vi. 120.
—— v. Mallery, i. 213.
—— v Ward, iii. 64. vii. 258.
Dudney v. Collier, vii. 384.
Duel v. Harding, ii. 586.
Duffield v. Smith, iv. 372.
Duke v. Doidge, iv. 349.
Dumas, *ex parte*, i. 437. iv. 603. vi. 695.
Dumper's caſe, vi. 375.
Dumper v Syms, iv. 125.
Dun's caſe, iii. 278.
Dun v Green, vii. 419.
—— v Vaucher, v. 448.
Dunbar's caſe, ii. 214.
Dunch v. Kent, v. 68. vii. 155.
Dunckley v. Wade, vi. 662.
Duncomb v. Duncomb, ii. 365. v. 762.
——— v. Hanſley, v. 101.
——— v. Reeve, vi. 559.
——— v. Tickeridge, iii 595.
——— v. Walter, i. 396. iii. 53.
Dungey v. Angove, iii. 657.
Dunn v. Patie, ii. 520.
—— v. Vacher, v. 175.
Dupieſſis v. Chalk, i. 60.
Dupps v. Gerrard, i. 263.
——— v. Mayo, i. 21. 263.
——— v. Stephens, v. 384.
Dupper v. Baſkerville, v. 351.
Duprett v. Teſtard, i. 331.
Durand v. Child, vi. 567.
Durant v. Preſtwood, iii. 55.
Durett v. Hayward, v. 624.
Durham's (Sheriffs) caſe, ii. 508.
——— (Biſhop) caſe, vii. 259.

Durnford v. Lane, iii. 603. vii. 90.
Durour v. Motteux, i. 595, vii. 146.
Durrand, *ex parte*, vii. 417.
Durrant v. Boys, vi. 580.
——— v. Durrant, vii. 314.
Durſton v. Sands, vi. 193, 194.
Dutch v. Warren, i. 259.
Dutens v. Robſon, v. 678.
Dutton v. Ingram, ii. 553.
——— v. Pitt, v. 637.
Dwyer v. Edie, iv. 673.
Dyche v. Burgoyne, v. 472.
Dye v. Leatherdale, vi. 559.
Dyer's caſe, vi. 98.
Dyer v. Dyer, vii. 149.
—— v. Manningham, vi. 376.
—— v. Miſſing, i. 404.
—— v. Weſton, ii. 669.
Dyeſly v. Tuer, ii. 92.
Dyke v. Sweeting, ii. 472.

E.

Eacles v. England, vii. 151.
Eardly v. Thornock, vii. 24.
Eare v. Snow, ii. 381.
Earl's caſe, ii. 25.
Earl v. Brown, i. 14.
—— v. Harris, iv. 669.
—— v. Hinton, iii. 87. vi. 123.
—— v. Peale, iii. 594.
—— v. Plummer, iii. 125.
Earles v. England, iv. 389. vii. 140.
Earlom v. Saunders, ii. 442.
Eaſt v. Eſſington, iv. 686.
Eaſtcourt v. Weeks, ii. 234. iv. 220.
Eaſterly v. Eaſterly, vi. 639.
Eaſt-India Company v. Clavel, iii. 315.
Eaſton v. Studd, ii. 325.
Eaſtwood v. Vincke, ii. 296. 447.
Eaton's caſe, ii. 435. v. 246.
Eaton v. Allen, vi. 236.
——— v. Ayloff, vi. 254.
——— v. Butler, i. 649.
——— v. Jacques, ii. 72.
——— v. Sherwin, vi. 759.
——— v. Southby, vi. 53.
Eccleſton v. Clipſam, ii. 48.
——— v. Petty, iii. 416. 615.
Ecollier v. Dutour, i. 303.
Eddie v. Davidſon, ii. 716. iv. 608.
Eddowes v. Hopkins, vii. 18.
Eden v. Bute, ii. 654.
—— v. Foſter, ii 27.
—— v. Parkinſon, iv. 657. 670.
—— v. Poole, iv. 640.
Eden v. Wills, vi. 122.
Edgar v. Farmer, i. 337.
Edge v. Saliſbury, iv. 350.
Edgebury v. Roſendale, iii. 339.
Edgecumbe v. Dee, iii. 82.
Edgworth v. Davis, ii. 190.
——— v. Smallridge, vii. 337.
Edie and Lord v. Eaſt-India Company, iv. 709. vi. 657.
Edmonds v. Boothe, iv. 60. vi. 759.
——— v. Probert, ii. 488.
Edmonſon v. Machell, vi. 659.
Edmonton (Churchwardens) v. Oſborne, v 472.
Edmund v. Thomas. v. 621.
Edmunſon v. Hartley, vii. 394.
Edrich's caſe, ii. 283.
Edſar v. Smart, ii. 725. iii. 463. vi. 115.
Edſell v. Buchanan, v. 91.
Edwards, *ex parte*, i. 443. iii 408.
Edwards v. Applebee, i. 430.
——— v. Carter, v. 221.
——— v. Child, iv. 617.
——— v. Faſhion, iii. 683.
——— v. Halinder, i. 84.
——— v. Hammond, v. 779, 780.
——— v. Harben, iii. 21.
——— v. Jenkins, iii. 655.
——— v. Morgan, ii. 72. 285.
——— v. Seymours, v. 841.
——— v. Slater, vii. 114.
——— v. Warwick (Earl of), vi. 646.
——— v. Warwick (Lady), i. 113. v. 115.
Edwin v. Allen, i. 346.
——— v. Eaſt-India Company, i. 103.
Eedes v. Knotsford, iii. 154.
Effingham v. Napier, iii. 615.
Effington v. Bourcher, vii. 222.
Egerton v. Still, vi. 740.
Eggleton v. Lewin, i. 259.
——— v. Seneſs, vi. 637.
Eichorn v. Le Maitre, i. 30.
Ekins v. Newman, vi. 569.
—— v. Smith, vi. 688.
Elde v. Stephens, i. 70.
Eldin v. Barnes, v. 241.
Elie v. Oſborn, v. 762.
Elkenhead's caſe, iv. 362, 363.
Elkins v. Paine, ii. 461.
Elliot's caſe, iii. 285.
Elliot v. Beſey, v. 571.
—— v. Callow, vi. 466. 471.
—— v. Cheval, i. 224.
—— v. Collier, i. 480. ii. 253, 254. iii. 55.

Elliot v. Cooper, iv. 733.
— v. Davenport, iv. 387. v. 684.
— v. Elliot, vii. 147, 148.
— v. Skipp, i. 160.
— v. Smith, vi. 121.
— v. Wilson, iv. 662.
Ellis, *ex parte*, i. 437.
— v. Atkinson, i. 507.
— v. Galindo, iv. 720.
— v. Guavas, v. 38.
— v. Hunt, i. 438.
— v. Jackson, vi. 168.
— v. Johnson, iii. 444.
— v. Nelson, vi. 148.
— v. Ruddle, v. 194.
— v. Saul, vi. 715.
— v. Smith, vii. 310.
— v. Wallis, ii 500.
— v. Warnes, vii. 201.
— v. Wilson, iv. 662.
— v. Yarborough, ii. 517.
Elliton v. Airey, iv. 285. 345.
— v. Cookson, iv. 383.
Elm v. Leaves, iv. 169.
Eloy v. Prior, vi 768.
Elrington v. Doshant, v 401.
Else v. Osborn, vii. 128. 154.
Elsee v. Gatward, i. 93. 112.
Elston v. Durrant, vii. 30.
Elton v. Brogden, iv. 644. 663.
— v. Elton, iv. 425.
Eltonhead v. Deerman, ii. 500.
Elve v. Sabe, v. 405.
Elwin v. Lombe, vi. 621.
Ely's (Bishop) case, v. 184.
Ely (Bishop) v. James, i. 170.
— (Dean of) v. Warren, i. 715.
Emblyn v. Freeman, vii. 142.
Embry v. Martin, iv. 408.
Emerson's case, vi. 219.
Emerson v. Hawkins, i. 327.
——— v. Inchbald, iii. 462.
Emerton v. Viner, iii. 437.
Emery's case, v. 409.
Emery, *ex parte*, i. 437.
——— v. Cook, i. 314.
——— v. Fell, vii. 48.
Emes v. Hancock, iv. 405.
Empson v. Dudley, iii. 635.
Enbrin v. Mompesson, iii. 18. vi. 113.
Enderby v. Fletcher, iv. 664.
Endsworth v. Griffith, v. 9.
England (Bank of) v. Morris, v. 156. 469.
——— v. Slade, ii. 430.
Englefield's case, iii. 271. v. 525. vi. 446. vii. 254.
English v. Cox, i. 70.
Entick (Clerk) v. Errington & al. i. 350. 354.
Entwistle, v. Shepherd, ii. 479.
Enys v. Donnithorne, ii. 68. iv. 170.
Ereskine—See Erskine.
Errington v. Aynsley, i. 107.
——— v. Errington, iv 33.
Erskine v. Murray, iv. 733, 734.
——— v. Ruffle, vi. 737, 738.
Erving v. Peters, iii. 87. vi. 123.
Escott v. Milward, i. 437. iv. 602.
Essex's (Earl) case, vi. 515.
—— (Sheriff) case, ii. 515. 518.
Essington v. East, iv. 734.
Estwart v. Warry, iv. 445.
Estwicke v. Conninsby, iv. 607.
Ettricke v. Ettricke, iii. 680.
Evans v. Astley, iv. 266.
—— v. Blood, iii. 305.
—— v. Brander, vi. 60.
—— v. Brown, v. 676.
—— v. Charles, vii. 493.
—— v. Cogan, i. 208.
—— v Cramlington, iv. 703.
—— v Croker, v. 332.
—— v. Martlett, iv. 683.
—— v. P——, i. 307.
—— v. Prosser, iv. 97. vi. 137.
Evedon's case, v. 611.
Eveley v. Soley, vi. 616.
Evelyn v. Chichester, i. 258. 737. ii. 282. iii 92.
——— v. Evelyn, iv. 286. v. 25. 819. vii. 462.
Everall v. Smalley, i. 710.
Everard v. Hern, v. 423.
Evereſt v. Sansum, vii. 53.
Everett v. Gery, vi. 118.
Evers v. Skinner, iii 532.
—— v. Strickland, ii. 85. iv. 761.
Evin's case, vii. 460.
Evindon's case, v. 611.
Eure v. Howard, v. 730.
—— v. Turton, vi. 417.
Eusden v. Dennis, iv. 50. 81.
Eustace v. Scawen, ii. 562. iii. 694. v. 690.
Ewer's case, vi. 207.
Ewer v. Astwicke, ii. 224.
—— v. Corbet, v. 70.
—— v. Strickland, i. 469.
—— v. White, v. 91.

Ewſtick's caſe, vi. 688.
Exeter (City of) *v.* Glyde, ii. 24.
——— (Dean and Chapter of) *v.* Drue, iii. 126.
——— ——— ——— *v.* Seagell, vii. 400.
Exeter (Mayor of) *v.* Trimlett, i. 258. vii. 513.
Eyles *v.* Smarr, iii. 746.
Eyre's caſe, ii. 442. vi 20.
Eyre and Strahan *v.* Carnan, v. 597.
Eyre *v.* Baniſter, iii. 749.
—— *v.* Jackſon, i. 33.
—— *v.* Iviſon, i. 117.
—— *v.* Popham, i. 110.
—— *v.* Shafteſbury (Lady), vi. 127.
—— *v.* Taunton, ii. 432.
Eyſton *v.* Studd, vi. 281. 386, 387.

F.

Fabian *v.* Plant, ii. 257.
Fabrigas *v.* Moſtyn, i. 531.
Fabrilius *v.* Cock, vi. 672.
Facey *v.* Long, vi. 717.
Factor *v.* Samyne, i. 479.
Facy *v.* Lange, v. 659.
Faikney *v.* Raynous, i. 262.
Fairbank *v.* Maſon, vi. 219.
Fairchild *v.* Gayre, vii. 7.
Fairclaim *v.* Shackleton, iii. 688.
——— *v.* Shamtitle, ii. 413.
Fairfax *v.* Grey, ii. 341.
——— *v.* Heron, iv. 296.
Fairley *v.* M'Connel, iii. 444.
Falconbridge's caſe, v. 75.
Faldoe *v.* Ridge, ii. 504, 505. vi. 613.
Falkener *v.* Caſe, i. 435.
Falkland *v.* Bertie, iii. 614.
——— *v.* Phipps, vi. 97.
Fallon, *ex parte*, i. 186. 188.
Falſtaff's caſe, vi. 9.
Fane *v.* Fane, ii. 655.
Fanſhaw *v.* Morriſſon, ii. 59.
Fareley's caſe, ii. 399.
Farley *v.* Canterbury (Mayor), ii. 415.
Farmer's caſe, iii. 191. 193. 212. v. 830.
Farmer *v.* Brook, ii. 238.
——— *v.* Downs, iii. 705. vi. 402.
——— *v.* Grant, i. 261.
——— *v.* Richmond, v. 61.
——— *v.* Rogers, iv. 210.
Farmha *v.* Watkins, iii. 605.
Farnaby *v.* Baſſet, ii. 511.
Farne's caſe, iv. 473. vi. 195.
Farnham *v.* Phillips, iv. 375.
Farquarſon *v.* Hunter, iv. 640.
Farquhar *v.* Morris, vii. 505.
Farr *v.* Denn, i. 15.
—— *v.* Eaſt, vi. 399.
—— *v.* Newman, ii. 716. vi. 177.
Farrant *v.* Lovel, v. 20. vii. 264.
Farrer *v.* Bates, i. 232.
——— *v.* Brookes, vi. 112.
Farrow *v.* Chevalier, v. 340.
Fawcet *v.* Carter, iii. 97.
Fawk *v.* Pinſack, v. 334.
Fawkes *v.* Pratt, i. 20. 306.
Fawkner *v.* Watts, ii. 253.
Fazakerly *v.* Wiltſhire, ii. 4. 248.
Fearon *v.* Bowers, iv. 683.
Feaſt *v.* Feaſt, ii. 253.
Featherſtonehaugh *v.* Atkinſon, iii. 476.
Fehner *v.* Fitcher, vi. 619.
Fell *v.* Brown, v. 98.
—— *v.* Fell, iv. 280.
——— *v.* Riley, i. 298.
Fellows *v.* Mitchell, iii. 31.
Feltham *v.* Feltham, iv. 434.
——— *v.* Terry, i. 263.
Fenn *v.* Denn, ii. 409.
——— *v.* Dixie, vi. 225.
—— *v.* Harriſon, i. 267.
Fenner *v.* Evans, i. 187.
——— *v.* Meares, i. 257.
Fenton *v.* Emblers, i. 122. iv. 474.
Fenwick *v.* Groſvenor, vi. 659.
——— *v.* Lamb and others, vi. 745.
——— *v.* Mitford, ii. 538. v. 726, 727. vii. 80.
Fereyes *v.* Robertſon, iii. 85.
Ferguſon *v.* Corniſh, iv. 181.
——— *v.* Mackreth, v. 439.
Fermor *v.* Dorrington, vi. 660.
Fernandes *v.* Da Coſta, iv. 652.
Ferne's (Dean and Chapter) caſe, iv. 107.
Ferral *v.* Shaen, vii. 202.
Ferrer's caſe, i. 38. 475. ii. 407. v. 629, 637. vi. 703.
Ferrer *v.* Arden, vi. 589. 702.
——— *v.* Cherry, v. 71.
——— *v.* Curſon, iv. 202.
——— *v.* Ferrers, i. 35. iv. 440.
——— *v.* Miller, v. 357.
Ferringham *v.* Greves, iv. 178.
Ferſer *v.* Proud, i. 221.
Fetter *v.* Beale, i. 245. v. 443.
Fettiplace *v.* Gorges, iv. 244.
Feverſham (Earl) *v.* Watſon, i. 110.
Field *v.* Canon, i. 70.

Field *v.* Curtis, i. 442.
Fielder *v.* Starkin, i. 82.
Fields *v.* Lewen, i. 298.
Filewood *v.* Button, vi. 715.
——— *v.* Popplewell, vi. 117, 124.
Filkin *v.* Hill, i. 170, 171.
Fillis *v.* Brutton, iv. 652.
Filmer *v.* Gott, ii. 654. iii. 305.
Finch's case, iii. 14. iv. 136.
Finch *v.* Duddin, i. 504.
—— *v.* Masters, vi. 746. 749.
—— *v.* Newnham, v. 63.
Fines's case, vi. 383. 700.
Fines *v.* North, i. 149.
Finn *v.* Hutchinson, i. 298.
Finnymore *v.* Stanley, vii. 18.
Firebrass *v.* Brett, iii. 336.
——— and Symmas *v.* Pennant, vii. 417.
Fish *v.* Campion, iv. 217.
—— *v.* Gasson, v. 685.
—— *v.* Hutchinson, i. 123.
Fisher *v.* Atkins, vi. 212.
——— *v.* Batten, ii. 191.
——— *v.* Beasley, vii. 211.
——— *v.* Brandon, vi. 425.
——— *v.* Branscombe, vii. 402.
——— *v.* Emerton, vi. 119.
——— *v.* Kitchingham, vi. 472.
——— *v.* Lane, ii. 262. iii. 60.
——— *v.* Lemen, vi 715.
——— *v.* Pomfret, iv. 704.
——— *v.* Wigg, iii. 679.
——— *v.* Young, vi. 683.
Fisherwood *v.* Concanen, vi. 611.
Fitch *v.* Hockley, vii. 81.
Fitzgerald *v.* Fauconbridge, ii. 508. 654. vii. 117. 142. 371.
——— *v.* Plunket, i. 298.
——— *v.* Whitmore, ii. 58.
Fitzharris's case, iii. 546.
Fitzharris *v.* Bouin, v. 468.
Fitzherbert's case, vii. 237.
Fitzherbert *v.* Mather, iv. 655.
Fitzhughes *v.* Dennington, i. 671.
Fitzjames *v.* Moys, vii. 11.
Fitzpatrick's case, i 607.
Fitzwalter's case, v. 319. vii. 12.
Fitzwilliam's case, ii. 371. iii. 233. vi. 411. 418. 428.
Flarty *v.* Odlam, i. 250.
Flavil *v.* Ventrice, ii. 364.
Fleetwood's case, ii. 371.
Fleetwood *v.* Calanda, iii. 201.
——— *v.* Curl, vi. 212. 231. 245.
——— *v.* Finch, iii. 121.
Fletcher's case, iv. 307. v. 817.
Fletcher *v.* Bathurst, i. 417.
——— *v.* Dyche, vi. 136.
——— *v.* Harcourt, i. 274.
——— *v.* Hennington, v. 176. 378.
——— *v.* Lidley, iii. 313.
——— *v.* Poole, iv. 640.
——— *v.* Richardson, v. 352.
——— *v.* Smiton, iv. 253.
Flewellin *v.* Rave, vi. 684.
Fling's case, iii. 446.
Flintam, *ex parte*, i. 460.
Flood's case, i. 579. iv. 244.
Flood *v.* Gregory, iv. 125.
—— *v.* Rumcey, iii. 11.
Flower *v.* Elgar, v. 699.
——— *v.* Herbert, i. 401.
Floyd *v.* Bachel, ii. 469.
—— *v.* Bethel, ii. 336. 717.
—— *v.* Buckland, i. 121.
Floyer *v.* Edwards, vii. 192.
——— *v.* Levington, v. 10.
——— *v.* Sherrard, i. 109.
Flud—See Flood.
Flyn, *ex parte*, i. 436.
Focus *v.* Salisbury, iv. 198.
Foden *v.* Haines, v. 399.
Foe *v.* Bolton, vi. 124.
Fogoe *v.* Gale, i. 59.
Foldoe *v.* Ridge, ii. 481.
Foley *v.* Burnell, ii. 503. 543. v. 722.
Folkard *v.* Hemmett, i. 621.
Follett *v.* Trill, vi. 122.
Fonnereau *v.* Fonnereau, iv. 397. 436.
——— *v.* Poyntz, ii. 653. vii. 343.
Fontleroy *v.* Ayelmer, vi. 600. 604. 605.
Foon *v.* Blount, v. 278.
Foot *v.* Berkley, iv. 172.
—— *v.* Prowse, iv. 522.
Forbes *v.* Ross, vii. 182.
Ford *v.* Burnham, v. 437.
—— *v.* Compton, i. 124.
—— *v.* Fleming, iv. 358.
—— *v.* Grey, ii. 424.
—— *v.* Hopkins, vi. 692.
—— *v.* Lerk, ii. 420.
—— *v.* Maxwell, vii. 397.
—— *v.* Offulston, iv. 331.
—— *v.* Parr, ii. 40.
—— *v.* Tilly, vi. 672.
Fordley's case, vi. 449.
Fordyce *v.* Willis, ii. 654.
Foreland *v.* Marygold, i. 235. v. 437. 465.
Forrester's case, iii. 606.

Forreſter v. Cotton, vii. 448.
——— v. Lee, v. 27.
——— v. Leigh, iii. 87.
Forſe v. Hembling, i. 483. vii. 340. 373.
Forſhall v. Coles, v. 61.
Forſter—See Foſter.
Forſyth v. Grant, vii. 450.
Forteſcue v. Abbot, v. 767. 769.
——— v Malone, iii. 244.
——— v. Maſon, ii. 476.
Forth v. Chapman, iv. 310.
Fortrey v Fortrey, iii. 468.
Forty v. Hermer, vi. 121.
Foſſam's caſe, vii. 276.
Foſſet v. Auſtin, iii. 469.
Foſter's caſe, vi. 75. 373. 377. 384. 436. vii. 207. 269.
Foſter v. Allanſon, i. 257. ii. 67.
—— v. Barrington, v. 621.
—— v. Blagden, i. 590. iii. 87.
—— v. Browning, vi. 228. 246.
—— v. Brunetti, i. 237.
—— v. Cale, vi. 635.
—— v. Cooke, ii. 383.
—— v. Denny, iii. 411.
—— v. Hawden, vi. 657. vii. 12.
—— v. Jackſon, ii. 718. vii. 21.
—— v. Merchant, iii. 530. v. 89.
—— v. Munt, iii. 67.
—— v. Pitfal, ii. 325, 326.
—— v. Ramſey, iv. 330.
—— v. Speckor and Iſlewith Hundred, iii. 514.
—— v. Taylor, i. 61.
—— v. Wilmer, iv. 665.
Fotherbie's caſe, iii. 49.
Fothergill v. Fothergill, iii. 721.
——— v. Kendrick, v. 61.
Fotheringham v. Greenwood, ii. 592.
Fountain v. Cain, iii. 615.
——— v. Gooch, iv. 262.
——— v. Grymes, vii. 193.
Fowell v. Cowe, vi. 214.
Fowkes v. Joyce, ii. 346.
Fowle v. Doble, v. 426.
Fowler v. Brown, i. 400.
——— v. Down, vii. 410.
——— v. Dunn, i. 345. vii. 401.
——— v. Dyer, v. 438.
——— v. Fowler, i. 482. iv. 368. 370.
——— v. Jones, vi. 138.
Fox's caſe, ii. 666. iii. 431.
Fox v. Aide, vi. 750.
—— v. Bardwell, vi. 756.
Fox v. Black, iv. 662.
—— v. Chandler, v. 175.
—— v. Collier, iv. 56. 63.
—— v. Hanbury, i. 462. ii. 716.
—— v. Lee, ii. 90.
—— v Prickwood, iv. 152.
—— v. Smith, i. 233.
—— v. Wright, v. 160.
Foxall v. Sands, i. 513.
Foxcroft's caſe, i. 513.
Foxcroft v. Lacey, vi. 231. 246.
Foxham (Tything) caſe, iii. 800.
Foxley's caſe, iii. 268. 246. v. 517.
Foxwith v. Tremaine, iii. 13.
Foy v. Hinde, v. 751.
—— v. Liſter, v. 654, 655.
Frampton v. Gerrard, vii. 98.
——— v. Payne, vi. 648.
Frances's caſe, iii. 456. vi. 454.
Francia's caſe, iii. 753.
Francis v. Baker, vi. 664.
——— v. Naſh, vii 458.
——— v. Taylor, i. 347.
——— v. Wyatt, ii. 344. iii. 661. 664.
Frank v Frank, i. 111.
—— v. Standiſh, vi 446.
—— v Stukely, ii. 459. iii. 466.
Fracklin v. Burlington (Earl), iv. 353.
——— v. Firth, vii. 182.
——— v. Green, vii. 181.
——— v. Jollin, ii. 37.
——— v. Reeves, ii. 470.
——— v. Spilling, vii. 517.
——— v. Thornbury, iii. 513.
——— v. Turner, v. 162.
Franſon v. Delamere, iv. 759.
Frazer's caſe, i. 289.
Frazer v. Moor, v. 91.
Freak v. Hearſey, v. 101.
Freame v. Pennegar, i. 241.
Frederick v. Frederick, i. 114. ii. 251. vii. 447.
——— v Hook, iii. 56.
——— v. Lookup, i. 69. ii. 503. iii. 343.
Freeland v. Johnſon, vii. 390.
Freeman's caſe, i. 155.
Freeman v. Archer, vi. 85.
——— v. Barnes, iii. 212. iv. 199.
——— v. Bernard, i. 231.
——— v Boddington, iii. 618.
——— v. Chandois (Duke), iv. 326.
——— v. Edwards, iii. 76. v. 26.
——— v. Freeman, i. 647. vi. 117.
——— v. King, i. 140.
——— v. Norris, i. 59.

Freeman

Freeman v. Ryett, vi. 136.
——— v. Sheen, v. 413.
——— v. Stacey, iv. 472.
——— v. Trevers, ii. 274.
——— v. Weſt, iv. 56. 61.
Freemoult v. Dedire, iii. 59. 462.
Freeſton v. Crouch, vi. 626.
Freke v. Barrington (Lord), vii. 450.
— v. Thomas, iii. 13.
French's caſe, i. 720.
French v. Adams, iv. 575.
——— v. Andrade, vi. 136.
——— v. Arnold, vi. 154.
——— v. Baron, v. 103.
——— v. Cadell, iv. 301.
——— v. Chicheſter, iii. 85.
——— v. Coppinger, i. 59.
——— v. Davis, ii. 383.
——— v. Fenn, i. 444.
——— v. Pierce, ii. 86. v. 339.
——— v. Wiltſhire, v. 477.
Frencham's caſe, v. 791.
Freſcobaldi v. Kinaſton, iii. 13.
Freſhwater v. Bois, ii. 364. iii. 234. v. 839.
Freſwell v. Welch, i. 729.
Fretwell v. Stacey, iv. 427.
Frevill v. Ewebank, iv. 62.
Frewin v. Charleton, vii. 156.
Frice v. Foſter, iv. 170.
Friend v. Baker, v. 473.
——— v. Bouchier, iv. 265.
Frier v. Gildridge, v. 688.
Fringe v. Lewis, vi. 474.
Frogmorton v. Holyday, iv. 252.
——— v. Wharey, ii. 549.
——— v. Wright, iv. 255.
Froſdick v. Sterling, i. 500.
Froſt's caſe, ii. 511.
Froſt v. Dawes, vi. 424.
Fry v. Corne, vi. 206.
— v. Fry, vii. 140.
— v. Hardy, vi. 657. vii. 13.
— v. Porter, i. 639. iii. 456. 589. iv. 412. v. 805.
— v. Wood, ii. 592.
Fryer v. Brown, i. 431.
— v. Johnſon, ii. 236.
— v. Kenn, v. 830.
Fulcher v. Griffin, iv. 53.
Fulham v. Jones, i. 113.
Fullarton v. Watts, vii. 377.
Fuller's caſe, i. 542. vii. 192, 193.
Fuller v. Fuller, v. 827. vii. 321.
——— v. Preſt, vii. 514.
Fulliam v. Harris, ii. 370.
Fulmerſton v. Steward, vi. 387. 395.
Fulwood's caſe, ii. 578. vii. 110.
Furden v. Moor, ii. 429.
Furley v. Newnham, ii. 422.
Furnes v. Smith, ii. 185.
Furnis v. Waterhouſe, ii. 389.
Furnival v. Crewe, ii. 78. iv. 229.
Furſaker v. Robinſon, i. 112. 726. vii. 418.
Fytche v. London (Biſhop), i. 644.

G.

Gabel v. Perchard, vii. 454.
Gadd v. Worrall, vii. 471.
Gage's caſe, iii. 221.
Gage v. Acton, i. 484. iii. 82.
——— v. Smith, iii. 770. vii. 253. 274, 275.
Gainſborough's (Counteſs and Earl) caſe, ii. 655. iii. 70.
Gainſborough v. Follzard, i. 300.
——— (Counteſs) v. Gifford, i. 170.
Gale's caſe, v. 610.
Gale v. Hill, vi. 421.
——— v. Lindo, iv. 544.
——— v. Noble, i. 707.
——— v. Till, ii. 47.
Galizard v. Rigault, v. 676. vi. 255.
Gallini v. Laborie, i. 276.
Gally v. Selby, v. 17.
Galton v. Hancock, ii. 383. iii. 85, 86. 452. 716. v. 23.
Gamon v. Vernon, ii. 285.
——— v. Jones, vi. 84.
Ganesford v. Levi, ii. 58.
Ganſel's (General) caſe, i. 363.
Garbrand v. Allen, i. 499.
Garbut v. Hilton, iv. 425.
Gardiner v. Atwater, vi. 235, 236. 239.
——— v. Bambridge, iii. 238. v. 555.
——— v. Brown, i. 156. vii. 389.
——— v. Coleman, iv. 601. vi. 695.
——— v. Croaſdale, iv. 671.
——— v. Davis, v. 141.
——— v. Griffith, iv. 17. 470.
——— v. Helvis, vi. 243.
——— v. Holt, iii. 620.
——— v. Jeſſop, i. 7.
——— v. Merrett, ii. 466.
——— v. Norman, ii. 430. iii. 165. iv. 14.
——— v. Pullen, i. 107. 114.
——— v. Sheldon, iv. 292. v. 797. vii. 108.

Gardiner *v.* Spurdance, vi. 234.
——— *v.* Walker, i. 481.
Gardner—See Gardiner.
Garfoot *v.* Garfoot, i. 316.
Garford *v.* Clark, vi. 241.
Garforth *v.* Fearon, i. 274. iii. 307. v. 196.
Gargrave *v.* Smith, v. 451.
Gargrove *v.* Markham, vi. 163.
Garland's case, i. 542.
Garland *v.* Burton, ii. 50.
Garmyn *v.* Astete, vii. 303.
Garnish *v.* Wentworth, vii. 96, 97.
Garnon's case, ii. 509. v. 231.
Garnons *v.* Barnard, ii. 663. vii. 520.
Garrard's case, v. 298.
Garret *v.* Blizard, ii. 573.
——— *v.* Cullum, i. 437. iv. 603.
——— *v.* Dandy, vi. 415.
——— *v.* Evers, v. 39.
——— *v.* Lister, iii. 84. iv. 445.
——— *v.* Moule, i. 394.
Garrood *v.* Saunders, vii. 392.
Garth *v.* Baldwin, iv. 275. vii. 179.
——— *v.* Cotton, v. 758. vii. 155. 296.
——— *v.* Crawford, v. 64.
——— *v.* Taylor, iii. 23.
Gartside *v.* Gartside, vii. 394.
——— *v.* Isherwood, iii. 307.
——— *v.* Ratcliffe, iii. 231.
——— *v.* Trent Navigation Proprietors, i. 554.
Gascoigne *v.* Thwing, vii. 142, 143.
Gastril *v.* Baker, i. 595.
Gate's case, ii. 359.
Gates *v.* Bayley, vi. 557. 611.
Gateward's case, i. 618.
Gawden *v.* Draper, v. 683.
Gawdy's case, iv. 753.
Gawen *v.* Ludlow, vi. 61.
Gawler *v.* Standewick, iv. 403.
——— *v.* Wade, iii. 461.
Gay *v.* Adams, ii. 464.
——— *v.* Cross, vi. 669.
Gayer *v.* Wilkinson, i. 403.
Gayner's case, i. 396.
Gaynon *v.* Wood, iv. 384.
Gayre *v.* Gayre, iv. 351.
Gayter, *ex parte*, i. 402. 459.
Gayton's case, i. 634.
Geale *v.* Wintour, vi. 767.
Geary *v.* Bearecroft, vi. 567.
——— *v.* Read, ii. 64.
Gegge *v.* Jones, v. 659. 661.
Gench *v.* Mynns, iii. 326.
Genne *v.* Tinker, vi. 457.
Genner *v.* Sparks, i. 363.
George *v.* Claggett, vii. 500.
——— *v.* Stamfield, vii. 283.
——— *v.* ———, i. 483.
——— *v.* Wisdom, ii. 454. 722.
Germain & Ux *v.* Orchard, iii. 399.
German *v.* Risley, vii. 98.
Germin *v.* Ascot, i. 648.
——— *v.* Randal, v. 431.
Gerrard's case, v. 610.
Gerrard *v.* Aylmer, i. 434.
——— *v.* Boden, i. 177.
——— *v.* Danby, i. 333.
——— *v.* Dandy, vi. 415.
——— *v.* Gerrard, ii. 362.
——— *v.* Roebeck, i. 59.
——— *v.* Vaux, i. 114.
——— *v.* Wright, vi. 753.
Gerring *v.* Manning, vi. 462.
Gery *v.* Hopkins, ii. 635.
Gibbert's case, vi. 229.
Gibbon *v.* Papper, vi. 609.
——— *v.* Paynton, i. 556.
Gibbons, *ex parte*, i. 450.
——— *v.* Moulto, i. 499.
——— *v.* Pepper, i. 244. 246.
——— *v.* Roberts, ii. 105.
——— *v.* Stevenson, iii. 246.
——— *v.* Summons, iv. 307.
Gibbs *v.* Cope, v. 464.
——— *v.* Goodman, vi. 768.
——— *v.* Herring, iii. 31. vii. 185.
Gibson, Mutton, &c. case, i. 543.
Gibson *v.* Burnell, vi. 60.
——— *v.* Hudson's Bay Company, i. 444.
——— *v.* Hunter, iv. 738.
——— *v.* M'Carty, v. 298.
——— *v.* Montford (Lord), i. 113. ii. 248. 251. vii. 324, 325.
——— *v.* Paterson, i. 109.
——— *v.* Rogers, vii. 321.
——— *v.* Scudamore, vii. 369.
Gie *v.* Rider, iv. 102.
Gifford's case, iii. 120.
Gifford *v.* Manley, vii. 153.
——— *v.* Perkins, v. 399.
Gilber *v.* Berkley, iii. 669.
Gilbert *v.* Stone, vi. 612.
——— *v.* Witty, iv. 304. v. 819.
Gilby *v.* Lockyer, vi. 359.
Gilchrist *v.* Brown, vii. 410.
Giles's case, vi. 406.
Giles *v.* Hart, v. 353.
——— *v.* Hartis, vi. 461. 463. 475.
——— *v.* Hooper, ii. 78.

Gil

Gill v. Attorney General, iii. 31.
—— v. Glaſs, v. 420.
—— v. Scrivens, vi. 123.
—— v. Woodmaſs, i. 442.
Gillam v. Clayton, vi. 606.
Gilleſpy v. Coutts, i. 435.
Gillman v. Hill, i. 298.
——— v. Smith, vi. 655.
Gilmore v. Harris, ii. 544.
——— v. Severn, iv. 347.
——— v. Shooter's executors, vi. 370.
——— v. Shutter, i. 122.
Gilpin's caſe, ii. 304.
Gilpin v. Cookſon, ii. 363.
——— v. Smith, i. 34.
Gimbart v. Pelah, ii. 348. vi. 558.
Ginger v. Cooper, ii. 461. 485.
Girdler's caſe, v. 615.
Girling's caſe, vi. 571.
Girling v. Alders, v. 668.
——— v. Lea, iii. 59. 461.
Gift v. Maſon, vi. 672.
Gittinſon v. Tyrrel, v. 613.
Gladman v. Bateman, iii. 617.
——— v. Henchman, v. 109.
Glanville v. Payne, vii. 170.
Glaſier v. Heliar, vi. 229.
Glaſs v. Gill, v. 367.
Glaſſcock v. Morgan, ii. 718. vi. 600. 603.
Glenham v. Hanby, vi. 593.
Glenorchy v. Boſville, iv. 269. vii. 137. 174.
Gliſſen v. Okeden, iii. 306.
Globe v. Carliſle (Earl), v. 102.
Gloſſe v. Hayman, vi. 589.
Glover v. Barrie, i. 226.
——— v. Black, iv. 631.
——— v. Cope, ii. 75.
——— v. Kendal, ii. 527.
——— v. Lane, vii. 439.
——— v. Pipe, vii. 251.
——— v. Strotheff, iv. 32.
Glub v. Attorney General, i. 595.
Glyde's caſe, ii. 19.
Glyn v. Bank of England, ii. 637. v. 177.
——— v. Yates, vi. 117.
Glynn v. Harding, vii. 140.
Godbolt's caſe, v. 194.
Goddard's caſe, v. 159.
Goddard v. Complin, v. 44. 59.
——— v. Garret, iv. 659.
——— v. Haſelfoot, vi. 215.
——— v. Keeble, vi. 768.
——— v. Phyſicians (College of), iv. 507.
Goddard v. Vanderhayden, i. 400. 426.
Goddart—See Goddard.
Godden v. Hale, v. 537.
Goddin v. London Aſſurance, iv. 601. 661.
——— v. Wainwright, v. 679.
Godfrey's caſe, i. 22. ii. 451. iii. 179. v. 349. vi. 406.
Godfrey v. Bullock, ii. 301.
——— v. Dixon, i. 129. 133. iv. 247. vii. 223.
——— v. Furzo, i. 437. iv. 603.
——— v. Godfrey, i. 203.
——— v. Norris, ii. 592.
——— v. Saunders, i. 31. 39.
Godkin v. Ferrers (Earl), i. 17.
Godolphin v. Penncock, iv. 285.
——— v. Tudor, v. 195.
Godſall v. Sounden, iii. 69.
Godwin—See Goodwin.
Goe v. Cother, i. 624.
Goff v. Popplewell, vii. 389.
Goſton v. Mill, iii. 462.
Gold v. Cutler, v. 398.
—— v. Death, vi. 642.
—— v. Strode, ii. 527.
Golding v. Barlow, ii. 57.
——— v. Crowle, vi. 661.
——— v. Grace, iv. 736.
Goldſmith v. Platt, vi. 415.
——— v. Sefton (Lord), vii. 516.
Goldſworthy v. Southcott, vi. 123.
Goldthwaite v. Petrie, ii. 47.
Goman v. Salisbury, i. 111.
Gomerſal v. Gomerſal, i. 147.
——— v. Medgate, ii. 206. vi. 680.
Gonzales v. Sladen, iv. 601.
Gooche's caſe, iii. 313.
Good v. Aſh, iv. 125.
Goodall's caſe, vi. 331. vii. 7.
Goodall v. Dolley, iv. 727.
——— v. Harris, iii. 411.
——— v. Rivers, v. 819.
——— v. Wyatt, i. 671.
Goodburn v. Marley, iii. 343.
Goode v. Elliot, iii. 335.
Gooding v. Gooding, iv. 159.
Goodiſſon v. Nun, ii. 93. v. 337.
Goodman v. Ayling, vii. 34.
——— v. Cotherington, vi. 669. vii. 10.
——— v. Goodright, iv. 300, 301.
Goodrick v. Brown, iii. 214.
Goodright v. Billington, iii. 242.
——— v. Cordwent, vii. 487.
——— v. Corniſh, iv. 298.

Goodright v. Dynham, iii. 242.
——— v. Glazier, vii. 352.
——— v. Harwood, vii. 351.
——— v. Hoblin, ii. 56. vi. 647. 649.
——— v. Holton, ii. 414.
——— v. Hugoſon, ii 468.
——— v. Mead, vii. 95. 465.
——— v. Moſs, ii. 579.
——— v. Noright, ii. 409.
——— v. Pullyn, iv. 277.
——— v. Rich, vii. 444.
——— v. Richardſon, iv. 181.
——— v. Rigby, iii. 232.
——— v. Sales, vii. 122.
——— v. Saul, i. 513.
——— v. Stocker, iv. 255.
——— v. Straphan, i. 498.
——— v. Strother, ii. 412.
——— v. Way, ii. 430.
——— v. White, iv. 332.
——— v. Wood, vi. 643.
——— v. Wright, i. 295. ii. 490. iv. 334. v. 745.
Goodtitle v. Alker, ii. 422.
——— v. Bailey, iii. 393.
——— v. Billington, iv. 392.
——— v. Cator, ii. 424.
——— v. Chandois (Duke), ii. 613. iii. 230.
——— v. Clayton, vii. 336.
——— v. Funucan, iv. 146. 155. 160.
——— v. Jones, vii. 122. 444.
——— v. Knott, vii. 122.
——— v. Layman, iii. 687.
——— v. Mayo, ii. 52.
——— v. Morgan, v. 67.
——— v. Newman, ii. 298.
——— v. North, i. 458. ii. 439.
——— v. Otway, iv. 277.
——— v. Pagden, iv. 310.
——— v. Pope, vii. 503.
——— v. Riſden, ii. 336.
——— v. Stokes, i. 731. iii. 679.
——— v. Way, iv. 165.
——— v. Welford, ii. 587. 592.
Goodwin, *ex parte*, i. 401. 456. 460.
——— v. Archer, i. 143.
——— v. Butlin, i. 267.
——— v. Crowle, ii. 84.
——— v. Cutler, vii. 139.
——— v. Goodwin, iv. 446.
——— v. Harwood, vi. 678. 701.
——— v. Lyſter, iii. 605.
——— v. Munday, iv. 410.
——— v. Weſt, ii. 594.
Goodwin v. Winſmore, i. 716. ii. 361.
Goodyer v. Banks, i. 78.
——— v. Clerk, v. 814.
Gordon's caſe, iii. 265.
Gordon v. Eaſt India Company, vii. 406, 407.
——— v Halpen, i. 504.
——— v. Harper, vi. 682.
——— v Morley, iv. 636. 663.
——— v. Powis, i. 284.
Gore v. Colethorp, vii. 23.
——— v. Gore, ii. 546. iv. 296.
——— v. Knight, iv. 244.
Gorges v. Gore, vi. 94.
——— v. Stanfield, v. 402.
Goring, *ex parte*, i. 412.
——— v. Bickerſtaff, i. 249. vii. 110.
Gorton v Falkner, ii. 344.
Gory's caſe, v. 83.
Goſley v. Gilford, i. 181.
Goſlin v. Elliſon, iii. 126.
Goſling v. Warberton, ii. 383. iii. 715.
Goſnal v. Kindlemarſh, iv. 90.
Goſper v. Shire, ii. 488.
Goſs v. Du Freſnoy, i. 460. 462. iv. 609.
——— v. Nelſon, iv. 402. 697.
——— v. Tracey, ii. 587. 592.
——— v. Withers, iv. 650. 659.
Goſſage v. Taylor, ii. 549.
Goſtwick v. Maſon, iv. 179.
Gott v. Vavaſor, iii. 464.
Govier v. Hancock, iv. 549. vii. 410.
Gould v. Coulthurſt, ii. 55.
——— v. Fleetwood, vii. 180.
——— v. Johnſon, iv. 474.
——— v. Tancred, i. 35. v. 106.
Gower v. Cunningham, vii. 371.
——— v. Heath, vi. 665.
Grace v. Hyam, iv. 609.
——— v. Smith, iv. 604.
Graham, *ex parte*, i. 449.
——— v. Beacontree Hundred, iii. 517.
——— v. Benton, i. 457.
——— v. Fraine, vi. 135.
——— v. Graham, iv. 370.
——— v. Londonderry, i. 482.
Gramvel v. Robotham, vi. 698.
Grandiſon v. Dower, iii. 13.
Grange's caſe, vii. 211.
Grange v. Denny, ii. 495.
Granſlade v. Baker, vi. 127.
Grant v. Aſtle, i. 736. ii. 505. v. 359.
——— v. Foley, i. 186, 187.
——— v. Hawding, ii. 260.
——— v. Hedding, vi. 722.

Grant *v.* Londonderry, iii. 87.
—— *v.* Parkinſon, iv. 659.
—— *v.* Sondes, i. 2.
—— *v.* Southers, ii. 518.
—— *v.* Vaughan, iv. 705. 736.
Grantham *v.* Hawley, iii. 384.
Granville *v.* Beaufort, ii. 655. iii. 71.
—— *v.* Dighton, vi. 420, 421.
—— *v.* Rutland, iii. 69.
Grave—See Graves.
Gravely *v.* Ford, vi. 154.
Gravenor *v.* Cape, ii. 57.
—— *v.* Hallam, i. 595. vii. 144.
—— *v.* Maſſey, ii. 459.
—— *v.* Mete, vii. 24.
Graves *v.* Blanchett, vi. 254.
—— *v.* Cliff, vii. 45.
—— *v.* D'Acaſtro, v. 227.
—— *v.* Drake, vi. 698.
—— *v.* Grave, iii. 620.
—— *v.* Hedges, iv. 611.
—— *v.* Saliſbury, iv. 380.
—— *v.* Short, ii. 54. vi. 632. 634. vii. 10. 13.
Graunt's caſe, vi. 713. 744.
Gray's caſe, iii. 467. 638. vii. 29.
Gray *v.* Day, i. 605.
—— *v.* Fielder, v. 443.
Graydon *v.* Graydon, iv. 421.
—— *v.* Hicks, iii. 67. iv. 421.
Grayſon *v.* Atkinſon, iv. 256. vii. 308. 310. 329.
Greaves *v.* Powell, iii. 59.
Gree *v.* Oliver, ii. 733. iii. 459.
Green's caſe, vi. 514.
Green *v.* Brown, ii. 661. iv. 641.
—— *v.* Chandler, iv. 150.
—— *v.* Cole, ii. 58. 468. vii. 275.
—— *v.* Durham, Mayor, i. 547.
—— *v.* Eakins, i. 114. vii. 164.
—— *v.* Elmſlie, iv. 641.
—— *v.* Farmer, vi. 695, 696.
—— *v.* Froud, ii. 612, 613. iii. 230.
—— *v.* Gatewicke, ii. 629.
—— *v.* Gifford, vi. 649.
—— *v.* Goddard, i. 245.
—— *v.* Harvey, ii. 385. iv. 550.
—— *v.* Hayman, iii. 236.
—— *v.* Hearne, iv. 740.
—— *v.* Horn, ii. 64.
—— *v.* Howard, iv. 348. 350.
—— *v.* New River Company, ii. 586.
—— *v.* Penilden, v. 671.
—— *v.* Pigott, iv. 434.
—— *v.* Poole, i. 170.
Green *v.* Pope, iv. 598.
—— *v.* Rivett, iv. 482.
—— *v.* Rod, iv. 306.
—— *v.* Roe, ii. 395.
—— *v.* Rutherford, i. 3. ii. 29.
—— *v.* Symonds, iv. 350.
—— *v.* Waller, ii. 503.
—— *v.* Waring, i. 214.
—— *v.* Wiſeman, vii. 134.
—— *v.* Wood, i. 110. iii. 306.
—— *v.* Young, iv. 667.
Greenhill *v.* Greenhill, i. 113. 726. iv. 248.
Greenveet *v.* Burwell, vi. 620.
Greenvill *v.* Phyſicians (College of), vi. 570.
Greenway *v.* Hurd, i. 260.
—— *v.* Kent (Earl), vi. 720.
Greenwood's caſe, vi. 252.
Greenwood *v.* Greenwood, iv. 328. 361.
—— — *v.* Scott, iv. 468.
—— — *v.* Tyler, iii. 149.
Greetham *v.* Thrale Hundred (Inhabitants), i. 70. ii. 34.
Gregg's caſe, ii. 47. vi. 544. 548.
Gregory's caſe, i. 475. iii. 436.
Gregory *v.* Chriſtie, iv. 631. 640.
—— *v.* Moleſworth, iii. 615.
—— *v.* Nevill, i. 280.
—— *v.* Oldbury, vi. 184.
—— *v.* Pelham, v. 722.
Gregſon *v.* Gilbert, iv. 641.
—— *v.* Heather, i. 58. 347.
Greſwold *v.* Marſham, v. 45.
Greves *v.* Weigham, iii. 50.
Grey, *ex parte*, i. 449.
—— *v.* Bendiſh, i. 413.
—— *v.* Grant, vi. 668.
—— *v.* Grey, vii. 147.
—— *v.* Heſkett, vi. 193.
—— *v.* Jones, vi. 123.
—— *v.* Kentiſh, i. 412.
Greys *v.* Fox, iii. 34.
Greyſbrook *v.* Fox, iii. 50.
Grice *v.* Gooding, ii. 250.
Griells *v.* Ganſell, i. 171.
Grieſley's caſe, iii. 171.
Grieve *v.* Caſe, i. 595.
Griffen's caſe, vi. 642.
Griffen *v.* Blandford, vi. 81.
—— *v.* De Veuille, i. 109. iii. 306.
—— *v.* Harriſon, ii. 91.
—— *v.* Stanhope, iii. 229. iv. 25.
Griffith's caſe, iii. 196. vi. 237. vii. 260.

Griffith *v.* Goodland, i. 672.
——— *v.* Harriſon, ii. 87.
——— *v.* Jones, iv. 350.
——— *v.* Matthews, i. 86.
——— *v.* Middleton, iv. 752.
——— *v.* Rogers, iii. 68.
——— *v.* Walker, i 58.
——— *v.* Williams, i. 299. v. 396. vi. 476.
Grigby *v.* Cox, i. 507.
Grimes *v.* Shack, vi. 687.
Grimmett *v.* Grimmett, i. 595.
Grimſley *v.* Falkingham, vi. 750.
Grimſtone, *ex parte*, iii. 529. 532.
——— *v.* Bruce, i. 643. iii. 252.
——— *v.* Burgers, ii. 413.
——— *v.* Gardner, iii. 749.
Grindley *v.* Holloway, ii. 49.
Grobham's caſe, iii. 315.
Grocer's Company *v.* Archbiſhop of Canterbury, v. 380. 530.
Groenvelt *v.* Burwell, i. 246.
Gronby *v.* Iſcham, v. 219.
Groome, *ex parte*, i. 403. 414. 424. 443.
——— *v.* Potts, vii. 409.
Groſs *v.* Naſh, vi. 121.
Groſvenor (Sir R.), *ex parte*, vi. 440.
Grove, *ex parte*, i. 418.
——— *v.* Dubois, i. 444. iv. 603.
——— *v.* Nevil, iii. 593.
——— *v.* Sanders, i. 226.
Grule *v.* Locroft, iii. 16.
Gruneth *v.* Derry, vi. 207.
Gryle *v.* Gryle, vii. 308.
Grymſtone *v.* Rayner, ii. 59.
Guavers *v.* Fountain, vi. 127.
Guernſey's (Lord) caſe, vii. 348.
Guibert *v.* Everſley, vi. 716.
Guidot *v.* Guidot, i. 113.
Guildford Town *v.* Clarke, v. 191.
Guillam *v.* Hardiſty, vi. 122.
Guiſe *v.* Small, vii. 412.
Gulliver *v.* Drinkwater, i. 458.
——— *v.* Moffat, vi. 655.
——— *v.* Poyntz, iv. 255. 324.
——— *v.* Shuckburgh, iii. 241.
——— *v.* Wagſtaff, ii. 409.
——— *v.* Wickatt, iv. 246. 393.
Gulſton, *ex parte*, i. 393. 459.
Gumbleton *v.* Graſton, vi. 697.
Gumley *v.* Birt, vi. 733.
——— *v.* Fontleroy, vi. 768.
Gundry *v.* Feltham, vi. 583.
Gunn *v.* Mackhenny, i. 340.
Gunnis *v.* Erhart, ii. 659.
Gunter *v.* Clayton, ii. 528.
Gunter *v.* Halſey, i. 117. 121.
Guppy *v.* Jennings, vii. 424.
Guth *v.* Guth, i. 494.
Guy *v.* Barnard, v. 222.
——— *v.* Rand, vii. 28.
Gwynn *v.* Heaton, iii. 307.
——— *v.* Poole, i. 20.
Gwynne *v.* Hooke, v. 746.
Gybert *v.* Fletcher, iv. 563.
Gyer *v.* Ormſtead, vi. 240.
Gyles *v.* Hall, v. 112, 113. vi. 450. 458.
——— *v.* Wilcox, iii. 651.
Gynes *v.* Kemſley, iv. 329.

H.

Habergham *v.* Vincent, iv. 273.
Hacker's caſe, ii. 579.
Hacket *v.* Hern, ii. 461.
Hackſhaw *v.* Clark, v. 374.
Haddock's caſe, ii. 21.
Haddock *v.* Howard, i. 16.
Hae's caſe, ii 710.
Hagerville *v.* Hare, vii. 91.
Hagget *v.* Giles, iii. 389.
Hague *v.* Rolleſton, i. 462.
Haines *v.* Jeſcott, iv. 529.
Hainſworth *v.* Pretty, i. 638. iii. 436. iv. 294. 315. v. 804.
Hake *v.* Moulton, vi. 228.
Halcock *v.* Dubois, iv. 761.
Halcot *v.* Markant, vii. 143.
Hale's caſe, v. 559.
Hale *v.* Burrodale, v. 721.
—— *v.* Clare, ii. 468.
——— *v.* Cove, vi. 657. 669. vii. 12.
—— *v.* Hale, iv. 341.
Hales *v.* Petit, vii. 303.
—— *v.* Riſley, v. 771.
——— *v.* Shafto, vi. 131.
——— *v.* Taylor, i. 236.
—— *v.* Vanderchem, i. 121.
Haley's caſe, iii. 444.
Halfhide's caſe, vi. 439.
Halfhide *v.* Fenning, i. 236.
Halfpenny *v.* Mallet, iii. 302.
Halifax *v.* Higgins, i. 114. v. 14.
Hall's caſe, i. 394. vi. 201.
Hall *v.* Atkinſon, v. 79.
——— *v.* Biggs, vii. 67.
——— *v.* Buchanen, v. 142.
——— *v.* Butler, i. 118.
——— *v.* Carter, v. 819. vi. 182.
——— *v.* Dench, vii. 185. 358.
——— *v.* Derby, iii. 695.
——— *v.* Digby, iii. 685.

Hall v. Fettyplace, vi. 737.
—— v. Gurney, i. 435.
—— v. Hammond, vi. 208.
—— v. Harding, ii. 354.
—— v. Hardy, i. 238.
—— v. Heneſley, vi. 242.
—— v. Holliday, vi. 396.
—— v. Howes, i. 329.
—— v. Jones, ii. 215.
—— v. Kendall, iii. 59.
—— v. Lawrence, i. 212.
—— v. Macket, vii. 516.
—— v. Potter, iv. 540.
—— v. Tanner, i. 604.
—— v. Terry, iv. 401.
—— v. Vaughan, iii. 176.
—— v. Whalley, i. 186.
—— v. Woodcock, ii. 475. iii. 245.
Hallet v. Byrt, v. 374. vi. 55. 590. 688.
—— v. Eaſt India Company, vi. 476.
—— v. Hallet, i. 61.
—— v. Hodges, v. 172.
—— v. Sanders, iii. 233.
Halliday v. Hudſon, vii. 145.
Hallilcy v. Kirtland, v. 82.
Hally v. Tipping, i. 340.
Hals v. Waller, ii. 259.
Halſey v. Carpenter, v. 412.
—— v. Hales, vii. 393.
Halſon v. Jefferies, v. 458.
Halſwell v. Aylworth, iii. 390. iv. 173.
Halton v. Haſſel, i. 736.
Hambleton's caſe, v. 269.
Hambleton v. Gerrard, i. 102.
—— v. Macclesfield, iii. 654.
—— v. Vere, ii. 268.
Hambling v. Liſter, iv. 356. 359.
Hambly v. Trott, iii. 98. vi. 697.
Hamel v. Hunt, iii. 683.
Hamilton v. Dalziel, vi. 157.
—— v. Mendes, iv. 651.
—— (Duke) v. Mohun, iii. 306.
Hammond's caſe, i. 486.
Hammond v. Bendiſh, v. 166.
—— v. Brewer, iii. 501.
—— v. Foſter, vii. 392.
—— v. Gatliffe, iii. 100.
—— v. Green, vi. 603.
—— v. Griffith, i. 14.
—— v Hatch, i. 216.
—— v. Kingſmill, vi. 213. 227.
—— v. Ouden, vi. 453.
—— v. Webb, vi. 388. 391. vii. 250.
Hampden's caſe, vi. 260.
Hampſon v. Adſhead, ii. 42.
Hampſon v. Bill, v. 356.
Hampſtead's (Lord of the Manor) caſe, ii. 292.
Hambury v. Ireland, v. 415.
—— v. Lord, ii. 256.
Hampton v. Spenſer, vii. 139.
—— v. Wild, vi. 715.
Hanbury v. Cockrell, v. 784.
—— v. Hanbury, iv. 381.
Hancock v. Entwiſle, i. 443.
—— v. Field, ii. 85. v. 707.
—— v. Hayward, i. 53. 441.
—— v. Price, ii. 421.
Hand v. Dinely, vi. 467.
Hands v. Hands, iv. 350.
—— v. James, vii. 315.
Haneington v. Du Chatel, v. 197.
Hanger v. Eyles, i. 111.
Hankey, *ex parte*, i. 451.
—— v. Garrat, i. 461, 462.
—— v. Hammond, i. 387.
—— v. Jones, i. 391.
—— v. Smith, vi. 657.
—— v. Trotman, vi. 664.
—— v. Twogood, i. 387.
Hankin v. Middleditch, ii. 608.
Hanmer v. Eyton, iv. 198.
Hannam v. Roll, v. 167.
Hanning v. Ferrers, iii. 299.
Hannington v. Du Chaſtel, iii. 307.
—— v. Rider, i. 653.
Hannot v. Ferrettes, vi. 428.
Hanſon v. Derby, v. 18. vii. 294.
—— v. Leverſedge, i. 220.
Harbin v. Barton, iv. 131.
—— v. Green, ii. 268.
Harbord v. Perigal, i. 27.
Harcourt v. Fox, v. 200.
—— v. Poole, iv. 148.
—— v. Wrenham, iii. 59.
Hard's caſe, vi. 475.
Hardcaſtle v. Chettle, iii. 649.
—— v. Howard, i. 41.
Hardiman v. Whitaker, iv. 468.
Harding's caſe, vi. 516. 541.
Harding v. Avery, vi. 425.
—— v. Cox, i. 170.
—— v. Glyn, iv. 339.
—— v. Wilkin, vi. 483.
Hardiſty v. Barney, vi. 108.
Hardwick v. Chandler, vi. 217.
—— v. Mynd, vii. 412.
Hardwood v. Goodright, ii. 505.
—— v. Wallis, ii. 654.
Hare v. Bickley, vi. 566.
—— v. Celey, vi. 568. 607.

Hare v. Ciceley, iv. 134.
—— v. Groves, vii. 424.
—— v. Mann, vi. 120.
—— v. Savil, ii. 91. v. 362. 402.
Harebottle v. Placock, ii. 422.
Hargrave's caſe, ii. 527. iii. 30.
Hargrave v. Ward, vi. 615.
Harkneſs v. Bailey, vii. 367.
Harland v. Trigg, iv. 339. vii. 140.
Harman's caſe, v. 406.
Harman v. Delaney, iv. 451.
—— v. Fiſher, i. 436.
—— v. Spottiſwood, i. 395.
Harper v. Bird, v. 699.
—— v. Leech, i. 302.
—— v. Till, i. 302.
Harpin's caſe, ii. 422.
Harpur v. Brook, ii. 637. 660.
Harrend v. Palmer, i. 53. iii. 92.
Harrington v. Garroway, i. 311.
—— —— v. Halkeld, iv. 663.
—— —— v. Wiſe, vi. 12.
Harris's caſe, iii. 296. vi. 250.
Harris v. Adams, vi. 228.
—— v. Aſhley, vi. 154.
—— v. Barnes, iv. 294. vii. 130.
—— v. Butterley, v. 144.
—— v. Cotton, vi. 743.
—— v. Daubeny, vii. 390.
—— v. Dilworthy, iv. 54.
—— v. Dixon, vi. 207. 235.
—— v. Evans, iv. 180.
—— v. Harris, v. 110.
—— v. Horwell, i. 118.
—— v. Ingledew, iv. 285. vii. 380.
—— v. Jones, ii. 48. v. 477.
—— v. Lincoln (Biſhop of), ii. 653.
—— v. Painter, i. 217.
—— v. Pett, v. 413.
—— v. Reyney, i. 65
—— v. Shawe, iii. 117.
—— v. Stapleton, vii. 391.
—— v. Woolford, iv. 483. vii. 499.
Harriſon's caſe, iii. 285. v. 612.
Harriſon v. Barney, iii. 706.
—— v. Beccles, iii. 88.
—— v. Belſey, v. 690. 770.
—— v. Bickle, iv. 434.
—— v. Bowden, ii. 724.
—— v. Buckle, i. 481.
—— v. Burwell, iv. 529.
—— v. Cage, i. 270. iv. 531.
—— v. Evans, ii. 484. vi. 142.
—— v. Forth, v. 79.
—— v. Goodman, i. 548.
—— v. Grundy, i. 241.
Harriſon v. Harriſon, vii. 183.
—— v. Hogg, iii. 651.
—— v. Huxley, v. 704.
—— v. Jackſon, vii. 501.
—— v. Naylor, iv. 403.
—— v. Thornborough, vi. 223.
Harrow's caſe, vi. 715.
Harſon v. Leverſay, i. 234.
Hart's caſe, ii. 498. vi. 92.
Hart v. Haldridge, vi. 562.
—— v. Bainard, iii. 743.
—— v. Baſſet, v. 334.
—— v. Buckminſter, v. 431.
—— v. Hale, vi. 714.
—— v. King, iv. 739.
—— v. Lovelace, vii. 391, 392.
—— v. Middlehurſt, i. 113.
—— v. Whitlock, vi. 651.
Hartford v. Jones, vi. 707.
Hartland v. Yates, v. 246.
Hartop's caſe, iv. 335.
Hartop v. Hoare, i. 368. iii. 115. vi. 692.
—— v. Whitmore, iv. 366. vii. 367.
Hartpole v. Walſh, v. 92.
Hartpool v. Kent, v. 769.
Hartwell v. Chitters, iii. 59.
Harvey's caſe, vi. 414.
Harvey v. Aſhley, iii. 603.
—— v. Aſton, iv. 413.
—— v. Deſbouverie, ii. 256.
—— v. Harvey, i. 482. ii. 391. 654. iii. 64. 410. iv. 441.
—— v. Reynell, ii. 529.
—— v. Syliard, vi. 694.
—— v. Thomas, iv. 15.
—— v. Thorn, iv. 475.
—— v. Young, i. 80.
Harwell v. Harwell, iii. 66.
Harwood v. Harriſon, vii. 180.
Haſe's caſe, ii. 359.
Haſelinton v. Gill, i. 436.
Haſlegrave v. Thompſon, vi. 700.
Haſlewood v. Pope, i. 725. iii. 85, 86.
Haſlop v. Chaplain, ii. 53.
Haſpart v. Wills, i. 261. ii. 229.
Haſſel v. Cooper, vi. 210. 256.
—— v. Simpſon, i. 395.
Haſſer v. Wallis, i. 261.
Haſtings's (Lady) caſe, vii. 120.
Haſtings v. Douglaſs, iii. 66.
—— v. Gregory, i. 170.
Hatch v. Bliſſet, v. 617. 623.
Hatcherly Prebend's caſe, v. 188.
Hatfield v. Linguard, vii. 400.
Hatter v. Aſh, iv. 57.
Hatton v. Hatton, iii. 71.

Hatton *v.* Mascall, iii. 619.
——— *v.* Nicholls, iv. 285.
Haughton *v.* Harrison, iv. 344.
Havelock *v.* Hanail, iv. 645.
Havergill *v.* Hare, i. 183.
Havert *v.* Gibbons, ii. 492.
Havithlome *v.* Harvey, ii. 594.
Haward *v.* Wood, v. 199.
Haw—See Hawes.
Hawe's case, vi. 370.
Hawe *v.* Cuton, vi. 107.
—— *v.* Hawes, iii. 684.
—— *v.* Loader, iii. 313.
—— *v.* Planner, ii. 669.
—— *v.* Randall, vi. 698.
—— *v.* Saunders, ii. 48.
—— *v.* Webster, iii. 23.
—— *v.* Wyatt, iii. 306.
Hawes—See Hawe.
Hawker *v.* Birbeck, vi. 556.
——— *v.* Buckland, iv. 252.
Hawkes *v.* Brayfield, vi. 758.
——— *v.* Brotherworth, iv. 52.
——— *v.* Saunders, i. 270. 394.
Hawkesworth *v.* Hillarys, iv. 566.
Hawkins's case, iv. 259. vi. 257.
Hawkins *v.* Bailey, iii. 330.
——— *v.* Cardy, iv. 707.
——— *v.* Coclough, i. 216. 218. 224. 226.
——— *v.* Crook, vi. 130.
——— *v.* Holmes, i. 119.
——— *v.* Leigh, i. 725.
——— *v.* Lewis, iii. 59.
——— *v.* Obeen, iii. 605.
——— *v.* Penfold, i. 439.
——— *v.* Plomer, ii. 525.
——— *v.* Rous, i. 603.
——— *v.* Taylor and Leigh, v. 61.
——— *v.* Turner, vi. 193, 194.
——— *v.* Waller, vi. 625.
Hawkinson *v.* Sandilans, v. 164.
Hawkshaw *v.* Rawlings, i. 46.
Hawley *v.* Simpson, i. 670.
Hawse—See Hawes.
Hawtry *v.* Anger, iii. 632. v. 221.
Hay *v.* Coventry (Earl), iv. 268.
—— *v.* Kitchin, i. 246.
Hayden, *ex parte*, i. 460.
Haydock *v.* Lynch, iv. 696.
——— *v.* Warneford, i. 52.
Haydon's (Sir John) case, i. 146.
Haydon *v.* Norton, ii. 48.
Hayes *v.* Dowse, vi. 718.
—— *v.* Foorde, vii. 130.
—— *v.* Hayes, i. 204.
Hayes *v.* Long, vii. 57.
—— *v.* Warren, i. 112.
—— *v.* Wright, i. 225.
Hayley's case, vii. 57.
Hayley *v.* Fitzgerald, i. 347. v. 382.
——— *v.* Riley, vii. 649.
Hayling *v.* Mullhall, iv. 702.
Hayman *v.* Gerrard, v. 411.
Hayn *v.* Bigg, vi. 58.
Haynes *v.* Hare, i. 188. ii. 659.
——— *v.* Haynes, v. 31. vii. 320.
——— *v.* Mico, iv. 370.
——— *v.* Pointer, vi. 257.
Haynsworth—See Hainsworth.
Hays—See Hayes.
Hayter *v.* Rod, vii. 122.
Hayward's case, i. 469. iii. 387.
Hayward *v.* Newton, vi. 665.
——— *v.* Williams, ii. 460. 500.
Haywood *v.* Davies, v. 381. vi. 619. 627.
——— *v.* Naylor, vi. 228.
Head *v.* Chaloner, iv. 15.
—— *v.* Egerton, v. 51.
—— *v.* Head, i. 494.
Healing *v.* London, ii. 8.
Hearle *qui tam v.* Boulter, vi. 379.
Hearle *v.* Greenbank, ii. 224. iii. 603.
Hearne *v.* Barbor, ii. 254.
——— *v.* James, vi. 303.
Hearns *v.* Bance, v. 85.
Heath *v.* Deuntley, vii. 211.
——— *v.* Hanley, iv. 473.
——— *v.* Pageat, i. 155.
——— *v.* Parry, iv. 425. 438.
——— *v.* Percival, iv. 609.
——— *v.* Wilmot, iii. 221.
Heathcock *v.* Hanbury, iii. 201.
Heathcote *v.* Crookshanks, i. 43. 112.
——— *v.* Goslin, i. 326.
——— *v.* Paignon, i. 109. iii. 306.
Heathe *v.* Heathe, iii. 680. iv. 297. 341.
Heatherly *v.* Weston, ii. 428.
Heaton's case, v. 611.
Heblethwaite *v.* Cartwright, ii. 546. v. 819.
——— *v.* Palmer, v. 334.
——— *v.* Roe, ii. 413.
Hedgeborough *v.* Rosenden, vii. 190.
Hedger *v.* Row, ii. 304. iv. 316.
Hedges *v.* Hedges, iv. 338.
——— *v.* Sandon, v. 381.
Hedley *v.* Brown, i. 21.
Hedworth *v.* Primate, v. 84.
Heigham *v.* Best, v. 580.
Helbut *v.* Held, ii. 490.

Hele v. Fretenden, vi. 731.
—— v. Green, iv. 154.
Helier v. Benhurſt, iii. 516.
Hellier v. Hallet, vi. 467. 470, 471.
——— v. Tarrant, i. 725.
Helvis v. Lamb, vi. 613. 622.
Helyar's caſe, i. 607.
Helyar v. Caſbord, ii. 285.
Hemmings v. Munkley, iv. 423.
——— v. Robinſon, iv. 739.
Hems v. Stroud, vii. 28.
Hen v. Hanſon, v. 708.
Henbeck's caſe, vii. 200. 206.
Hender v. Roſe, ii. 254.
Henderſon v. Williamſon, i. 234. v. 477.
——— v. Withy, vi. 124.
Hendey's caſe, vi. 229.
Heneage v. Hunlocke, iv. 349.
Henkle v. Royal Exchange Aſſurance Company, ii. 653. iv. 629.
Henley v. Acton, i. 109.
——— v. Broad, vi. 598.
——— v. Roſſe, vi. 412.
——— v. Walſh, v. 418.
Hennings v. Brabaſon, iv. 197.
——— v. Pinchardin, iii. 149.
Henriques v. Dutch Eaſt-India Company, i. 296. vi. 125.
Henſchen v. Garves, vi. 578.
Henſey's caſe, vi. 517. 547.
Henſhaw v. Pleaſance, vi. 578.
Henſloe's caſe, iii. 34.
Henſlow's caſe, ii. 171.
Henſtead's caſe, i. 483.
Henton v. Roffee, vii. 209.
Heny v. Purcel, iv. 279.
Henzell v. Lodge, iii. 247.
Herbert's caſe, ii. 685. iii. 410. 459. v. 63. vii. 243.
Herbert v. Binion, ii. 388. iii. 623. 625.
——— v. Flower, vii. 53.
——— v. Forbale, iv. 245.
——— v. Herbert, iv. 244.
——— v. Monday, iv. 102.
——— v. Shaw, vi. 659. 673.
——— v. Torbale, iii. 577.
——— v. Tucknal, ii. 634.
——— v. Waters, ii. 278.
——— v. Wilkinſon, ii. 55.
Hereford's (Biſhop) caſe, iv. 69.
——— v. Bridgewater (Duke), ii. 635.
——— v. Scorey, iv. 77.
Hereford's (Earl) caſe, ii. 112.
Hernaman v. Bawden, iv. 618.
Herne v. Herne, iv. 363.
Herne v. James, i. 124.
—— v. Meeres, i. 109.
Heron v. Heron, vii. 143.
Herries v. Jamieſon, vii. 386.
Herring v. Blacklow, vi. 619.
—— v. Brown, iii. 210.
Herſon's caſe, i. 686.
Hertford (Earl) v. Leach, vi. 742.
Hervey—See Harvey.
Heſketh v. Braddock, i. 548. 551. iii. 748.
——— v. Grey, vi. 195.
——— v. Lee, iii. 244.
Heſter v. Hall, ii. 56.
Hetherington v. Lowth, v. 616.
——— v. Reynolds, i. 16. iii. 445.
Hevey, *ex parte*, i. 419.
Hewitt, *ex parte*, i. 413.
——— v. Bibbins, i. 21.
——— v. Ireland, ii. 546.
——— v. Powell, iii. 447.
Heydon's caſe, i. 709. 711. ii. 272. iii. 781. iv. 73. vi. 114. vi. 383. 389. 390.
Heydon v. Gould, iv. 531.
——— v. Heydon, ii. 716. iv. 608. vi. 178.
Heyford v. Reeve, v. 346.
Heylin v. Adamſon, iv. 703.
—— v. Heylin, vii. 326.
Heyling v. Haſtings, iv. 483.
Heylor v. Hall, i. 401.
Heyns v. Villars, v. 764. vii. 86.
Heyrick v. Poſter, v. 449.
Heyward's caſe, vii. 21.
Heywood's caſe, ii. 444.
Heywood v. Smith, v. 841.
Hibbert v. Carter, iv. 683.
——— v. Cawthorpe, i. 278.
——— v. Pigou, iv. 669.
——— v. Rolleſton, iv. 747.
Hiblyn, v. Slack, v. 831.
Hick's caſe, i. 65.
Hickes v. Phillips, i. 111.
Hickey v. Hayter, ii. 732.
Hickford v. Machin, vi. 384.
Hickman's caſe, iii. 131.
Hickman v. Weſtbrooke, iii. 100.
Hickmot's caſe, v. 167.
Hicks v. Goats, vii. 25.
—— v. Gore, iv. 540.
—— v. Pendarvis, iv. 417. vi. 669.
—— v. Woodſon, vi. 751.
Hickſon v. Witham, vii. 300.
Hide v. Cooth, i. 241.
—— v. Ellis, vi. 739.

Higden *v.* Williamſon, i. 249. 431.
Higgins's caſe, iii. 107.
Higgins *v.* Andrews, vi 586.
—— *v.* Grant, iv. 116.
—— *v.* Jennings, ii. 39.
—— *v.* York Buildings Company, i. 35.
Higginſon *v.* Martin, vi. 570.
Higgs *v.* Warry, vii. 421. 463.
Higham, *ex parte*, i. 507.
—— *v.* Barker, iv. 288.
—— *v.* Reynold, v. 395.
Highman *v.* Cook, iv. 169.
Highmore *v.* Molloy, i. 391.
Highnam *v.* Haſſel, i. 217.
Highter *v.* Sturman, i. 106.
Highway *v.* Banner, i. 113. vii. 164.
—— *v.* Derby, vi. 601.
Hilchins *v.* Hilchins, ii. 380.
Hill's caſe, vi. 227.
Hill, *ex parte*, i. 426.
— *v.* Adams, v. 99.
— *v.* Aland, v. 435.
— *v.* Boomer, vi. 638.
— *v.* Chapman, iv. 337.
— *v.* Filkins, v. 279.
— *v.* Fleming, v. 416.
— *v.* Good, iv. 528.
— *v.* Goodchild, ii. 273.
— *v.* Hawkes, ii. 239.
— *v.* Lewis, vii. 19.
— *v.* London (Biſhop of), vii. 146.
— *v.* Mills, iii. 7.
— *v.* Pleaſant, iii. 339.
— *v.* Prideaux, vi. 611.
— *v.* Spencer, i. 113.
— *v.* Vaun, vi. 740.
— *v.* Vaux, vi. 747. 764.
— *v.* Wigget, ii. 655.
— *v.* Whittingham, iii. 594.
— *v.* Williams, vi. 452. 466.
Hilliard *v.* Conſtable, vi. 213.
—— *v.* Jefferſon, v. 763.
—— *v.* Jennings, ii. 587. vii. 329.
—— *v.* Stapleton, vi. 193.
Hillier, *ex parte*, i. 414.
—— *v.* Fletcher, v. 449.
—— *v.* James, i. 301.
—— *v.* Plympton, v. 411.
Hills *v.* Univerſity of Oxford, iii. 651.
Hillyard *v.* Taylor, i. 590. iii. 87.
Hilſborough (Lord) *v.* Jefferies, vi. 643.
Hilſden *v.* Mercer, v. 407.
Hinchcliffe *v.* Payne, ii. 524.
Hind's caſe, i. 471. vii. 107.
Hind *v.* Lyons, iv. 292.
Hine *v.* Dodd, v. 78.
Hingen *v.* Pain, ii. 528.
Hinklin, *ex parte*, i. 413.
Hinton's caſe, i. 436.
Hinton *v.* Hinton, i. 105. 111. iii. 695.
—— *v.* Pinke, iv. 425.
—— *v.* Roffey, v. 176.
Hiply *v.* Tuck, ii. 489.
Hitchcock *v.* Hervey, vi. 567.
—— *v.* Hitchcock, vi. 743.
—— *v.* Sedgwick, i. 430. v. 59. 65.
Hitchin *v.* Hitchin, ii. 383. iii. 716.
Hitchins *v.* Baſſet, vii. 351.
Hix *v.* Ling, v. 112.
Hixon *v.* Witham, iii. 461.
Hoare *v.* Barnes, vii. 451.
—— *v.* Dawes, iv. 605.
Hobart *v.* Abbot, v. 100.
—— *v.* Suffolk (Lady), vii. 144.
Hobberly *v.* Lewis, iii. 175.
Hobbs *v.* Green, vi. 602. 700.
—— *v.* Norton, iii. 299. v. 48.
—— *qui tam v.* Young, iv. 574.
Hobſon *v.* Campbell, i. 327.
Hobſons *v.* Rudge, vi. 462.
—— *v.* Wills, iii. 35.
Hockley *v.* Mawbey, iv. 309.
—— *v.* Merry, i. 425.
Hodder *v.* Holman, iii. 495.
Hoddy *v.* Wheelhouſe, iii. 114.
Hodges *v.* Jane, vii. 223.
—— *v.* Money, i. 187, 188.
—— *v.* Moor, v. 634.
—— *v.* Simpſon, vi. 698.
—— *v.* Stewart, i. 259.
—— *v.* Tucker, iv. 100.
Hodgeſkins *v.* Thornborough, vi. 49, 50.
Hodgkinſon *v.* Moor, vii. 149.
Hodgſon, *ex parte*, i. 460.
—— *v.* Ambroſe, iv. 279. 335.
—— *v.* Bell, vii. 403.
—— *v.* Hodſon, ii. 653.
—— *v.* Rawſon, iv. 407.
—— *v.* Richardſon, iv. 652.
—— *v.* Thornton, vi. 193.
Hodſon *v.* Nugent, i. 345.
—— *v.* Warrington (Earl), vi. 106.
Hoe's caſe, ii. 505. v. 704.
Hoe *v.* Garrell, v. 784.
—— *v.* Marſhall, vi. 635.
Hoel *v.* Bell, vi. 78.
Hog *v.* Goulding, iv. 648.
Hog *v.* Laſhley, vii. 462.
Hogan *v.* Jackſon, iv. 254.
Hogg *v.* Croſs, iii. 160.
Holbeach *v.* Bennet, ii. 504. vii. 17.

Holbeach v. Whaddock, vi. 715. 745.
Holbeck—See Holbeach.
Holby v. Bray, vi. 398.
Holcombe v. Rawlins, vi. 592, 593.
——— v. Wright, i. 298.
Holcroft's caſe, v. 750.
Holcroft v. Smith, ii. 592.
Hold v. Liſter, v. 835.
Holder v. Taylor, ii. 65.
Holderneſs v Marquis of Carmarthen, i. 177. ii. 442.
Holdip v. Otway, ii. 277.
Hole v. White, i. 121.
Holford v. Hatch, iv. 128.
Holiday v. Hicks, vi. 687. 693.
Hollano's caſe, vi. 374, 375, 376. 394. vii. 82. 186.
Holland v. Brooks, vii. 394.
——— v. Calliford, i. 426.
——— v. Ellis, vi. 600.
——— v. Ereſkine, i. 331.
——— v. Eyles, ii. 521.
——— v. Gore, ii. 36.
——— v. Heale, vi. 734.
——— v. Heron, iii. 746.
——— v. Hopkins, ii. 313.
——— v. Jackſon, ii. 499.
——— v. Lee, iii. 618.
——— v. Shelly, v. 434.
Holles (Lady) v. Wyſe, i. 114. v. 14.
Holliday v. Bowman, iii. 85.
——— v. Fletcher, iii. 95.
——— v. Nabb, i. 171.
Hollingſhead's caſe, i. 407. i. 612. vi. 210. 253.
Hollingſhead v. Hollingſhead, iii. 603.
Hollingworth v. Aſcue, v. 164.
Hollis's caſe, vii. 139.
Holloway's caſe, v. 124. vi. 553.
Holloway v. Pollard, vii. 134.
——— v. Smith, ii. 355.
Holman v. Barber, iii. 446.
——— v. Johnſon, i. 276.
Holmby's caſe, i. 684.
Holmes v. Brockett, v. 366. 455.
——— v. Holmes, iv. 380.
——— v. Lyſaght, iv. 422.
——— v. Meynell, v. 820.
——— v. Plunkett, iv. 298.
——— v. Savill, i. 279.
——— v. Seller, iii. 387.
——— v. Twiſte, ii. 491.
——— v. Willett, iv. 291.
Holſworth's caſe, vi. 681.
Holt's caſe, ii. 191. v. 182.
Holt v. Aſtgrigg, vi. 234.
Hoit v. Burleigh, v. 816.
—— v. Frederick, iii. 77.
—— v. Greenlaw, vi. 155.
—— v. Holt, vii. 123.
—— v. Lowe, iii. 214.
—— v. Mill, v. 60.
—— v. Samback, v. 860.
—— v. Scholefield, vi. 207.
—— v. Tyrrell, ii. 587.
—— v. Ward, iii. 606. iv. 531. vii. 67.
—— v. Wincheſter (Biſhop), iii. 61.
Holtford v. Platt, iii. 613.
Home v. Camden (Earl), ii. 503. v. 669.
Hone v. Medcraft, vii. 346.
Honeycomb v. Sweet, vi. 258.
Honor v. Honor, i. 113. vii. 166.
Hood v. Burlton, i. 185.
Hook v. Galloway, vi. 669.
Hooker v. Hooker, ii. 365. v. 762. 770.
——— v Wilks, iii. 334.
Hooley v. Hatton, iv. 361.
Hooper v. Andrews, vi. 748.
——— v. Eyles, iii. 417. vii. 143.
——— v. Harewood, ii. 104.
——— v. Lawley, vii. 194.
——— v. Shepherd, vii. 19.
——— v. Smith, i. 394.
Hope v. Coleman, v 393.
—— v. Gill, i. 396.
Hopkins's caſe, iv. 14.
Hopkins v. Chele, ii. 503.
——— v. Ellis, i. 393.
——— v. Neil, iii. 620.
——— v. Robinſon, i. 621.
——— v. Waller, i. 186.
Hopkinſon, *ex parte*, i. 415.
Hopper v. Hacket, i. 214. 224.
Hopſwell v. Ackland, iv. 253.
Hore v. Broom, iii. 749 775.
—— v Chapman, vi. 598.
—— v. Dix, vii. 101.
—— v. Whitmore, iv. 668.
Horn v. Buſhel, vi. 422.
—— v. Horn, vii 461.
—— v. Lewin, vi. 464.
—— v. Luines, vi. 455.
Hornbuckle v. Eaton, iii. 441.
Hornby v. Comford, v. 196.
——— v. Houlditch, i. 425. ii. 73.
Horne v. Joy, ii. 13.
Horner v. Moor, i. 20.
Hornſby v. Finch, iii. 67.
Horſam v. Turger, iii. 50.
Horſey's caſe, i. 456.

Horſham's (Borough of) caſe, iii. 645.
Horſham v. Target, ii. 259.
Horſley v. Bell, i. 107.
—— v. Chaloner, iv. 342. vii. 181.
Horton's caſe, iv. 288.
Horton v. Arnold, ii. 345.
Horwood v. Smith, vi. 682. 689.
Hoſkins v. Berkley (Lord), i. 285. ii. 55.
—— v. Hoſkins, iii. 69. iv. 361. vii. 348.
—— v. Lee, vi. 254. 257.
—— v. Pickerſgill, iv. 641.
—— v. Slayton, iv. 616.
Hotham v. Eaſt-India Company, i. 110. iv. 627. v. 337.
—— v. Ryland, i. 642.
Hothwall v. Abney, v. 73.
Houblon v. Miller, vi. 210.
Houghton v. Starkey, v. 655.
Houſe and Erlkin v. Grinder, v. 454.
Houſin v. Barron, vii. 400.
Hovel v. Reynolds, vi. 606.
How v. Beech, i. 282.
— v. Bridgwater, i. 347.
— v. Napier, ii. 181. iv. 621.
— v. Planner, i. 245.
— v. Prinn, vi. 206. 212, 213.
— v. Vigures, v. 102.
— v. Weldon, iii. 307.
— v. Whalley, v. 613.
— v. Whitebank, i. 664.
Howard's caſe, iv. 675.
Howard v. Banks, vi. 556, 557.
—— v. Bartlett, ii. 398.
—— v. Burtonwood, iv. 552.
—— v. Cavendiſh, iii. 372.
—— v. Cheſhire, ii. 36.
—— v. Hall, vii. 160.
—— v. Harris, v. 6. 35. 108.
—— v. Hooker, iii. 304.
—— v. Hopkins, i. 111.
—— v. Jennett, i. 437. 458.
—— v. Inchiquin (Lord and Lady), ii. 616.
—— v. Nolder, i. 327.
—— v. Radburn, ii. 47.
—— v. Suffolk (Duke of), i. 701.
—— v. Ward, i. 26.
—— v. Wood, i. 260. iv. 9.
Howell's caſe, i. 607.
—— (John and Thomas) caſe, ii. 471.
Howell v. Anger, v. 788.
—— v. Coningſby (Lord), vi. 133.
—— v. Hanforth, ii. 722. vii. 459.
Howell v. Howell, vii. 166.
—— v. James, v. 287.
—— v. Johns, ii. 215.
—— v. Ireland, ii. 107. v. 360.
—— v. M'Ivers, i. 435.
—— v. Price, iii. 85. v. 24.
—— v. Sambeck, v. 349.
Hower's caſe, vi. 217.
Howes v. Carter, vi. 718.
Howis v. Wiggins, i. 422.
Howlett v. Carpenter, iii. 211.
—— v. Strickland, ii. 92. vi. 136.
Howſe v. Haſelwood, vii. 50.
Hubard v. Hammond, i. 736.
Hubbard v. Sir H. Penrice, i. 599.
Hubby's caſe, v. 805.
Hubert's caſe, iii. 217.
Huckle v. Money, vi. 668.
Huckſtep v. Mathews, iv. 330.
Hudſon's caſe, vii. 336.
Hudſon v. Benſon, iii. 236.
—— v. Davis, vii. 466.
—— v. Hudſon, iii. 30. v. 700.
—— v. Jones, iii. 601.
—— v. Skinner, vii. 393.
—— v. Spier, v. 174.
Huer v. Whitebread, ii. 45. vi. 125.
Hugget's caſe, v. 128.
Huggins v. Durham, ii. 527.
—— v. Wiſeman, iii. 594. v. 339. 409.
Hugh v. Lloyd, ii. 48.
Hughes's caſe, vi. 224.
Hughes v. Burgeſs, i. 40.
—— v. Clubb, ii. 325, 326.
—— v. Doulben, iv. 287.
—— v. Hughes, ii. 341. iv. 344. 442. vi. 391.
—— v. Mayre, i. 307.
—— v. Owen, vi. 133.
—— v. Richman, ii. 91.
—— v. Sayer, iv. 309.
—— v. Smith, vi. 691.
—— v. Underwood, ii. 478. vi. 419. 422.
Hughton v. Price, vi. 724.
Huiſh v. Phillips, v. 363.
—— v. Sheldon, vi. 672.
Hulbert v. Long, v. 159.
Hull's caſe, v. 131.
Hull (Mayor of) v. Horner, vii. 513.
—— —— v. Pitfield, iv. 723.
Hulland v. Malken, v. 178.
Hulm v. Heylock, iii. 209.
Hulme v. Tenant, i. 507.
Humberſton v. Cotteral, iv. 762.

Humberſton *v.* Humberſton, iv. 317. vii. 161.
Humberton *v.* Howgill, v. 372.
Hume *v.* Burton, iii. 226.
—— *v.* Edwards, ii. 254. iv. 426.
Humfreſton's caſe, vii. 66. 68.
Humphreys *v.* Humphreys, iii. 53.
Humphry—See Humphreys.
Humphrys *v.* Bullen, i. 480. iii. 55.
——— *v.* Churchman, v. 380.
——— *v.* Daniel, vi. 119. 421.
——— *v.* Parcel, v. 185.
——— *v.* Struthfield, vi. 220.
——— *v.* Taylor, vii. 363.
——— *v.* Ward, i. 27.
Hungate's caſe, i. 228.
Hungerford's caſe, v. 604.
Hungerford *v.* Clay, v. 18.
——— — *v.* Earl, iii. 311.
——— — *v.* Noſworthy, iv. 244.
Hunlock *v.* Peter, iii. 292. v. 427.
Hunſden *v.* Cheyney, iii. 299.
Hunt's caſe, vi. 347.
Hunt *v.* Baker, vii. 122.
—— *v.* Berkley, iv. 392.
—— *v.* Bourn, iv. 446.
—— *v.* Brains, vi. 80.
—— *v.* Coxe, vi. 118. 121.
—— *v.* Gilbourn, ii. 398.
—— *v.* King, iii. 203.
—— *v.* Mathews, i. 485. iii. 304.
—— *v.* Singleton, iv. 67.
—— *v.* Thimblethorp, vi. 228.
—— *v.* Thomas, vii. 471.
—— *v.* Wotton, i. 112.
Hunter, *ex parte*, i. 462.
——— *v.* Gray, i. 59.
——— *v.* Potts, i. 434.
Huntingdon's caſe, v. 653.
Huntingdon *v.* Huntingdon, i. 497. 507.
Hurſt's caſe, iv. 501. v. 180.
Hurſt *v.* Bambridge, i. 219.
—— *v.* Thomas, vii. 471.
—— *v.* Winchelſea (Earl), iii. 462. iv. 253.
Hurt's caſe, iv. 453.
Huſbands *v.* Huſbands, iv. 362.
Huſſey's caſe, iii. 414.
Huſſey *v.* Baſkerville, i. 328.
——— *v.* Fidell, i. 442.
——— *v.* Jacob, iii. 338.
——— *v.* Jordan, i. 7.
——— *v.* Moor, i. 153.
——— *v.* Pacey, i. 73. iii. 296. iv. 589.
Huſtler *v.* Raines, vi. 620. 623.
Hutcheſon *v.* Hammond, vii. 145. 183.
Hutchin *v.* Campbell, i. 441.
Hutchins *v.* Chambers and others, ii. 344. 352.
——— *v.* Foy, iv. 406.
——— *v.* Lee, vii. 143.
Hutchinſon's caſe, ii. 497. iii. 218.
Hutchinſon *v.* Brown, vii. 385.
——— — *v.* Hewſon, vii. 410.
——— — *v.* Johnſton, ii. 721. vi. 179.
——— — *v.* Puller, ii. 422.
——— — *v.* Smith, i. 347.
——— — *v.* Thomas, i. 25.
Hutchiſon *v.* Hodgſon, vii. 394.
Hutſon *v.* Hutſon, vii. 523.
Hutton's caſe, v. 648.
Hutton *v.* Boulton, vi. 475.
——— *v* Lewis, vii. 393.
——— *v.* Simſon, iv. 335. vii. 321.
Huxtep *v.* Brooman, iv. 254.
Huyt *v.* Cogan, ii. 712.
Hyde, *ex parte*, i. 451.
—— *v.* Hill, i. 126.
—— *v.* Hyde, iii. 86. vii. 350.
—— *v.* Maſon, vii. 375.
—— *v.* Pettit, vi. 127.
—— *v.* Skinner, iv. 230. vii. 489.
—— *v.* Trent and Merſey Navigation Company, i. 555.
Hylliard, *ex parte*, i. 400.
Hylling *v.* Haſtings, iii. 612.
Hylton *v.* Hylton, iii. 306.
Hynde's caſe, iii. 231. 635.
Hynde *v.* Lyon, v. 777.
Hyon *v.* Ballard, vi. 656. 661.

I and J.

Jackey *v.* Butler, iv. 608.
Jacks *v.* Cavendiſh, vi. 735.
—— *v.* Pemberton, i. 326, 327.
Jackſon *v.* Barnard, vii. 513.
——— *v.* Caleſworth (Inhabitants of), i. 70. ii. 34. iii. 509.
——— *v.* Darcy, v. 843.
——— *v.* Duchaire, iii. 305.
——— *v.* Fairbank, iv. 484.
——— *v.* Farrant, iv. 402.
——— *v.* Giſling, i. 25. 67.
——— *v.* Haſſell, i. 341.
——— *v.* Humphreys, ii. 511.
——— *v.* Hunter, vii. 402.
——— *v.* Hurlock, vii. 325.
——— *v.* Lever, i. 109. 186.
——— *v.* Mordant, iv. 15.
——— *v.* Pigot, iv. 714.

Jackſon v. Warren, iii. 776.
——— v. Warwick, vii. 500.
——— v. Williamſon, vii. 47.
Jacob v. Allen, i. 260.
——— v. Amyatt, iv. 322.
——— v. Marſh, vi. 649.
——— v. Miles, ii. 59.
——— v. Mills, vi. 234.
——— v. Miniconi, vii. 521.
——— v. Shepherd, i. 396.
Jacobſon v. Williams, i. 433. 481. iv. 433.
Jacomb v. Harwood, iii. 30. iv. 609. v. 700.
Jaggard v. Jaggard, iv. 329.
James v. David, i. 43.
—— v. Greaves, vii. 378.
—— v. Hailes, v. 31.
—— v. Hatfield, iii. 620.
—— v. Moody, vi. 86.
—— v. Morgan, ii. 266.
—— v. Owen, i. 109.
—— v. Pierce, ii. 518.
—— v. Richardſon, iv. 331.
—— v. Rutlech, vi. 249.
—— v. Staples, vii. 454.
J'Anſon v. Stewart, iv. 456.
——— v. Wilſon, i. 442. ii. 628.
Jaques and Thoroughgood v. Collins, iii. 680.
——— v. Golightly, i. 262.
——— v. Nixon, ii. 462. 466. 477. vi. 422.
——— v. Withy, i. 186, 187, 188. 262.
Jarman v. Wooloton, i. 436. ii. 715.
Jarvis v. Hayes, ii. 586.
Jaſon v. Kete, v. 236.
Ibberſon v. Galway (Lord), iii. 534.
Ibbetſon v. Beckwith, iv. 253. 255.
Ibbotſon's caſe, iii. 645.
Ibbotſon v. Brown, ii. 39.
——— v. Rhodes, ii. 582. iii. 301. v. 46.
Idle v. Cook, i. 730.
Jeakil v. Linne, i. 680.
Jeal v. Tickener, iv. 408.
Jeanes v. Wilkins, vii. 458.
Jefferies—See Jefferys.
Jefferſon v. Dawſon, ii. 482.
Jeffery v. Coite, v. 859.
——— v. Guy, iv. 17.
——— v. White, v. 174.
——— v. Wood, ii. 503.
Jefferys, *ex parte*, i. 426.
——— v. Auſtin, i. 112.
——— v. Baldwin, iii. 651.
Jefferys v. Barrow, iii. 464.
——— v. Legendra, iv. 669.
——— v. Snow, iv. 755.
——— v. Walter, iii. 343.
Jelly v. Clerk, iii. 665.
Jemott v. Cowley, i. 183. vii. 262.
Jenkin v. Whitehouſe, iv. 244.
Jenkins v. Barker, ii. 632.
——— v. Edwards, v. 175.
——— v. Hancock, v. 171. vi. 152.
——— v. Jenkins, vii. 254. 449.
——— v. Plume, ii. 46.
——— v. Powel, iv. 362.
——— v. Pritchard, ii. 424.
——— v. Purcel, iii. 743.
——— v. Tucker, i. 271.
——— v. Young, ii. 546.
Jenner v. Morgan, vi. 24.
——— v. Tracey, v. 91. 94.
Jennet v. Biſhopps, i. 18.
Jenning's caſe, iii. 224. v. 855. vii. 272.
Jenning v. Bragg, iv. 129.
——— v. Gallimore, vii. 493.
——— v. Gore, i. 640.
——— v. Hartley, v. 232.
——— v. Hathwaite, iv. 90.
——— v. Hunking, i. 151.
——— v. Looks, iv. 400.
——— v. Martin, i. 326.
——— v. Moore, ii. 580. v. 75.
——— v. Ward, v. 6.
——— v. Webb, i. 27.
Jenniſon v. Lexington, vi. 23.
Jenny v. Hele, iv. 695.
—— v. Norris, vi. 699.
Jenor v. Hardie, v. 804.
Jenys v. Fowler, iv. 737.
Jerningham v. Glaſs, v. 524.
Jerome v. Phear, i. 246.
Jervis v. Bruton, i. 648.
Jeſſer v. Gilford, i. 54.
Jeſton v. Brooke, vii. 192.
Jevon v. Turner, vi. 120.
Jevons v. Harridge, v. 435.
Jewell's caſe, ii. 341. vi. 9. 485.
Jewſon v. Moulſon, i. 412. 481. iii. 319.
Jeynes v. Stephenſon, i. 70.
Ifield v. Weeks, vi. 649.
Ilderton v. Ilderton, vii. 49. 442.
Ile's caſe, iv. 501.
Ince v. Everard, vii. 392.
Incledon v. Northcote, ii. 383. iii. 716. iv. 436.
India Company—See Eaſt-India Company.

Ingle v. Wordſworth, ii. 45.
Inglefield's caſe, vii. 82.
Inglis v. Grant, i. 393.
Ingolby v. Wivel, ii. 445.
Ingoldſby v. Martin, ii. 468.
Ingolſby v. Ward, vi. 743.
Ingram's caſe, v. 194.
Ingram v. Foot, vi. 375.
——— v. Tothil, iii. 489.
Inkerſalls v. Sams, vii. 22.
Inwood v. Twyne, iii. 614.
Jobſon's caſe, iii. 424. iv. 328.
Joce v. Mills, vi. 600.
John's caſe, vi. 159.
Johns v. Adams, iii. 89.
—— v. Bowen, ii. 489.
—— v. Gittings, vi. 251.
—— v. Ridler, v. 408. vii. 16.
—— v. Smith, vii. 44.
—— v. Stratford, vi. 183.
—— v. Whitley, ii. 424.
—— v. Wilſon, vi. 601.
Johnſon's caſe, ii. 492. iv. 761. v. 625.
Johnſon, *ex parte*, i. 454. iii. 225. 605.
———— v. Adams, vi. 81.
———— v. Bann, iii. 344.
———— v. Carr, ii. 92.
———— v. Derby (Earl), iii. 239.
———— v. Ellis, vi. 418.
———— v. Goldſwaine, vii. 470.
———— v. Holditch, vi. 468.
———— v. Jebb, ii. 475.
———— v. Kenyon, iv. 723.
———— v. Lancaſter, vi. 475.
———— v. Long, v. 443.
———— v. Lowth, vi. 333.
———— v. Milkſop, v. 23.
———— v. Morris, ii. 32.
———— v. Norway, ii. 32.
———— v. Ogilby, i. 106.
———— v. Oldham, v. 678.
———— v. Pie, iii. 592.
———— v. Ryſon, vi. 764.
———— v. Smith, iv. 338. 364. 482.
———— v. Sowers, ii. 150.
———— v. Spiller, i. 457.
———— v. Sutton, i. 97. iv. 657.
———— v. Trumper, v. 694.
———— v. Turner, v. 476.
———— v. Twiſt, iii. 68.
———— v. Wolyer, vi. 72.
Joice v. Williamſon, iv. 679.
Jollet v. Deponthien, i. 434.
Jolliffe v. Bride, i. 646.
——— v. Langſton, v. 625.
Jolly v. Walker, iv. 662.
Jolly v. Wills, v. 721.
Jones's caſe, v. 830.
Jones v. Aſhurſt, iii. 272.
—— v. Axen, vi. 375.
—— v. Barkley, ii. 92. v. 337.
—— v. Barrett, vi. 766.
—— v. Beale, iv. 349.
—— v. Bean, v. 185.
—— v. Berkley, i. 455.
—— v. Bew, v. 206.
—— v. Biſhop, iii. 331.
—— v. Bouget, ii. 165.
—— v. Bromley Hundred, iii. 513.
—— v. Cave, iii. 226.
—— v. Clerk, iv. 9. v. 201. vii. 66.
—— v. Collier, ii. 383. iii. 716.
—— v. Concannon, v. 142. vi. 53.
—— v. Dawkes, vi. 224.
—— v. Dod, iii. 667.
—— v. Eamer, vii. 454.
—— v. Edwards, ii. 722.
—— v. Green, vi. 156.
—— v. Gwin, i. 94.
—— v. Hammond, v. 359.
—— v. Hart, vi. 691.
—— v. Hill, vii. 258.
—— v. Lake, i. 113. vii. 308.
—— v. Lander, vii. 402.
—— v. Langton, vii. 163.
—— v. Lawrence, vi. 192.
—— v. Mancheſter (Counteſs of), vii. 120.
—— v. Marſh, iii. 311. 319. 462.
—— v. Maſon, ii. 592. vii. 456.
—— v. Meredith, v. 36.
—— v. Morgan, iv. 270. 276. vii. 178.
—— v. Morley, vii. 89. 91. 120.
—— v. Nabbs, vii. 339.
—— v. Palmer, iii. 286.
—— v. Pearle, iii. 668.
—— v. Perry, iv. 248.
—— v. Philpot, ii. 325.
—— v. Pope, ii. 525. iv. 472. v. 341.
—— v. Pritchard, vi. 599, 600. 697.
—— v. Randall, ii. 619.
—— v. Say and Seal (Lord), vii. 124.
—— v. Schmoll, iv. 641.
—— v. Selby, iv. 338.
—— v. Smart, iii. 328.
—— v. Smith, v. 85.
—— v. Sparrow, vi. 688.
—— v. Stone, v. 678.
—— v. Stratford (Lord), iii. 15. iv. 484. vii. 138.
—— v. Thrale, i. 56.
—— v. Treſilian, i. 247.

Jones v. Turberville, iv. 429.
— v. Walker, i. 558.
— v. Weſtcomb, iii. 69.
— v. Williams, i. 596. v. 172. 413.
— v. Winkworth, vi. 687. 697.
Johnſtone—See Johnſon.
Jordan v. Colley, vi. 767.
— v. Lyſter, vi. 245.
— v. Sanders, v. 707.
— v. Savage, iii. 717.
— v. Sawkins, i. 118.
— v. Wilkes, iv. 13.
Jory v. Cox, v. 14.
Joſſelyn v. Lacier, iv. 695.
Jouce v. Parker, vi. 14.
Jouram v. Bourdieu, iv. 647.
Joy v. Kent, iv. 678.
Joyce v. Heynes, i. 216.
Joynes v. Statham, i. 121.
Ipſwich's (Taylors of) caſe, i. 547.
Ireland v. Barker, iv. 108.
— v. Higgins, iii. 324.
— v. Lockwell, vii. 39.
— v. Rittle, i. 121.
Irith v. Hook, iv. 176.
Irnham (Lord) v. Child, i. 110.
Irod v. Hurſt, vii. 347.
Ironmonger v. Nuſam, ii. 285.
Iſaac v. Clerk, vi. 678. 681. 706.
— v. Doſriez, iv. 350.
— v. Gordon, v. 448.
— v. Iſaac, iv. 342.
Iſaacs v. Humpage, iii. 655.
Iſham v. Morrice, iii. 227. iv. 198. vii. 41.
— v. York, vi. 213.
Iſled v. Stanley, iii. 19.
Iſrael's caſe, vi. 689.
Iſrael v. Douglaſs, i. 259.
Ithel v. Beane, v. 71.
Juel—See Jewel.
Julian v. Shobrooke, iv. 715.
Jurado v. Gregory, ii. 181.
Jury v. Cox, i. 114.
Ives v. Wright, vi. 765.
Juxon v. Andrews, vii. 35.
Ivy v. Gilbert, iv. 286.

K.

Kane v. Hamilton, iv. 233.
Kaye v. De Mattos, i. 299.
— v. Whitehead, v. 472.
Keale's caſe, iii. 146.
Kearle v. Boulter, iii. 329.
Kearſlake v. Morgan, i. 281.
Keble v. Oſbaſton, v. 367.
— v. Page, vi. 207.
— v. Thompſon, i. 461.
Keckwick's caſe, iii. 584.
Keddington v. Bridgman, iv. 54. vi. 758, 759.
Kedwelly v. Brand, vi. 586.
Keech v. Hall, v. 15. 35.
— v. Kennegal, iii. 90.
— v. Knight, v. 339.
Keeling v. Windham, ii. 286.
Keen v. Angel, vii. 444.
— v. Cope, v. 841.
— v. Effingham (Earl), ii. 613.
— v. Stukeley, i. 109. 111.
— v. Whiſtler, ii. 37.
Keighley's caſe, ii. 213.
Keighley v. Bulkley, ii. 73. 286.
Keightley v. Keightley, iv. 286.
Keite v. Clopton, vii. 64.
Keley v. Manning, v. 550.
Kellam v. Maneſby, vi. 208.
Kellock v. Robinſon, iv. 723.
Kellow v. Rowden, iii. 464. 468.
Kelly v. Bellew (Lord), v. 110.
— v. Pawlett, iv. 353.
Kelſick v. Nicholſon, iii. 31.
Kemp v. Andrews, iii. 92. 675.
— v. Antill, iii. 649.
— v. Davy, iv. 409.
— v. Mackerill, vi. 654.
— v. Stafford (Hundred of), iii. 517.
Kempland v. Macauley, ii. 452. 479.
Kempſton v. Nelſon, vi. 71.
Kempton v. Croſs, ii. 631.
Kenchin v. Knight, ii. 244.
Kenn's caſe, i. 513. iv. 534.
Kenn v. Stukely, i. 109.
Kennard v. Jones, i. 18. ii. 143.
Kennedy v. Slainſby, iii. 67.
Kennoule (Lord) v. Bedford (Earl), i. 181.
Kenrick v. Burgeſs, iii. 22. 26.
— v. Pargiter, i. 623.
— v. Taylor, i. 85, 86. v. 335.
Kenrig v. Eccleſton, i. 556.
Kenſey v. Langham, v. 17.
Kent, *ex parte*, iii. 614.
— v. Bird, iv. 660.
— v. Bridgman, iii. 321.
— v. Kent, ii. 394. 396. 491. 503. 505.
Kenyon v. Berthon, iv. 668.
— v. Solomon, i. 450.
Kerney, *ex parte*, v. 618.
Kernot v. Norman, iii. 534.

Kerrick v. Bransby, iii. 322.
Ketilby v. Ketilby, v. 156.
Ketsey's case, iii. 612.
Kettier v. Raynes, i. 425.
Kettle v. Hammond, i. 395.
——— v. Jones, i. 669.
——— v. Townsend, i. 725.
Kettleby v. Hales, vi. 124.
Kettley's case, ii. 361, 362.
Kettley v. Elliot, iii. 611. iv. 12.
——— v. Hales, vi. 124.
Kew v. Rouse, iii. 683.
Kewley v. Rian, iv. 632. 667.
Key v. Bradshaw, iv. 546.
——— v. Gamble, v. 825.
——— v. Koke, vi. 620.
Keymer v. Summers, iii. 496.
Kidden v. Edwards, vi. 751.
Kidwelly's case, i. 655.
Kielway v. Kielway, iii. 76.
Kiely v. Fowler, iv. 311.
Kiffin v. Willis, v. 703.
Kildare (Lord) v. Eustace, vii. 94.
——— v. Fisher, ii. 421.
Kill v. Hollister, i. 236. iv. 671.
Killick v. Flexney, vii. 181.
Kilmurry's (Lady) case, iv. 419.
Kilwick v. Maidman, i. 27. vi. 461.
Kimp v. Crewes, ii. 346.
Kimpland v. Courtney, i. 249.
Kinaston v. Clarke, iii. 468.
——— v. Mayor, &c. of Shrewsbury, ii. 505.
Kinchant v. Kinchant, i. 111.
Kinder v. Paris, vii. 389. 499.
——— v. Williams, v. 618.
King (The)—See Rex.
King's case, vi. 438. 443.
King, *ex parte*, v. 618.
——— v. Andrews, ii. 528.
——— v. Ayloffe, iii. 92.
——— v. Bromley, v. 10.
——— v. Burdett, vi. 669.
——— v. Clifton, i. 286.
——— v. Dallison, iii. 589.
——— v. Fines, i. 220.
——— v. Gallwich, i. 372.
——— v. Gosper and Shire, ii. 488.
——— v. Hammerton, i. 216.
——— v. Henchman, iv. 502.
——— v. Hilton, i. 486.
——— v. Hobbs, v. 413.
——— v. King, i. 101. 726. iii. 85. v. 23. vi. 440.
——— v. Lake, vi. 205. 215, 216.
——— v. Milling, iv. 261.
——— v. Nichols, vi. 464.
King v. Norwich (Bishop of) & al. vi. 198.
——— v. Pippet, v. 141.
——— v. Rose, vi. 575, 576. 686.
——— v. Rumball, iii. 680. iv. 258.
——— v. Somerland, i. 473.
——— v. Tibbart, i. 248.
——— v. Withers, i. 249. iv. 420.
——— v. Worcester (Bishop of), vi. 200.
Kingdom v. Bridges, iii. 673.
Kingsdale v. Mann, ii. 738.
Kingsman v. Kingsman, iv. 325.
Kingston's (Duchess of) case, ii. 580.
Kingston v. Herbert, iii. 245.
——— v. Long, iv. 696.
——— v. Preston, v. 337.
Kingwell v. Chapman, i. 677.
Kinlyside v. Thornton, i. 98.
Kinnersley v. Orpe, v. 320.
——— v. Smart, vii. 212.
Kinnoul (Earl) v. Money, i. 497.
Kirbee v. Leers, v. 364.
Kirby v. Hanfaker, v. 170.
Kirk v. Clark, iii. 317.
——— v. Nowill, i. 552.
——— v. Webb, vii. 143.
Kirkham v. Smith, v. 31. vii. 185.
——— v. Wheeler, v. 357.
Kirkman v. Price, i. 187.
——— v. Thompson, ii. 325.
Kirle v. Clifton, ii. 503.
Kirlee—See Kirbee.
Kissebower v. Tims, i. 259.
Kitchen v. Buckley, ii. 71.
——— v. Calvert, vi. 188. 190.
——— v. Campbell, v. 442.
——— v. Knight, iii. 706.
Kitson v. Fagg, i. 347. vi. 154.
Knapp v. Noyes, iv. 424.
Knapton v. Drew, vi. 473.
Knevit v. Pool, iii. 64.
——— v. Taylor, vi. 647.
Knight's case, vi. 13.
Knight v. Bamfield, v. 105, 106.
——— v. Barker, vi. 699.
——— v. Bate, iv. 480.
——— v. Berry, ii. 181. iv. 611.
——— v. Cambridge, iv. 644.
——— v. Du Plessis, iv. 247. v. 565.
——— v. Ellis, iv. 273. 322.
——— v. Fortipan, iii. 601. v. 860.
——— v. Freeman, ii. 72.
——— v. Halsey, vi. 739.
——— v. Hamilton (Duchess), vi. 474.
——— v. Harvey, v. 369.
——— v. Keech, v. 413.

Knight *v.* Robinſon, v. 470.
——— *v.* Savage, ii. 494.
——— *v.* Syms, ii. 420.
Knightley's caſe, vi. 552.
Knipe *v.* Edwin, iv. 504.
——— *v.* Palmer, iii. 530.
Kniveton's caſe, v. 855.
Kniveton *v.* Latham, iii. 78. v. 701.
Knott *v.* Hill, iii. 307.
Knowles *v.* Powell, v. 238.
——— *v.* Spence, v. 93.
Knox *v.* Caſtello, ii. 461. vi. 125.
——— *v.* Simmonds, i. 217. 237.
Kockill v. Wetheral, i. 221.
Kreley *v.* Medley, i. 342.
Kretchman *v.* Beyer, i. 21.
Krutzer *v.* Wilcox, iv. 601.
Kynaſton *v.* Kynaſton, iii. 85.
——— *v.* Lloyd, ii. 325.

L.

Lacam *v.* Mertins, i. 497. iii. 86. v. 26.
Lacey *v.* Williams, iii. 229. 233.
Lacon *v.* Barnard, vi. 703.
——— *v.* Briggs, iv. 484. vii. 138.
——— *v.* Hooper, v. 654.
——— *v.* Martins, i. 117. 120, 121.
Lacy *v.* Fiſher, vi. 77.
Ladd *v.* Garrod, vi. 642.
Lade *v.* Barker, iii. 415.
——— *v.* Holford, vii. 122.
——— *v.* Shepherd, iii. 494. iv. 567.
Laicon *v.* Bernard, v. 441.
Lake's caſe, v. 571.
Lake *v.* Billers, vi. 591.
——— *v.* Croydon (Hundred of), iii. 516.
——— *v.* Gibſon, iii. 685.
——— *v.* King, i. 96. vi. 226.
——— *v.* Lake, ii. 655. iii. 69. 71.
——— *v.* Thomas, vii. 504.
Lamb's caſe, iv. 457.
Lamb *v.* Archer, iv. 307.
——— *v.* Gunman, ii. 149. v. 568.
——— *v.* Parker, vii. 357.
——— *v.* Williams, i. 299.
——— *v.* Wiſeman, i. 148. iii. 774.
Lambell *v.* Pretty John, ii. 485.
Lambert's caſe, iv. 518.
Lambert *v.* Achetree, ii. 182. iv. 611.
——— *v.* Branthwaite, v. 162.
——— *v.* Cumming, vi. 754.
——— *v.* Pack, vi. 710.
——— *v.* Thurſton, ii. 102. vi. 594.
Lames *v.* Bayley, i. 121.
Lamine *v.* Dorrel, vi. 705. 707.
Lamlee *v.* Hamman, iv. 544.
Lampen *v.* Deering, v. 614.
——— *v.* Hatch, ii. 41. 503.
Lampet's caſe, i. 249. ii. 543. iii. 454, v. 705. 707. 778. vii. 115.
Lampiere *v.* Mereday, vi. 422.
Lampleigh *v.* Braithwaite, i. 112.
Lampleugh *v.* Blaithwait, v. 343.
Lampley *v.* Blower, iv. 310.
Lamplugh *v.* Lamplugh, vii. 141. 148.
Lamply *et ux v.* Sands, ii. 57.
Lamſhead *v.* Leate, vi. 53.
Lamu *v.* Sewell, ii. 57.
Lancaſhire *v.* Killingworth, vi. 448. 454. 459, 460.
——— *v.* Lancaſhire, vii. 470.
Lancaſter's (Duchy of) caſe, iv. 12. v. 494.
Lancaſter *v.* French, vi. 219.
——— *v.* Keyleigh, i. 344. ii. 481.
——— *v.* Law, ii. 487.
——— *v.* Lucas, iv. 112.
——— *v.* Thornton, iv. 281.
Land *v.* Harris, vi. 478.
Lane's caſe, ii. 26.
Lane, *ex parte*, i. 413.
——— *v.* Alexander, v. 391.
——— *v.* Cotton and Frankland, iv. 585.
——— *v.* Degberg, i. 245. ii. 630.
——— *v.* Foulk, vi. 58.
——— *v.* Pannell, v. 770, 771.
——— *v.* Pledall, vii. 26.
——— *v.* Smith, vi. 461.
——— *v.* Vane, v. 857.
——— *v.* Wheat, iv. 483.
——— *v.* Williams, iv. 607.
Laneſborough *v.* Fox, iv. 273. 289.
——— *v.* Jones, i. 443.
Langdale *v.* Maſon, iv. 675.
Langdon *v.* Goole, v. 162.
——— *v.* Stokes, v. 682.
Langford *v.* Barnard, vii. 203.
——— *v.* Ellis, i. 420.
——— *v.* Pitt, i. 113.
Langhorne's caſe, i. 406.
Langley *v.* Baldwin, iv. 273.
——— *v.* Pain, vii. 40.
Langly *v.* Haines, vi. 397.
Langridge *v.* Flood, i. 343.
Langſtaff *v.* Rain, i. 504.
Langton *v.* Grant, vi. 417.
——— *v.* Wallis, ii. 514.
Lanion *v.* Kerne, iii. 489.
Lanoy *v.* Athol (Duke), iii. 86.
——— *v.* Lanoy, vii. 368.
Lant *v.* Norris, ii. 78.

Lark's caſe, v. 637.
Laroche *v.* Waſsborough, ii 461. 478.
Larwood's caſe, v. 191.
Laſablonière *v.* Swinton, i. 461.
Laſbrook *v.* Tyler, i. 494.
Laſhmer *v.* Avery, ii 398.
Latham *v.* Atwood, iii. 64.
Latleſs *v* Holmes, i. 186.
Laughter's caſe, i. 676.
Laughter *v.* Humphry, vi. 80.
Launceſton's (Mayor) caſe, ii. 354.
Laundy *v.* Williams, iv. 434.
Lavabre *v.* Walter, iv. 665.
——— *v.* Wilſon, iv. 640.
Lavie *v.* Phillips, i. 385.
Law *v.* Crowther, v. 449.
—— *v.* Davis, iv. 264.
—— *v.* Hollingſworth, vii. 501.
—— *v.* Horwood, ii. 40. iv. 469.
—— *v.* King, v. 395. 596. 615.
—— *v.* Law, iii. 307. v. 197.
—— *v.* Saunders, iv. 758.
—— *v.* Skinner, i. 396.
—— *qui tam v.* Worrell, i. 70. ii. 50.
Lawe *v.* Bennet, vi. 207.
Lawley *v.* Arnold, v. 416.
——— *v.* Hooper, vii. 194.
Lawrence *v.* Atherton, ii. 262.
——— *v.* Beverley, i. 113. v. 39.
——— *v.* Boſwell, vi. 669. vii. 13.
——— *v.* Cox, vi. 480.
——— *v.* Lawrence, ii. 383. iii. 716. vii. 443.
Lawſon *v.* Copeland, iii. 60.
——— *v.* Hudſon, iii. 86. v. 30.
——— *v.* Lamb, i. 441.
——— *v.* Lawſon, iii. 69. iv. 337.
——— *v.* Stitch, iv. 355. 425.
——— *v.* Story, ii. 43, 44. 349. vi. 91.
Lawton *v.* Lawton, iii. 64. vii. 258.
Laycock *v.* Tuffnell, vi. 136.
Layer's caſe, iii. 751. vi. 542. 547.
Layfield's caſe, vi. 616, 617.
Layton *v.* Grindall, vi. 601.
Lazarus *v.* Pritchard, ii. 57.
Lea *v.* Barber, vii. 388.
—— *v.* Exelby, vi. 459, 460.
—— *v.* Garret, vi. 462.
—— *v.* Lib, vii. 299. 308, 309.
—— *v.* Wheatly, v. 628.
Leach *v.* Cole, v. 855.
—— *v.* Jackſon, v. 821.
Leadbeater *v.* Markland, iv. 483.
Leapridge *v.* Pongilliqnne, vi. 477.
Leaſe *v.* Box, i. 347.
Leaſingby *v.* Smith, vii. 59, 60.
Leatherſellers' Company *v.* Beacon, vi. 640.
Le Caux *v.* Eden, ii. 180.
Lechill *v.* Reynell, v. 356.
Lechmere *v.* Earl of Carliſle, i. 113, 114.
——— *v.* Thoroughgood, i. 436. ii. 735.
——— *v.* Toplady, vi. 705.
Le Clea *v.* Trot, v. 523.
Le Cras *v.* Hughes, iv. 646. 660.
Ledeſham *v.* Lenham, vi. 679. 684. 687.
Ledgar *v.* Langley, vi. 738, 739.
Ledſome *v.* Hickman, iv. 391.
Ledwith *v.* Catchpole, i. 687.
Lee's caſe, iv. 502. v. 611.
Lee's (Sir Thomas) caſe, ii. 443.
Lee, *ex parte*, i. 400.
—— *v.* Adams, v. 343.
—— *v.* Aſhton, iii. 577.
—— *v.* Aſton, vii. 288.
—— *v.* Browne, v. 605.
—— *v.* Colſhill, ii. 80.
—— *et ux. v.* Colſhill, i. 645. iv. 95.
—— *v.* Elkin, i. 216. 235.
—— *v.* Ganſell, vi. 170. 587.
—— *v.* Knight, i. 301.
—— *v.* Lee, vii. 182.
—— *v.* Luttrell, ii. 89.
—— *v.* Raynes, iv. 485.
—— *v.* Stradwick, vi. 211.
—— *v.* Vernon, iv. 226. vii. 142.
—— *v.* Vernon (Lord), v. 19.
—— *v.* Vincent, v. 813.
—— *v.* Welſh, i. 277.
—— *v.* White, iii. 110.
—— *v.* Withers, iv. 252.
Leech *v.* Davys, vi. 183.
—— *v.* Leech, iv. 442.
—— *v.* Midgley, vi. 611.
Leek *v.* Morrice, i. 120.
Leeke, *ex parte*, i. 416.
Lees *v.* Smith, vii. 501.
Lefebre, *ex parte*, i. 420.
Leftley *v.* Mills, iv. 724, 725. 728. 730, 731.
Legal *v.* Miller, i. 111. ii. 654.
Legard *v.* Sheffield, iii. 416. 616.
Legart *v.* Shewell, iv. 274.
Legaſficke *v.* Exeter (Biſhop of), ii. 727.
Legaſtick *v.* Cowne, iv. 484.
Legat *v.* Sewell, vii. 172. 174. 185.
Legatt's caſe, v. 603.
Legg *v.* Da Coſta, iii. 649.
—— *v.* Goldwire, i. 113. vii. 170.

Legg *v.* Hackett or Strudwick, iv. 180, 181.
Legh *v.* Warrington (Earl), iv. 285.
Legliſe *v.* Champante, iii. 708. vi. 578.
Le'Grange *v.* Hamilton, vii. 197.
Leiceſter (Mayor of) *v.* Green, i. 59.
Leiceſter (Lord) *v.* Mandy, vi. 99.
Leigh's (Lady) caſe, iii. 425.
Leigh *v.* Barry, iii. 31. vii. 183.
——— *v.* Brace, ii. 544.
——— *v.* Burton, vii. 134.
——— *v.* Chapman, iii. 521.
——— *v.* Hallier, iv. 102.
——— *v.* Kent, i. 64. 66.
——— *v.* Mather, iv. 638.
——— *v.* Maudeſley, vi. 766. 768.
——— *v.* Wood, vi. 760.
Leighton *v.* Leighton, vii. 293.
——— *v.* Walwin, v. 231.
Leiſter *v.* Foxcroft, iii. 303.
Leith *v.* M'Farlan, ii. 487.
Lekeux *v.* Naſh, ii. 73.
Leman *v.* Allen, vi. 668.
——— *v.* Goulty, i. 605.
——— *v.* Newnham, iii. 86. v. 26.
Lémaiſtre *v.* Banniſter, vii. 140.
Lemayne *v.* Stanley, vii. 310.
Lemon *v.* Lemon, ii. 383. iii. 716.
Lempriere *v.* Paiſley, i. 439.
Leneret *v.* Rivet, i. 279. v. 344.
Le Neve *v.* Le Neve, ii. 580. v. 78. vi. 387.
Lenthal *v.* Lenthal, ii. 518.
Lenthall *v.* Thomas, iv. 133.
Leonard *v.* Bacon, iii. 310. v. 426.
——— *v.* Stacey, vi. 66.
——— *v.* Suſſex (Earl), iv. 268. vii. 173.
Leperd *v.* Germain, i. 167.
Leppin *v.* Kedgwin, v. 441.
Le Pypre *v.* Farr, iv. 659.
Leſlie's caſe, vii. 181.
Letchmere *v.* Toplady, v. 442.
Lethuillier *v.* Tracey, ii. 574. iv. 265.
Lethulier's caſe, iv. 635. 669.
Level *v.* Hall, v. 440.
Lever *v.* Fletcher, iv. 658.
Leverſage *v.* Smith, vi. 237.
Leveſon *v.* Kirk, iv. 589.
Levett *v.* Farrar, vi. 154.
Levin *v.* ———, ii. 473.
Leving *v.* Caverly, iii. 416. 615.
Levit *v.* Needham, vii. 122. 142.
Leward *v.* Baſely, i. 246.
Lewellin *v.* Williams, iv. 58.
Lewes *v.* Bucknall, vii. 28.
Lewin *v.* Alſop, vi. 152.
——— *v.* Cox, iii. 680.
——— *v.* Lewin, ii. 255. iv. 426.
——— *v.* Oakley, iii. 59. vii. 160.
——— *v.* Suaſſo, iv. 645.
Lewis's (Hugh) caſe, iii. 197.
Lewis's (Mrs.) caſe, i. 483.
Lewis, *ex parte*, i. 400.
——— *v.* Aſkham, vii. 54.
——— *v.* Bourdieu, i. 262.
——— *v.* Bowles, vii. 260.
——— *v.* Bucknall, vi. 81.
——— *v.* Clerges, ii. 614.
——— *v.* Fogg, ii. 586.
——— *v.* Harris, ii. 234.
——— *v.* Hilliard, ii. 77.
——— *v.* King, vii. 447.
——— *v.* Nangle, i. 497. v. 26.
——— *v.* Piercy, i. 420. 455. 457.
——— *v.* Pottle, i. 329.
——— *v.* Rucker, iv. 646. 659.
——— *v.* Shepherd, i. 43.
——— *v.* Wallace, vi. 44.
——— *v.* Wallis, ii. 259.
——— *v.* Walter, vi. 239.
——— *v.* Webb, ii. 464.
——— *v.* Whitley, vi. 253.
——— *v.* Willis, v. 376.
Lewkner's caſe, vii. 262.
Lewkner *v.* Freeman, iii. 313.
Lewknor *v.* Huntly, ii. 260.
Lewſon *v.* Piggot, iv. 83.
Ley's caſe, iii. 377.
Leyfield's caſe, v. 463.
——— (Dr.) caſe, v. 423.
L'Fitt *v.* L'Batt, vii. 337.
Liardet *v.* Johnſon, v. 593.
Lickbarrow *v.* Maſon, ii. 505. iv. 683. vii. 423.
Lidderdale *v.* Montroſe (Duke), i. 250.
Lidiate *v.* Butler, iv. 470.
Liford's caſe, iii. 396. vi. 593. 721, 722, 723. vii. 252, 253. 259. 263. 276.
Lightfoot *v.* Brightman, vii. 43.
——— *v.* Bulier, v. 614.
——— *v.* Cameron, v. 617.
Ligo *v.* Smith and Leigh, vii. 296.
Lilcot *v.* Compton, iv. 353.
Lillington's caſe, ii. 284. ii. 699.
Lilly *v.* Ewer, iv. 669.
——— *v.* Hedges, ii. 68.
——— *v.* Oſborn, i. 432.
——— *v.* Whitney, iii. 163.
Limbery *et al.* *v.* Hide, vii. 312.

Limbuy *v.* Langham, vi. 420.
Limner *v.* Every, iii. 13.
Linch *v* Coote, v. 577. 773.
——— *v.* Hook, v. 431.
Lincoln College's caſe, ii. 326. vii. 242.
——— (Earl) *v.* Broughton, vi. 99.
——— ——— *v.* Flower, iii. 184.
——— ——— *v.* Hoſkins, iv. 90. 96.
Lindo *v.* Rodney, ii. 177. 180. v. 661.
Lindon *v.* Hoſper, i. 260.
Lindopp *v.* Eberall, i. 725.
Lindſay, *ex parte*, i. 415.
——— *v* Gray, iii. 221.
Linfield *v.* Ferne, i. 220, 221.
Lingard *v.* Derby (Earl), iv. 287.
Lingen *v.* Sowray, i. 113. iv. 249.
Lingham *v.* Toule, vii. 471.
Lingood, *ex parte*, i. 401. 405.
Linſey *v.* Clerk, ii. 431. iii. 175. vi. 595.
Linton *v* Bartlett, i. 396.
Liſle *v.* Gray, v. 746.
Liſter *v.* Bromley, iii. 123.
——— *v.* Cramel, v. 403.
Litchfield and Coventry's (Biſhop of) caſe, iv. 104.
Litheley *v.* Coryton, i. 53.
Little, *ex parte*, ii. 677.
Littlebury *v.* Buckley, ii. 484. 655. iii. 71.
Littlehale *v.* Boſanquet, vi. 469.
Littler *v* Holland, ii. 93.
Littleton's caſe, i. 387.
Littleton *v.* Hanſon, i. 333.
——— *v.* Hibbins, iii. 83.
Littlewood *v.* Smith, ii. 40.
Liveridge *v.* Hodges, vi. 557.
Livermore *v.* Martin, vi. 225.
Liverpool (Mayor, &c. of) *v.* Lancaſter (Chancellour of), vi. 111.
Livingſtone *v.* M'Kenzie, ii. 180.
Llewellyn, *ex parte*, i. 416.
——— *v.* Mackworth, iv. 473. vii. 138.
Lloyd *v.* Brooking, v. 762.
——— *v.* Carew, iii. 214. 411. 620. iv. 296. v. 793.
——— *v.* Curdy, v. 523.
——— *v* Eagle, vi. 633.
——— *v.* Evelyn, iii. 231.
——— *v.* Gregory, iii. 600. iv. 60. 215.
——— *v.* Hatchett, v. 156. vii. 504.
——— *v.* Lee, i. 267.
——— *v.* Manſell, v. 46.
——— *v.* Maund, iv. 483.
——— *v.* Pollard, v. 844.
Lloyd *v.* Say and Seal (Viſcount), iii. 193. 231. vii. 369.
——— *v.* Skutt, i. 65. ii. 481.
——— *v.* Spillet, vii. 125. 142. 376.
——— *v.* Tench, iii. 55. 75.
——— *v.* Vaughan, iii. 246.
——— *v.* Walcot, ii. 290.
——— *v.* Williams, v. 331. vii. 196. 212.
——— *v.* Winton, ii. 53. vi. 82.
——— *v.* Woodall, vi. 333.
Lo *v.* Sanders, vi. 235.
Lobly *v* Gildart, i. 42.
Lock *v.* Bennet, i. 443.
——— *v.* Lock, vi. 236, 237.
——— *v.* Tillard, ii. 478.
Locket's caſe, iii. 285.
Lockey *v.* Lockey, i. 35. 121. iii. 587. iv. 477.
Lockwood *v.* Ewer, v. 99.
——— *v.* Hill, i. 340.
——— *v.* Stannard, ii. 42.
Lockyer *v.* E. I. Company, ii. 248.
——— *v.* Offley, iv. 634. 643.
——— *v.* Savage, i. 426. ii. 253. v. 705.
Locton *v.* Locton, i. 316.
Loddington *v.* Kime, iii. 241. iv. 26[illegible]
Lodge *v* Jennings, vii. 6.
Lodie *v.* Arnold, vi. 611.
Loeffes *v.* Lewen, ii. 252.
Lofield's caſe, vi. 14.
Loggin *v.* Comitem, ii. 88.
Lomax *v.* Armorer, ii. 390.
——— *v.* Hide, v. 45.
——— *v.* Holmden, i. 513.
London's (Chamberlain of) caſe, i. 548.
——— (Mayor of) caſe, i. 584.
London (Mayor, &c. of) *v.* Alfred, v. 787.
——— (Mayor of) *v.* Alsford, iii. 20[illegible]
——— (City of) *v.* Coates, ii. 24[illegible]
——— *v.* Craven, vi. 458.
——— (Mayor, &c. of) *v.* Dupeſter, vii. 221.
——— (Biſhop of) *v.* Ffytche, ii. 192. 194.
——— (City of) *v.* Garway, vii. 14[illegible]
——— (Mayor, &c. of) *v.* Gore, v. 438.
——— (Mayor) *v.* Gory, i. 258.
——— (City) *v.* Greyme, vii. 25[illegible]
——— (Chamberlain of) *v.* Grosvenor court, i. 548.
——— (Biſhop of) *v.* Hickeringhill, vi. 101.

London *v.* Lynn, i. 287.
——— (Mayor, &c. of) *v.* Mayor, &c. of Lynn, ii. 635.
——— (City of) *v.* Naſh, i. 107. ii. 70.
——— (Biſhop of) *v.* Nicholls, vi. 766.
——— *v.* Pickering, ii. 497.
——— (City of) *v.* Richmond, i. 109.
——— (Mayor, &c. of) *v.* Swinland, ii. 635.
——— (City of) *v.* Vanacre, vi. 144.
——— (Biſhop of) *v.* Webb, vii. 291.
——— (City of) *v.* Wood, vi. 373. vii. 215. 218, 219, 220, 221.
Long's caſe, v. 617.
Long *v.* Allen, iv. 671.
—— *v.* Beaumont, ii. 546. iv. 331.
—— *v.* Clopton, v. 90.
—— *v.* Dennis, iv. 424.
—— *v.* Glouceſter (Biſhop of), iii. 398.
Longchamp *v.* Kenny, i. 262.
Longford *v.* Eyre, vii. 312.
Longhead *v.* Phelps, iv. 310. vii. 493.
Longman *v.* Calliford, vii. 470.
——— *v.* Fenn, ii. 276.
Lonſdale (Lord) *v.* Church, v. 156. ii. 84.
——— *v.* Littledale, v. 645.
Lookup *v.* Frederick, v. 449.
Loraine *v.* Thomlinſon, iv. 671.
Lord *v.* Biſcoe, iii. 247.
—— *v.* Turk, vi. 754.
Lorymer *v.* Hollifter, i. 295.
Lougher *v.* Williams, ii. 70. iii. 453.
Louviere *v.* Laubray, iv. 734, 735. 738.
Love's caſe, i. 273.
Love *v.* Wotton, vi. 398, 399. vii. 211.
Love *v.* Wyndham, iv. 305.
Loveacres *v.* Blight, iv. 255.
Loveday's caſe, vi. 661. vii. 194. 213.
Loveitt *v.* Goddard, v. 810.
Lovelace's caſe, ii. 195. v. 160. vi. 378.
Lovelace *v.* Cockatt, v. 405.
——— *v.* Cocket, i. 42.
——— *v.* Juniper, ii. 493.
Loveland *v.* Baſſet, i. 326.
Lovell *v.* Bidgood, iii. 182.
Lovelock *v.* Doncaſter, ii. 413.
Loveridge *v.* Plaiſtow, i. 364.
Lovey *v.* Arnold, vi. 588.
Low *v.* Peart, vi. 107.
Lowe's caſe, vi. 490.
Lowe *v.* Jolliffe, ii. 587. 592. vii. 336.
—— *v.* Morgan, v. 100.
Lowe *v.* Waller, i. 427. iii. 338. 343. vii. 196. 202.
Lowen *v.* Bedd, vii. 341.
Lowfield *v.* Bancroft, ii. 273. iv. 459.
——— *v.* Stoneham, ii. 658. vii. 337.
Lowick's caſe, vi. 511. 541.
Lowry *v.* Bourdieu, i. 262. iv. 660. 670.
Lowther *v.* Carlton, v. 79.
——— *v.* Condon, iv. 404.
——— *v.* Stamper, vii. 286.
Lowthian *v.* Haſel, v. 83.
Loyd *v.* Eagle, iii. 585.
—— *v.* Read, vii. 149.
—— *v.* Williams, iv. 439.
Lucam *v.* Martins, iv. 241. v. 18.
Lucas *v.* Comerford, i. 107. ii. 70. vii. 387.
—— *v.* Fullwood, ii. 284.
—— *v.* Hurlow, v. 455. vii. 27.
—— *v.* London, vi. 478.
—— *v.* Lucas, i. 482.
Luckin *v.* Ruſhworth, iv. 223.
Lucy *v.* Gardiner, iii. 86.
—— *v.* Levinſton, ii. 80.
—— *v.* Moore, iii. 603.
Ludford *v.* Barber, i. 425. 458. iv. 127.
Ludlam *v.* Bradley, ii. 248.
——— *v.* Lopez, v. 287.
Ludlow, *ex parte*, iii. 530, 531, 532.
Ludwell *v.* Hole, vi. 219. 248.
——— *v.* Newman, vii. 426.
Lug *v.* Godwin, i. 28.
Lugg *v.* Lugg, vii. 64.
Lumley *v.* Fitz, vii. 400.
——— *v.* Foſter, i. 26.
——— (Lord) *v.* Fox, vi. 99.
——— *v.* May, iv. 284.
——— *v.* Nicholls, ii. 48.
——— *v.* Palmer, iv. 711.
Lupton *v.* Barker, vii. 458.
Luther *v.* Kirby, vii. 369.
Lutkins *v.* Leigh, iii. 86, 87. 452.
Luton *v.* Bigg, i. 388.
Lutterell's caſe, v. 334.
Lutterell *v.* Weſton, iv. 134.
Lutwich *v.* Piggott, iv. 151.
Lutwyche *v.* Lutwyche, i. 532.
Lutwydge *v.* Jameſon, vi. 59.
Luxford *v.* Cheek, iv. 258. v. 750.
Luxton *v.* Robinſon, i. 280. v. 338.
Lyde *v.* Lyde, iv. 312.
Lydiard, *ex parte*, i. 461.
Lynall *v.* Longbotham, iii. 343.
Lynch *v.* Dalzell, iv. 676.
——— *v.* Templeman, vii. 186.
Lyne, *ex parte*, iii. 531.

Lyne *v.* Willis, iii. 615.
Lynn *v.* Bruce, vii. 395.
—— (Mayor of) *v.* Denton, ii. 635.
—— (Mayor of) *v.* Turner, ii. 10.
Lynn Regis (Mayor, &c. of) caſe, ii. 5.
Lynne *v.* Moody, ii. 352.
Lyon's caſe, i. 542.
Lyons, *ex parte*, i. 431.
Lypet *v.* Carter, iv. 285.
Lyte *v.* Penny, vii. 104.
Lytton *v.* Falkland (Viſcounteſs), vii. 323.
—— *v.* Lytton, iii. 615.

M.

Maber *v.* Maſſias, iv. 699.
Maby *v.* Shephard, v. 431.
Macaeree *v.* Tall, iv. 253.
Macarty *v.* Barrow, i. 423.
Maccarty *v.* Wickford, v. 195, 196.
Macclesfield *v.* Fitton, v. 106. 109.
Macdonald's caſe, v. 520.
Macdonnel *v.* Welder, ii. 353. vi. 78.
Macdowell *v.* Fraſer, iv. 654.
Mace *v.* Cadell, i. 435.
Macey *v.* Shurmer, i. 726.
Macguire's (Lord) caſe, iii. 552.
Machell *v.* Dunton, v. 729.
—— *v.* Nevinſon, i. 18. 21.
Machil *v.* Clerk, vii. 65, 66. 95, 96.
Machin *v.* Machin, vi. 761.
—— *v.* Moulton, ii. 169.
Mackalley's caſe, vi. 88. vii. 31.
Mackdowell *v.* Halfpenny, iv. 378.
Mackell *v.* Winter, vii. 474.
Mackenzie *v.* Banks, vi. 362.
—— *v.* Mackenzie, i. 326. 331. iii. 101.
—— *v.* Powis (Marquis), vi. 130.
—— *v.* Robinſon, v. 17.
Mackerneſs, *ex parte*, i. 401.
Macklin, *ex parte*, i. 417.
Mackreth *v.* Marlar, i. 110.
Mackworth *v.* Clifton, iv. 476.
Maclellan *v.* Howard, vi. 462.
Macnamara *v.* Jones, i. 726. vii. 447.
Macneal's caſe, iv. 747.
Macpherſon *v.* Roriſon, i. 299.
Macro *v.* Hull, vi. 663.
Maddiſon *v.* Andrew, iv. 344.
—— *v.* Shore, ii. 594.
Maddock *v.* Fletcher, iii. 422.
—— *v.* Hammett, vii. 389. 522.
Maden *v.* Micocke, vi. 240.
Maddox *v.* Maddox, v. 73.
Madox *v.* Jackſon, vii. 507.
Madox *v.* Staines, iv. 297.
Magdalen College's caſe, iv. 43. 123. v. 559. vi. 388, 389. vii. 55. 67.
Magennis *v.* Mac-Cullogh, iv. 210.
Magrath *v.* Muſkerry (Lord), iv. 236.
Main's caſe, iii. 271.
Mair, *ex parte*, iii. 605.
Maitland's caſe, vii. 431.
Maitland *v.* Adair, v. 685.
Major *v.* Brandwood, iii. 491. vi. 76.
—— *v.* Talbot, ii. 85. v. 852.
Makeham *v.* Hooper, i. 590.
Malcolm *v.* Fullarton, i. 214.
Maleverer *v.* Hawby, i. 632.
—— *v.* Spinke, vii. 262. 281.
Malin *v.* Keighley, iv. 339. vii. 140.
Mallabar *v.* Mallabar, i. 725. iii. 71. vii. 146. 336.
Mallack *v.* Galton, iii. 615.
Mallam *v.* Bringloe, v. 282.
Mallet *v.* Hilton, v. 142.
—— *v.* Mallet, iv. 75. vii. 260.
Mallock *v.* Eaſtly, iii. 326.
Malloon *v.* Fitzgerald, iii. 456.
Mallorie's caſe, iv. 188.
Mallory's caſe, vi. 21.
Mallory *v.* Bird, vii. 190.
—— *v.* Marriot, vi. 763. 765.
Malone *v.* Fitzgerald, v. 807.
Maltom *v.* Acklom, v. 654.
Man *v.* Ballet, i. 587.
—— *v.* Man, iv. 390.
Manby *v.* Scott, i. 488, 489.
Manchester (College of) *v.* Trafford, iv. 178.
Mandeville's caſe, vii. 128.
Manley *v.* Lovell, vi. 401. 404.
Manlove *v.* Ball, iv. 241. v. 6. 19.
Mann *v.* Fletcher, vii. 399.
—— *v.* Shepherd, vii. 403.
Manning's caſe, i. 130. ii. 543. iii. 45. v. 722. vii. 110.
Manning's (Mathew) caſe, iv. 305.
Manning *v.* Andrews, v. 759.
—— *v.* Barges, vi. 450.
—— *v.* Bois, vi. 120.
—— *v.* Burgeſs, v. 113. vi. 45.
—— *v.* Herbert, iv. 408.
—— *v.* Napp, iii. 55.
—— *v.* Newnham, iv. 651.
Manſel *v.* Manſel, v. 762.
Manſell *v.* Manſell, vii. 152. 157.
Manſer's caſe, i. 667. ii. 88. v. 416.
Manſer *v.* Shelly, i. 300.
Mansfield's caſe, iii. 218.

Mansfield *v.* Dugard, iv. 282.
Manton *v.* Moore, vii. 406.
Manxell's case, vii. 73.
Mara *v.* Quin, iii. 89. vi. 122.
March *v.* Astry, vi. 157.
——— *v.* Brace, ii. 285.
——— *v.* Rainsford, i. 272.
Mardiner *v.* Elliot, i. 717. vii. 417.
Margaret and Marshall's case, v. 540.
Markal's case, iii. 621. 627.
Markant *v.* Twisden, iv. 327.
Market Bosworth (Churchwardens of) *v.* Market Bosworth (Rector of), v. 678.
Markham's case, v. 603.
Markham *v.* Cobb, v. 439. vi. 579. 689.
——— *v.* Fortescue, ii. 494.
——— *v.* Jennings, i. 219.
——— *v.* Middleton, vi. 666.
Marks *v.* Marks, i. 661. iii. 454. iv. 296. vi. 446.
Marlar, *ex parte*, i. 419.
Marlborough (Duchess) *v.* Strong, i. 106.
——— ——— *v.* Wigmore, i. 168.
——— (Duke of) *v.* Spencer, v. 722.
Marler *v.* Ayliff, vii. 30.
Marlin, *ex parte*, i. 461.
Marlow *v.* Pitfield, iii. 595.
——— *v.* Smith, vii. 151.
Marriot *v.* Hampton, vii. 395.
——— *v.* Lister, i. 258. 280.
——— *v.* Marriot, vii. 381.
——— *v.* Shaw, ii. 716. iii. 334.
Marrow's case, iv. 98.
Marrow *v.* Turpin, ii. 285.
Marryatt *v.* Townly, iv. 291. v. 820, 821.
Marsh's case, ii. 460.
Marsh, *ex parte*, i. 437.
——— *v.* Bower, vi. 663.
——— *v.* Chambers, i. 443. vi. 137.
——— *v.* Edmunds, i. 670.
——— *v.* Fawcett, vii. 459.
——— *v.* Whitestone, ii. 478.
Marshall, *ex parte*, i. 420.
——— *v.* Charleton, i. 28.
——— *v.* Cope, ii. 476.
——— *v.* Frank, iii. 393.
——— *v.* Gibbs, v. 401.
——— *v.* Riggs, vii. 390.
Marshaller's (The) case, ii. 187.
Marshalsea, the case of, vi. 570.
Marsham *v.* Buller, vi. 665.
Marsham *v.* Gibbs, i. 281.
——— *v.* Humber, i. 739.
Marston *v.* Cleypole, vi. 767.
——— *v.* Gowan, i. 725.
Marten *v.* Blithman, i. 274.
Marters *v.* Whitefield, v. 232.
Martin, *ex parte*, iii. 439.
——— *v.* Burling, vi. 217.
——— *v.* Clerk, iv. 340. 354.
——— *v.* Court, i. 444.
——— *v.* Crump, iv. 607.
——— *v.* Davis, ii. 418.
——— *v.* Douch, vii. 139.
——— *v.* Duckett, v. 247.
——— *v.* Kerridge, vi. 129.
——— *v.* Kesterton, vi. 426.
——— *v.* Long, iv. 307. 310.
——— *v.* Martin, iii. 649.
——— *v.* Moulin, i. 710. 539.
——— *v.* Nicholl, ii. 420.
——— *v.* Norfolk, ii. 47.
——— *v.* Nutkin, i. 106. iii. 651.
——— *v.* O'Hara, i. 343. 458.
——— *v.* Pewtress, i. 395.
——— *v.* Rebow, iii. 67. 69.
——— *v.* Ridge, vi. 107.
——— *v.* Savage, vii. 362.
——— *v.* Strahan, vii. 442.
——— *v.* Townshend, v. 644.
——— *v.* Tregonwell, vii. 126.
——— *v.* Willis, vi. 130.
——— *v.* Winder, i. 302.
——— *v.* Wyvill, v. 479.
Martindale *v.* Fisher, i. 280. v. 338.
Marwood *v.* Dorrel, v. 280.
——— *v.* Turner, vii. 344, 345. 375.
Mary's case, i. 625.
Marzennor *v.* Sandiford, i. 301.
Mascal *v.* Price, vi. 716. 742. 745.
Mascall *v.* Davys, vi. 333.
Maschall's case, ii. 74.
Masham *v.* Bridge, vi. 213.
——— (Lord) *v.* Harding, iii. 59.
Mason's case, v. 122.
Mason *v.* Abdy, vii. 198.
——— *v.* Day, vii. 153.
——— *v.* Dixon, iii. 98.
——— *v.* Hanson, iii. 94.
——— *v.* Hunt, iv. 713. 717. 722.
——— *v.* Jackson, ii. 46.
——— *v.* Keeling, vi. 599.
——— *v.* Nevill, v. 773.
——— *v.* Reding, vi. 576.
——— *v.* Simmonds, vi. 423.
——— *v.* Skurray, iv. 647. vi. 657.
——— *v.* Thompson, vi. 209. 235.

Maſon *v.* Vowſon, vi. 333.
——— *v.* Watkin, i. 646.
——— *v.* Welland, i. 257.
——— *v.* Williams, iii. 83.
Maſſa *v.* Dauling, vii. 196. 208.
Maſſenburgh *v.* Aſh, iv. 297. vii. 110.
Marlborough (Duke) *v.* Godolphin (Lord), iv. 244. 335.
Maſſey *v.* Aubrey, i. 218.
——— *v.* Sherman, vii. 140.
Maſt *v.* Goodſon, i. 51.
Maſterman *v.* Grant, ii. 479.
Maſters *v.* Drayton, i. 442. ii. 587.
——— *v.* Lewis, ii. 260.
——— *v.* Maſters, i. 584. iii. 86. iv. 353. 361. vii. 308.
——— *v.* Wood, v. 456.
Maſtin *v.* Abdee, vii. 198.
Mather *v.* Brinker, vii. 44.
——— *v.* Holmwood, vi. 737.
——— *v.* Mills, v. 414.
Mathew *v.* Cartwright, v. 59.
——— *v.* Croſe, vi. 205.
——— *v.* Croſs, vi. 222.
——— *v.* Stranſon, vi. 701.
Mathews *v.* Alderton, v. 437.
——— *v.* Croſs, vi. 256.
——— *v.* Erbo, v. 253.
——— *v.* Griffiths, vii. 523.
——— *v.* Lee, iii. 464.
——— *v.* Mathews, iv. 384.
——— *v.* Phillips, iv. 481.
——— *v.* Wheſton, iv. 134.
Mathewſon's caſe, v. 168.
Mathiſon *qui tam v.* Allanſon, vi. 674.
Matiſon *v.* Atkinſon, v. 170.
Matthew *v.* Hanbury, i. 113.
Matthews, *ex parte*, i. 416. 435.
Maud *v.* Branthwaite, i. 329.
Maudy *v.* Maudy, iv. 255.
Maund's caſe, vi. 25.
Maunſel *v.* Maſſareene (Lord), ii. 276.
Maure *v.* Harriſon, v. 168.
Maurice *v.* Brecknock, vi. 665.
Mauzell's caſe, v. 838.
Mawbey *v.* Edmead, vii. 519.
Maxwell's caſe, ii. 542. iii. 235.
Maxwell *v.* Aſhe, iv. 241.
——— *v.* Dulwich College, ii. 9.
——— *v.* Mayer, ii. 57.
May *v.* Hook, iii. 602.
——— *v.* Proby, vi. 169.
——— *v.* Street, v. 495.
——— *v.* Wood, iv. 396.
Maybank *v.* Brooks, iv. 391.
Maydwell, *ex parte*, i. 421.
Maget *v.* Mayet, iv. 425.
Mayhew's (Anne) caſe, iv. 126.
Maynard *v.* Baſſet, iii. 384.
——— *v.* Pomfret, vi. 133.
Mayne's caſe, ii. 359. vii. 254.
Mayne *v.* Diggle, vi. 211.
——— *v.* Somner, vi. 478.
——— *v.* Walter, iv. 653. 670.
Mayo *v.* Archer, vii. 5.
——— *v.* Coghill, ii. 431.
——— *v.* Combes, i. 496.
——— *v.* Parſons, i. 567.
Mayor *v.* Coulthard, iii. 247.
——— *v.* Steward, i. 458.
M'Donald *v.* Bovington, iv. 736.
M'Leiſh *v.* Taite, vi. 82.
M'Leod *v.* Sner, iv. 696.
M'Quillan *v.* Cox, ii. 287. v. 417.
Mead *v.* Bigot, i. 274.
——— *v.* Death and Pollard, i. 261.
——— *v.* Orrery (Lord), v. 63. 70.
——— *v.* Thurman, vi. 718.
——— *v.* Webb, iii. 300.
——— *v.* Wyndham, vi. 470.
——— *v.* Young, iii. 285.
Mear, *ex parte*, i. 387.
Meard *v.* Phillips, v. 402.
Mears *v.* Greenaway, ii. 42.
Meaſe *v.* Meaſe, ii. 659
Meath (Biſhop of) *v.* Belfield (Lord), ii. 663.
Medcalfe *v.* Ives, v. 705.
——— *v.* Medcalfe, ii. 253.
Medina *v.* Stoughton, i. 27. 80.
Medlicot's caſe, i. 400.
Medlicot *v.* Bowes, vii. 498.
Meeker *v.* Tanton, v. 101.
Meekings *v.* Smith, v. 618.
Meers *v.* Holbetch, vii. 185.
——— (Sir Thomas) *v.* Stourton (Lady), i. 103.
——— *v.* Stourton, v. 641.
Meggot *v.* Mills, i. 401.
Meggs *v.* Ford, v. 331.
Megit *v.* Johnſon, iii. 36.
Mekins *v.* Minſhaw, v. 665.
Melchar *v.* Executors of Haiſey, ii. 57
Mellet *v.* Herbert, vi. 254, 255.
Melliſh *v.* Arnold, vi. 669. vii. 12.
——— *v.* De Coſta, iii. 407.
Mellor *v.* Barber, vii. 50.
——— *v.* Walker, vi. 615.
Melſome *v.* Gardner, iii. 422.
Melvin's caſe, i. 607.
Melwich *v.* Luther, vii. 419.
Mendez *v.* Mendez, iii. 407.

Mer

Menetone *v.* Athawes, i. 262.
——— *v.* Gibbons, ii. 180. iv. 621. 626.
Menville's caſe, v. 572.
Menzey *v.* Walker, iv. 340.
Mercer *v.* Hilſden, vi. 251.
——— *v.* Sparks, vi. 241.
Meredith *v.* Jones, iii. 717.
——— *v.* Leſlie, iii. 234.
——— *v.* Wynn, i. 110. iv. 369.
Mereſield *v.* Hulls, iii. 438.
Meres *v.* Anſell, ii. 658.
Merick *v.* Wymondſold, i. 107.
Meriton's caſe, ii 77.
Merit's caſe, i. 60.
Merrel *v.* Smith, ii. 425.
——— *v.* Rumſey, v. 752.
Merrick's caſe, iv. 505.
Merrick *v.* Vaucher, vii. 401.
Merry *v.* Abney, ii. 580. v. 73. 75.
Merryfield *v.* Berry, ii. 472.
Merſon *v.* Blackmoor, iv. 253.
Mervin *v.* Lyds, vii. 281.
Mervyn's (Sir John) caſe, iv. 76.
Meſme caſe, v. 841. 843.
Meſſenger *v.* Armſtrong, vi. 42.
Meſſin *v.* Maſſareene (Lord), ii. 276.
Meſure *v.* Britten, v 472.
Metcalfe *v.* Dean, ii. 596. iii. 768. vi. 669. vii. 9. 13.
——— *v.* Hall, iv. 726, 727.
——— *v.* Markham, i. 59.
——— *v.* Roe, ii. 419.
Metham *v.* Devon (Duke of), i. 511.
Methuen *v.* Martin, vi. 334.
Methwin *v.* Thiſtleworth (Inhabitants of), iii. 519.
Methwold *v.* Anguiſh, iii. 183. 614.
——— *v.* Bawd, ii. 479.
Meudike *v.* Stint, ii. 106.
Meure *v.* Meure, iv. 269.
Mewburn *v.* Langley, v. 142.
Meymot, *ex parte*, i. 385. 391. 407.
Meyſey *v.* Carnell, i. 346.
Michael's caſe, v. 168.
Michael *v.* Aleſtree, iv. 586.
Michel *v.* Pareſki, vii. 422.
Michelborn's caſe, ii. 187.
Michell *v.* Cue, vi. 106.
——— *v.* Hyde, ii. 390.
——— *v.* Neale, i. 244.
Middlemore *v.* Goodall, ii. 74.
Middleſex's (Sheriff of) caſe, vi. 332.
Middleton's caſe, iv 503. v. 220. 247.
Middleton *v.* Blakes, vii. 502.
——— *v.* Croft, v. 656.
Middleton *et ux v.* Crofts, i. 13.
——— *v.* Forder, vi. 604.
——— *v.* Hill, vi. 123.
——— *v.* Onſlow (Lord), iii. 304.
——— *v.* Price, vi. 600.
——— *v.* Spicer, iii. 67. v. 497.
——— *v.* Weeks, i. 216.
Midgely & Gilbert *v.* Lovelace (Lord), iii. 706.
Midhurſt *v.* Waite, v. 207. 209.
Miftlin *v.* Morgan, i. 347.
Milborn's caſe, iii. 510.
Milbourn *v.* Ewart, i. 484. v. 162. 688.
Milburne *v.* Read, ii. 39. 41.
Mildmay's caſe, i. 648. iv. 149. vi. 373. vii. 87. 106.
Mildmay, *ex parte*, vii. 468.
——— *v.* Dean, vi. 624.
——— *v.* Hungerford, v. 771.
——— *v.* Mildmay, vii. 288.
Miles *v.* Baker, vii. 13.
——— *v.* Williams, i. 432. 441. i. 457. vi. 383.
Mileſard *v.* Ingram, i. 281.
Millar *v.* Taylor, v. 598.
——— *v.* Yarroway, ii. 476. vi. 121.
Millard's caſe, vii. 153.
Millen *v.* Fawdry, vi. 581. 585.
Miller's caſe, i. 406 408. 612. vi. 230.
Miller *v.* Manwaring, iii. 390. iv. 172.
——— *v.* Miller, iv. 338.
——— *v.* Race, iv. 705. vi. 690.
——— *v.* Seagrave, iv. 277.
——— *v.* Seare, i. 407.
——— *v.* Turner, iii. 583. iv. 347.
——— *v.* Warren, iv. 391.
Milles *v.* Fletcher, iv. 650.
Millinder *v.* Robinſon, v. 785.
Milliner *v.* Robinſon, iv. 194.
Mills, *ex parte*, vii. 408.
——— *v.* Auriol, i. 457. ii. 73.
——— *v.* Banks, iv. 286.
——— *v.* Ethridge, iv. 90 91.
——— *v.* Roebuck, iv. 657.
——— *v.* Snowballs, v. 609. 783.
——— *v* Wilkins, vi. 369 395. 398, 399.
Millward *v.* Coffin, vi. 56.
Milner *v.* Colmer, i. 412.
——— *v.* Mills, i. 113. iv. 248.
——— *v.* Milner, i. 331. 502.
——— *v.* Milnes, i. 16. 18.
——— *v.* Reeve, vi. 212.
——— *v.* Robinſon, ii. 428.
Milnes *v.* Buſk, vii. 411.
Milton (Lord) *v.* Edgworth, i. 111.

Milward *v.* Ingram, i. 281. v. 406.
——— *v.* Thatcher, v. 205.
Minchamp's caſe, iv. 569.
Minet *v.* Gibſon, iv. 732. 738.
Minett *v.* Robinſon, iv. 618.
Minnitt *v.* Whitney, iv. 608.
Minors *v.* Leeford, vi. 208. 240.
Mints *v.* Bethel, v. 412.
Mires *v.* Solebay, vi. 682. 691. vii. 37.
Miſgret *v.* Miſgret, iv. 415.
Mitchel *v.* Harris, i. 236.
——— *v.* Neale, i. 713.
Mitchell *v.* Brown, vi. 207.
——— *v.* Cockburn, iv. 631. vii. 396.
——— *v.* Crofts (St. John), vi. 115.
——— *v.* Edie, iv. 649.
——— *v.* King, i. 23.
——— *v.* Milbank, ii. 273.
——— *v.* Mitchell, i. 482. 508.
——— *v.* Oldfield, vii. 398.
——— *v.* Reynolds, i. 646.
——— *v.* Tarbut, v. 375.
Mitford *v.* Cordwell, i. 313.
Milton's caſe, ii. 514. v. 182. vi. 140. 149.
Mocatta *v.* Murgatroyd, iii. 301.
——— *et al. v.* Murgatroyd, v. 47, 48.
Mocket's caſe, i. 470.
Mogg v. Hodges, iii. 86, 87.
Moggeridge and Clarke, *ex parte*, i. 114.
Moggridge, *ex parte*, i. 426.
——— *v.* Hudſon, i. 171.
——— *v.* Thackwell, i. 586.
Mohun *v.* Orby, iv. 82, 83.
Moir *v.* Munday, ii. 238. 352. vi. 558.
Molin's caſe, v. 604. vi. 491.
Molineux's caſe, ii. 334. vii. 41.
Molineux *v.* Molineux, i. 148. v. 781.
——— *v.* Powell, vii. 287.
Molins *v.* Wheatly, ii. 489.
Molliſon *v.* Staples, iv. 674.
Money *v.* Leach, i. 530. 690.
Money *et al. v.* Leach, i. 350.
Moneypenny *v.* Brown, vii. 379.
Monings *v.* Warley, v. 415.
Monk's caſe, ii. 344.
Monk *v.* Clayton, iv. 586.
——— *v.* Cooper, vi. 50.
——— *v.* Coup, ii. 65.
Monkton *v.* Paſhley, vi. 604.
Montague's (Lady) caſe, iv. 135.
Montague (Duke of) *v.* Beaulieu (Ld.), iv. 319.
——— (Lord) *v.* Dudman, iii. 649.
Montague *v.* Jeffries, vii. 357.
Montal *v.* Woolington, ii. 404.
Monteſiori *v.* Monteſiori, iv. 546.
Montgomery *v.* Clarke, ii. 618.
——— *v.* Egginton, iv. 636.
Montjoy's (Lord) caſe, i. 695.
Mood *v.* London (Mayor of), vii. 215. 219, 220, 221.
Moodamay *v.* Morton, i. 12.
Moody's caſe, i. 293.
Moody *v.* Garnon, i. 631.
——— *v.* Moody, iii. 234.
Moor *v.* Barham, vii. 462.
—— *v.* Brown, vi. 603.
—— and Brown *v.* Onſlow, iii. 700.
—— *v.* Cliptam, vi. 71.
—— *v.* Godfrey, iv. 435.
—— *v.* Green, v. 236.
—— *v.* Lynch, i. 333.
—— *v.* Parker, iv. 273.
—— *v.* Reynolds, v. 231.
—— *v.* Wilſon, i. 74.
—— *v.* Withey, iv. 712.
Moore's (Sir William) caſe, i. 637. vi. 382.
Moore, *ex parte*, i. 422.
——— *v.* Battie, vii. 195.
——— *v.* Bennet, v. 68.
——— *v.* Foſter, vi. 214.
——— *v.* Freeman, i. 482. 508.
——— *v.* Goodright, i. 285.
——— *v.* Hawkins, i. 250.
——— *v.* Huſſey, iv. 170. vi. 391.
——— *v.* Melliſh, v. 524.
——— *v.* Moore, i. 710. iv. 352.
——— *v.* Norwich (Biſhop of), vii. 477. 480.
——— *v.* Prine, iv. 699.
Moorecraft *v.* Dowding, vii. 139.
Moravia's caſe, iii. 636.
Moravia *v.* Levy, i. 257. ii. 67.
Morby *v.* Hurlin, i. 14.
Mordant's (Lewis) caſe, vi. 147.
Mordant (Lord) *v.* Bridges, vi. 99.
——— ——— *v.* Thorold, ii. 395.
——— ——— *v.* Walden, v. 343.
Mordecai *v.* Nutting, ii. 45.
——— *v.* Solomon, i. 296.
More *v.* Manning, iv. 708.
—— *v.* Mayhow, v. 65.
—— *v.* Sluce, iv. 612.
Moreau's caſe, i. 496.
Moreland *v.* Bennett, v. 177.
Moreton *v.* Hopkins, iii. 98.
Morewood *v.* Wood, v. 396.
Morfoot *v.* Chivers, vi. 120.

Morgan's (Owen) caſe, vii. 207.
Morgan *v.* Dillon, iii. 407.
—— *v.* Gardiner, iv. 409.
—— *v.* Green, vii. 223.
—— *v.* Griffiths, iv. 259.
—— *v.* Hughes, i. 95. vi. 551.
—— *v.* Luckup, v. 449.
—— *v.* Painter, vii. 385.
—— *v.* Sock, iii. 88.
—— *v.* Vaughan, v. 429.
—— *v.* Williams, vi. 208. 231.
—— *v.* Wye, iii. 731.
Moriſon *v.* Arbuthnot, iv. 545.
Morland *v.* Hammerſley, vii. 398.
Morley *v.* Morley, vii. 181.
Morret *v.* Paſke, v. 72. 83.
—— *v.* Weſterne, v. 45.
Morrice's caſe, i. 698. vii. 245.
Morris *v.* Antrobus, iv. 79. 83.
—— *v.* Bank of England, iii. 69.
—— *v.* Golder, ii. 2[illegible]1.
—— *v.* Hankey, iii. 656.
Morris, *ex parte*, i. 451.
—— *v.* Lord Berkley (leſſees of), iii. 651.
—— *v.* Branſom, v. 591.
—— *v.* Boroughs, ii. 253, 254. 256.
—— *v.* Burroughs, v. 705.
—— *v.* Burrows, vii. 447.
—— *v.* Chapman, i. 276.
—— *v.* Creech, i. 203.
—— *v.* Fletcher, ii. 489.
—— *v.* Gelder, vi. 77.
—— *v.* Iſham, iii. 212.
—— *v.* Lea, iv. 698.
—— *v.* Le Gruy, iv. 277.
—— *v.* M'Culloch, iii. 307. v. 196.
—— *v.* Miller, iv. 552.
—— *v.* Prince, vii. 35.
—— *v.* Rees, i. 347.
—— *v.* Reynolds, i. 237.
—— *v.* Webber, i. 513. iv. 534.
—— *v.* Wilford, iii. 52.
Morriſon *v.* Cade, vi. 239.
Mors *v.* Sluce, i. 555. iv. 585.
—— *v.* Thacker, vi. 242.
Morſe *v.* Wilſon, vii. 195.
Morſton *v.* Pary, vi. 414.
Mortimer *v.* Capper, i. 109.
—— *v.* Lloyd, vii. 518.
—— *v.* Orchard, i. 117.
Morton *v.* Cloebury, vi. 343.
—— *v.* Hopkins, vi. 645.
Moſedel's caſe, ii. 513.
Moſely *v.* Pierſon, iii. 114.
—— *v.* Virgin, vii. 387.
Moſely *v.* Warburton, ii. 728. vi. 129.
Moſes *v.* Macfarlane, i. 263.
Moſley *v.* Foſſet, iii. 662.
Moſs *v.* Byrom, iv. 645. 662.
—— *v.* Gallimore, ii. 342. v. 15.
—— *v.* Hardy, vi. 478.
Moſtyn *v.* Fabrigas, i. 3. 58.
Motam *v.* Motam, vi. 254.
Moth *v.* Frome, i. 431.
Motley *v.* Slaney, vi. 241.
Mott *v.* Hales, iv. 91.
—— *v.* Verney, iii. 534.
—— *v.* Williams, vi. 357.
Motteram *v.* Jolly, iii. 392.
Motteux *v.* Governor, &c. of London Aſſurance, iv. 629. 637. 663.
Moulſdale *v.* Birchall, i. 249.
Moultby *v.* Richardſon, i. 326.
Moulton *qui tam v.* Bingham, i. 66.
—— *v.* Clapham, vi. 226.
Mounſon *v.* Lyſter, v. 181. 531.
—— *v.* Weſt, iii. 748. vii. 11.
Mountain *v.* Wilkins, i. 338.
Mountford *v.* Sidley, vi. 760.
Mountjoy's caſe, iv. 55. 78.
Mountjoy *v.* Terdrue, iii. 386.
Moyle *v.* Moyle, vii. 252. 255.
—— *v.* Roberts (Lord), v. 177.
Moyſe *v.* Giles, i. 482. iii. 693.
Moyſer *v.* Gray, vi. 58.
Moyſes *v.* Little, i. 438.
Mudy *v.* Oſam, i. 208.
Mulcarry *v.* Eyres, ii. 421.
Mullacke *qui tam v.* Speering, v. 345.
Mullineux's caſe, vi. 433.
Mulſo *v.* Shere, i. 332. vi. 103.
Mumma *v.* Mumma, vii. 148, 149.
Mundy *v.* Mundy, ii. 396. vii. 443.
Munt *v.* Stokes, iii. 94.
Murdock *v.* Potts, iv. 662.
Murphy *v.* Cunningham, i. 302. vii. 398.
Murray, *ex parte*, iv. 602.
—— *v.* Derby (Earl), iii. 202.
—— *v.* Eyton, iii. 239.
—— *v.* Harding, vii. 194. 201.
—— *v.* Thornhill, ii. 635.
—— *v.* Vandam, iv. 657.
—— *v.* Wyſe, iv. 253.
Murrel *v.* Cox, vii. 183.
Murrey *v.* Eyton, vi. 373.
Muſchamp's caſe, i. 647.
Muſgrave *v.* Appleby (Mayor of), ii. 18.
—— *v.* Bovey, vi. 215, 257.
—— *v.* Daſhwood, i. 105.
—— *v.* Nevinſon, vi. 659.

Muſgrave *v.* Parry, iv. 347.
——— *v.* Robinſon, i. 671.
Muſtard *v.* Homden, iii. 177.
Muſton *v.* Yateman, vii. 43.
Mutton's caſe, iii. 157. 689.
Myer *v.* Arthur, vi. 118.
Mynd *v.* Francis, vii. 466.
Mynn *v.* Oughton, ii. 738.
Mythwold *v.* Walbank, i. 111.
Mytton *v.* Cock, i. 378.

N.

Nab *v.* Nab, vii. 138.
Namink *v.* Farwell, vi. 655.
Nandick *v.* Wilkes, i. 113. vii. 163, 164.
Napier *v.* Effingham (Lady), i. 170. iii. 615. v. 33.
Napper *v.* Saunders, v. 791.
——— *v.* Jaſper, v. 369.
Naſh *v.* Aſhton, i. 651. ii. 82.
Naſſie's caſe, vii. 206.
Natchbolt *v.* Porter, iv. 211.
Neal *v.* Sheffield, v. 405. 706.
Neale *v.* Cottingham, i. 434.
—— *v.* De Garay, vii. 522.
—— *v.* Ovington, iv. 732.
—— *v.* Wadeſon, iii. 655.
—— *v.* Willis, iv. 396.
Neat *v.* Mills, i. 347.
Neave *v.* Alderton, iii. 86.
Nedham's caſe, vii. 65.
Needham's caſe, iii. 11.
Needler *v.* Deeble, v. 46. 105.
——— *v.* Wincheſter (Biſhop of), v. 604.
Neele (Sir Paul) *v.* Reeve, i. 674. ii. 443.
Negus *v.* Coulter, i. 596.
Nelſon *v.* Oldfield, vii. 381.
——— *v.* Smith, vi. 231. 244.
——— *v.* Woodward, vi. 759.
Nelthorpe *v.* Farrington, vi. 683.
Nerot *v.* Wallace, i. 262.
Neſbitt *v.* Luſhington, iv. 643.
Nevil's caſe, i. 177. 185. ii. 541. iii. 382. v. 212.
Nevil *v.* Hamerton, i. 626.
—— *v.* Nevil, iv. 348. 435.
—— *v.* Saunders, vii. 123.
—— *v.* Soper, v. 416.
Neville *v.* Wilkinſon, iv. 546.
Neviſon *v.* Whitley, v. 393. vii. 210.
Newberry's (Weaver of) caſe, i. 547.
Newburgh (Earl) *v.* Bickerſtaffe, i. 35.
Newby *v.* Read, ii. 661. iv. 641. 669.
Newcaſtle (Earl of) *v.* Suffolk (Earl of), vii. 135.
Newcomb's caſe, iv. 109. 116.
Newcomb *v.* Bonham, v. 9.
——— *v.* Burdon, vii. 139.
——— *v.* Hervey, ii. 280.
Newcomen *v.* Barkham, iii. 363. iv. 331. 333. v. 746. vii. 161.
Newdigate's caſe, ii. 574. vii. 273. 278.
Newdigate *v.* Davy, i. 261.
Newell *v.* Pidgeon, ii. 452.
Newerty *v.* Colgate, vi. 274.
Newgate *v.* Degelder, i. 205.
Newland *v.* Oſman, i. 522.
——— *v.* ———, i. 430.
Newling *v.* Abbot, v. 31.
——— *v.* Francis, i. 546. ii. 21.
Newman *v.* Cartony, i. 507.
——— *v.* Cazalet, iv. 681.
——— *v.* Franco, vii. 466.
——— *v.* Holdmyfaſt, ii. 417.
——— *v.* Johnſon, iv. 284.
——— *v.* Moor, vi. 64.
——— *v.* Newman, i. 707. vii. 447.
——— *v.* Payne, i. 303. iii. 307.
——— *v.* Ringerby, vi. 257.
——— *v.* Smith, i. 244. vi. 603. 626, 627.
——— *v.* Strafford (Inhabitants of), iii. 517.
——— *v.* Zachary, i. 50.
Newport's caſe, ii. 123. iii. 318.
Newport *v.* Godfrey, iii. 82.
New-River Company *v.* Graves, vi. 388.
Newſom *v.* Waters, vi. 481.
Newſome *v.* Bowyer, i. 482.
Newſtead *v.* Johnſtone, iii. 68.
——— *v.* Searles, i. 485.
Newt *v.* Chamberlayn, vi. 714. 736.
Newton, *ex parte*, i. 411.
——— *v.* Bennett, iii. 59. 462. vii. 182.
——— *v.* Newton, i. 389.
——— *v.* Preſton, vii. 143.
——— *v.* Rowland, v. 619.
——— *v.* Shaftoe, ii. 301.
——— *v.* Swynmer, i. 329.
——— *v.* Trigg, i. 388. iii. 661.
——— *v.* Weeks, v. 429.
Newys *v.* Lark, vi. 395.
Nichol's caſe, v. 366. 455. vii. 16.
Nichol *v.* Nichol, iv. 318.
Nicholas's caſe, v. 292.

Nicholas *v.* Elliot, vi. 733.
——— *v.* Powlett, i. 140.
Nicholl *v.* Wilder, vi. 333.
Nicholls *v.* Criſp, iii. 67.
——— *v.* Granwin, i. 223.
——— *v.* Jeames, v. 374.
——— *v.* Judſon, iv. 370.
——— *v.* Maynard, i. 114.
——— *v.* Oſborn, iv. 353.
——— *v.* Rainbred, v. 338.
——— *v.* Reeve, ii. 271.
——— *v.* Skinner, iv. 309.
——— *v.* Webb, vi. 217.
Nichols *v.* Dalyhanty, i. 327.
——— *v.* Danvers, i. 494.
——— *v.* Grunnion, i. 216.
——— *v.* Maynard, v. 14.
——— *v.* Newman, vi. 59.
Nicholſon *v.* Chapman, vi. 695.
——— *v.* Maſters, i. 605.
Nicols *v.* Gould, i. 109.
——— *v.* Robins, ii. 669.
Nightengale and others *v.* Deviſme, i. 259.
——— *v.* Lawſon, iv. 241.
——— *v.* Nightengale, i. 330.
Nightingale *v.* Bridges, vii. 17.
Niſbet *v.* Smith, vii. 507.
Nixon *v.* Broham, iv. 589.
——— *v.* Jenkins, vii. 408.
Noble *v.* Durell, ii. 232.
——— *v.* Harris, i. 205.
——— *v.* Kennoway, iv. 639.
——— *v.* Lancaſter, vii. 16.
Nockold, *ex parte*, i. 446.
Noel *v.* Nelſon, iii. 176.
Noell *v.* Robinſon, iii. 58.
——— *v.* Wells, iii. 34.
Noke's caſe, vii. 228. 247.
Noke *v.* Caldecot, i. 206.
——— *v.* Ingham, ii. 272.
Nokes *v.* James, ii. 65.
——— *v.* Watts, v. 301.
Norden *v.* Fox, v. 341.
——— *v.* Levit, iii. 78.
Norfolk's (Duke of) caſe, ii. 543. iii. 270. iv. 292. 306. vi. 516.
Norfolk (Duke of) *v.* Browne, vii. 142.
——— ——— *v.* Johnſon, vii. 36.
——— ——— *v.* Newcaſtle (Duke of), ii. 195.
Norman *v.* Beaumont, vi. 660.
——— *v.* Symons, vi. 222.
Norrice *v.* Norrice, iii. 487.
Norris *v.* Freeman, vi. 664.
——— *v.* Gawtry (Hundred of), iii. 517.
Norris *v.* Royle, i. 49.
——— *v.* Stapes, i. 547.
——— (Lord) *v.* Wincheſter (Marquis of), iii. 244.
North *v.* Champernoon, iii. 242. vii. 185.
——— *v.* Compton, iv. 290.
——— *v.* Cox, i. 621.
——— *v.* Fines, v. 226.
——— *v.* Hoyle, v. 357.
——— (Lord) *v.* Purdon, iii. 67.
——— *v.* Wiggins, i. 285.
Northampton's (Earl) caſe, vi. 99. 228.
Northampton (Mayor of) *v.* Ward, vi. 582.
Northcott *v.* Underhill, i. 472. ii. 81.
Northey *v.* Strange, iv. 347, 348. vii. 470.
Northumberland's (Earl of) caſe, ii. 405. iv. 353.
Northumberland *v.* Burt, vi. 221.
——— ——— (Duke of) rington, ii. 68.
Northy *v.* Burbage, iv. 392.
Norton *v.* Norton, ii. 254.
——— *v.* Sims, vi. 151.
——— *v.* Frecker, i. 33.
——— *v.* Turvill, i. 507.
——— *v.* Turville, vii. 138. 410.
Norwich and Norwich's caſe, i. 213.
Norwich's (Biſhop of) caſe, vi. 397.
Norwich (Mayor of) *v.* Berry, v. 612.
——— (Mayor, &c. of) *v.* John, iii. 23.
——— *v.* Johnſon, vii. 270.
——— ——— *v.* Swann, vi. 582.
——— (Biſhop of) *v.* Prickett, vi. 99.
Norwood *v.* Norwood, iv. 415.
Nottingham's (Lord) caſe, ii. 332. iii. 418.
Nottingham *v.* Jennings, iv. 260.
Nourſe *v.* Finch, ii. 655. iii. 69. 71.
——— *v.* Yarworth, vii. 122. 138.
Nowell *v.* Sands, vi. 624.
Nowlan, *ex parte*, vii. 404.
——— *v.* Nelligan, iv. 339, 340. vii. 140.
Noys *v.* Mordant, v. 40. vii. 448.
Nugent *v.* Gifford, v. 70.
Nuncomar *v.* Burdett, ii. 57.
Nuney *v.* Modigliani, ii. 48.
Nurſe *v.* Yearworth, iv. 203.
Nutkins *v.* Robinſon, i. 605. v. 672.
Nutt *v.* Bourdieu, iv. 645.

Oakapple

O.

Oakapple *v.* Copons, vii. 487.
Oates *v.* Brydon, ii. 424.
—— *v.* Cooke, iv. 251.
—— *v.* Fryth, vi. 19.
—— *v.* Robinſon, ii. 709.
—— *v.* Shepherd, ii. 412.
Obrian *v.* Frazier, vi. 121.
—— *v.* Ram, i. 485. vi. 116.
Obrien *v.* Obrien, vii. 293.
Ocallian's caſe, vi. 532.
Ockenden, *ex parte*, vi. 695.
Octavian Lombard's caſe, iii. 223.
Oddye *v.* Preſton, ii. 414.
Odiham *v.* Smith, iii. 491. vi. 623.
Ody *v.* Yates, ii. 481.
Offley's caſe, iii. 24.
Offley *v.* Beſt, iii. 41.
—— *v.* Whitehall, v. 663. vi. 764.
Offly *v.* Ward, iv. 703. v. 700.
Ogilvie *v.* Foley, ii. 722. vii. 459.
Ogle *v.* Cook, vii. 329. 370.
—— *v.* Moffat, ii. 48. 56.
—— *v.* Ogle, vi. 142.
Oglethorpe *v.* Hyde, v. 464.
Ognel's caſe, ii. 342. 506. iii. 54. v. 256. vi. 42.
Ognell *v.* Darlington (Lord), iii. 208.
O'Hara *v.* O'Neil, vii. 139.
Oke *v.* Heath, iv. 244. 388.
Okedin *v.* Okedin, iv. 286.
Okell *v.* Hodgkinſon, iii. 193.
Okey *v.* Sell, vi. 376.
—— *v.* Viccars, ii. 432.
Oldfield *v.* Witherly Hundred, iii. 183.
Oldham *v.* Hand, iii. 307.
—— *v.* Hughes, ii. 442.
—— *v.* Litchford, vii. 139.
—— *v.* Peake, vi. 228. 250.
—— *v.* Pickering, ii. 567.
Oldis's caſe, ii. 153.
Oldis *v.* Donmille, v. 666.
Oldknow, *ex parte*, i. 460.
—— *v.* Wainwright, ii. 21. 56.
Oles *v.* Thornhill, i. 657.
Oliphant *v.* Hendrie, i. 596.
Olivant *v.* Perineau, vi. 482.
Oliver *v.* Collins, vi. 397.
—— *v.* Hamilton, vii. 501.
—— *v.* Style, i. 186.
—— *v.* Thomas, iv. 473.
Olliet *v.* Beſey, vi. 570.
Olmius *v.* Delany, i. 329.
Omelaughland *v.* Hood, iv. 194.
Ommaney *v.* Douglaſs, vii. 462.
Omulcunrie *v.* Eyres, ii. 504.
Omychund *v.* Barker, ii. 577.
O'Neal *v.* Mead, iii. 87.
Oneby's caſe, v. 122.
Onions *v.* Tyrer, vii. 349.
Only *v.* Walker, i. 117.
Onſlow's caſe, ii. 442. v. 626.
Onſlow *v.* Home, vi. 214.
—— *v.* Orchard, ii. 273.
Openheimer *v.* Levy, i. 6.
Opey *v.* Thomaſius, iv. 24. 154.
Oppenheim *v.* Harriſon, i. 306.
Opy *v.* Addiſon, ii. 181. iv. 620.
Orby *v.* Trigg, v. 8.
Ord *v.* Blackett, i. 112.
—— *v.* Herning, v. 91.
—— *v.* Smith, iv. 429.
Orde *v.* Clarke, vii. 517.
Ordway *v.* Godfrey, iii. 80.
Orford (Mayor, &c. of) *v.* Richardſon, v. 388. vi. 584.
Orme *v.* Smith, iv. 355.
Ormelade *v.* Cooke, i. 216. 224.
Ormond's (Earl of) caſe, iii. 238. v. 556. vii. 81.
Ormond (Duke of) *v.* Bierly, vi. 59.
O'Rouck's caſe, iii. 552.
Orr *v.* Kaines, iii. 49. iv. 428.
Orton *v.* Fuller, vi. 228. 246.
Oſbaldeſton *v.* Croſs, i. 303.
Oſborn *v.* Governors of Guy's Hoſpital, i. 271.
—— *v.* Jay, iv. 17.
—— *v.* Rider, iv. 56.
Oſborne's caſe, iii. 415. iv. 139. v. 159. vi. 603.
Oſborne *v.* Bradſhaw, vii. 223.
—— *v.* Brookhouſe, vi. 571.
—— *v.* Carter, v. 251.
—— *v.* Haddock, i. 30.
—— *v.* Rogton, i. 211.
—— *v.* Steward, iii. 491.
—— (Lady) *v.* Villiers, iii. 71.
Oſmond *v.* Fitzroy, iii. 306. 525.
Oſſory's (Biſhop of) caſe, iv. 88. vi. 419.
Oſſulſton *v.* Yarmouth (Lord), v. 14.
Oſwald v. Legh, ii. 660. v. 176.
Oſwell (Inhabitants of) *v.* Woking (Inhabitants of), vi. 411.
—— *v.* Probert, vii. 404.
Otway *v.* Hudſon, i. 113. ii. 220.
Otwaye's caſe, iii. 228.
Oughterlony *v.* Powis (Earl), iv. 484.
Oulton *v.* Perry, ii. 143.

Ourſell, *ex parte*, iv. 603.
Ouſton *v.* Hebden, ii. 182. iv. 611.
Outram *v.* Morewood, ii. 637.
Overton's caſe, i. 338.
Oviat *v.* Vyner, ii. 719.
Owdy *v.* Gibbons, i. 204.
Owen's caſe, vi. 511. vii. 283.
Owen *v.* Ap Rees, iv. 69.
—— *v.* —— v. 662.
—— *v.* Bean, i. 584.
—— *v.* Bulkley, i. 26.
—— *v.* Davies, i. 118.
—— *v.* Davis, iii. 540.
—— *v.* Hurd, i. 237.
—— *v.* Morgan, iii. 232, 233. v. 837.
—— *v.* Nail, vii. 402.
—— *v.* Owen, iv. 390.
—— *v.* Reynolds, v. 452.
—— *v.* Thomas, iv. 81.
—— *v.* Williams, iv. 224.
—— *v.* Woolley, iv. 483.
Owſton *v.* O'Bryan, i. 304.
Oxenden *v.* Oxenden, i. 494.
—— *v.* Penrice, vii. 336.
Oxford's (Biſhop of) caſe, iv. 72. 75. 123.
—— (Chancellour of) caſe, ii. 7. vi. 394. vii. 63.
—— (City of) caſe, vii. 57.
—— (Lord) caſe, vii. 290.
Oxford (Univerſity of) *v.* Cliftons, iv. 279.
—— (Mayor of) *v.* Richardſon, v. 320.
—— *v.* Rivet, v. 365.
Oxwick *et al.* *v.* Plumer *et al.* v. 43.

P

Packenham *v.* Blau, i. 398.
Packer's caſe, ii. 676.
Packer *v.* Wyndham, i. 481.
Packington *v.* Packington, vii. 289.
Packman's caſe, iii. 51.
Packman *v.* Cole, iv. 316. 335.
Page's caſe, vii. 213.
Page, *ex parte*, i. 460.
—— *v.* Barnes, vii. 219.
—— *v.* Creed, ii. 42.
—— *v.* Hayward, i. 639. iii. 241. 367.
—— *v.* Page, iv. 390.
—— *v.* Rogers, iv. 672.
Paget's (Lord) caſe, v. 828. vii. 98. 100. 264.
Paget *v.* Gee, vi. 25.
Paget *v.* Prieſt, iii. 21.
—— *v.* Voſcius, iv. 282.
Pain's caſe, ii. 222. 228.
Paine *v.* Maſters, i. 46.
—— *v.* Stratton, iv. 310.
—— *v.* Teap, i. 429.
Palache's caſe, i. 141.
Palfreman *v.* Grobie, iii. 166.
Palgrave *v.* Windham, i. 90. vi. 34.
Palm *v.* Fleſhees, v. 392.
Palmby *v.* Maſters, i. 457.
Palmer's caſe, ii. 174. 420. 442. iii. 392. iv. 173. vi. 174. 683.
—— (Sir Thomas) caſe, i. 623. v. 772.
Palmer *v.* Danby, iii. 416. v. 37.
—— *v.* Edwards, iv. 128.
—— *v.* Ekins, v. 396.
—— *v.* Humphry, ii. 712.
—— *v.* Jones, vii. 181.
—— *v.* Scribb, iv. 339. vii. 140.
—— *v.* Stannage, v. 432.
—— *v.* Stavely, v. 416.
—— *v.* Thorpe, vi. 255.
—— *v.* Williams, ii. 55.
—— *v.* Young, iv. 223. vii. 142.
Palmerſton (Lord) *v.* Copeland, ii. 411.
Pamer *v.* Stabick, vi. 77.
Pancras (Inhabitants of) *v.* Rumbald (Inhabitants of), vi. 409. 411.
Panton *v.* Iſham, iv. 181.
Pape *v.* Onſlow, v. 84.
Papillion *v.* Voyce, iv. 274. vii. 173, 174.
Paradice *v.* Holiday, i. 346.
Paradice *v.* June, ii. 65.
Paramor *v.* Verrald, v. 386.
Paramour *v.* During, v. 430.
—— *v.* Veral, ii. 238.
Paris *v.* Salkeld, i. 452. v. 479.
Pariſh *v.* Crawford, iv. 615.
Park *v.* Carter, i. 303. 444.
Parker, *ex parte*, i. 461.
—— *v.* Amys, v. 441.
—— *v.* Appleton, v. 524.
—— *v.* Aſhton, ii. 150.
—— *v.* Bleeke, i. 430.
—— *v.* Brown, i. 269.
—— *v.* Budon, vi. 618.
—— *v.* Edith, ii. 399.
—— *v.* Godin, vi. 692.
—— *v.* Harris, ii. 501. vi. 5.
—— *v.* Harvey, iii. 81.
—— *v.* Kett, v. 208.
—— *v.* Lamb, vii. 348.
—— *v.* Large, vi. 214.

Parker *v.* Lawrence (Sir John), v. 167. 703.
——— *qui tam v.* Macfarlane, i. 70.
——— *v.* Moor (Sir William), vi. 173.
——— *v.* Norton, vi. 706.
——— *v.* Patrick, i. 372. vi. 690.
——— *v.* Plummer, iv. 142.
——— *v.* Rennady, v. 159.
——— *v.* Taylor, v. 365.
——— *v.* Thacker, iv. 259.
——— *v.* Thoroton, iii. 745. vi. 661.
——— *v.* Turner, vii. 419.
——— *v.* Wells, ii. 505.
Parkhurſt *v.* Foſter, iii. 661.
Parkins *v.* Titus, i. 736.
Parkinſon *v.* Caines, i. 298.
Parks *v.* Wilſon, i. 111. vii. 139.
Parquot *v.* Eling, ii. 58.
Parr *v.* Seames, vi. 657.
Parrey's caſe, iii. 180.
Parrot *v.* Bridges, vi. 583. 590, 591.
——— *v.* Spraggon, vii. 454.
——— *v.* Wells, i. 106.
Parry *v.* Hodgſon, ii. 429.
——— *v.* Paris, vi. 637.
——— *v.* Roberts, iii. 553.
——— *v.* Woodward, v. 158.
Parſlow *v.* Weedon, iii. 462.
Parſon *v.* Priddock, v. 109.
Parſons, *ex parte*, i. 408.
——— *v.* Freeman, iii. 86. 307. v. 26. vii. 370.
——— *v.* Gill, i. 166.
——— *v.* King, vii. 499.
——— *v.* Lenow, vii. 341.
——— *v.* Lloyd, vi. 609.
——— *v.* Perus, iii. 147.
——— *v.* Thompſon, i. 273. v. 196.
Parten *v.* Baſeden, iii. 19.
Partericke *v.* Powlett, i. 497. 508.
Partridge *v.* Clarke, i. 331.
——— *v.* Gopp, iii. 311.
——— *v.* Naylor, vi. 393.
——— *v.* Partridge, iv. 355. 357. 426.
——— *v.* Pawlett, iii. 685.
——— *v.* Straunge, vi. 396.
——— *v.* Whiſton, vi. 192.
Partyn *v.* Roberts, i. 113.
Paſley *v.* Freeman, i. 86.
Pate *v.* Davy, vii. 324.
Paternoſter *v.* Graham, vii. 57. 59.
Paterſon *v.* Groſs, i. 236.
——— *v.* Taſh, i. 372. iv. 601.
Patman *v.* Vaughan, i. 388.
Patrick's caſe, iv. 505.
Patrick *v.* Balls, ii. 14. 415.
Patrick *v.* Johnſon, i. 245. vi. 616.
——— *v.* Harriſon, iii. 651.
——— *v.* Powlett, iii.
Patten *v.* Panton, iii. 53.
——— *v.* Purbeck, ii. 711.
Patterſon *v.* Black, iv. 674.
Pattiſon *v.* Banks, i. 423.
Paul *v.* Jones, i. 425.
——— *v.* Shaw, vi. 273.
Paulet *v.* Delaval, vii. 411.
Paulin *v.* Hardy, iii. 229.
Paulter *v.* Cornhill, v. 773. 780. 787.
Pauncefoot *v.* Blunt, v. 227.
Pauſeley *v.* Blackman, iv. 167.
Pawcey *v.* Bowen, iv. 156.
Pawlett's caſe, iv. 355.
Pawlett *v.* Attorney General, vii. 186.
——— *v.* Dogget, iv. 420. v. 723.
——— *v.* Heathfield, vi. 470.
Pawſey *v.* Bowen, i. 110.
——— *v.* Edgar, iv. 409.
——— *v.* Lowdall, v. 771.
Pawſon *v.* Watſon, iv. 653.
Pay *v.* Dearſley, vi. 461.
Payn *v.* Worth, vii. 59.
Payne *v.* Fry, v. 615.
Peachey *v.* Bowes, vi. 426.
Peacock *v.* Bell, ii. 106. v. 357.
——— *v.* Beſt, ii. 188.
——— *v.* Harris, iii. 123.
——— *v.* Monk, i. 482. 499. 507. ii. 654. iv. 245. 426.
——— *v.* Peacock, v. 394.
——— *v.* Rhodes *et al.* iv. 706.
——— *v.* Spooner, iv. 308.
——— *v.* Stear, ii. 46.
Peacocke *v.* Rhodes, iii. 343.
Peake *v.* Turner, v. 319.
Pearce *v.* Davis, i. 26.
——— *v.* Grove, i. 171.
——— *v.* Snaplin, iv. 425.
——— *v.* Taylor, iii. 87.
Peard *v.* Johns, vi. 216. 231.
Pearl *v.* Bridges, vi. 614.
——— *v.* Edwards, i. 272.
Pearly *v.* Smith, vi. 25.
Pearne *v.* Liſle, v. 523, 524.
Pearſon *v.* Brereton, i. 507.
——— *v.* Campion, v. 671.
——— *v.* Garnett, i. 112.
——— *v.* Garret, iv. 697.
——— *v.* Henry, i. 208.
——— *v.* Iles, ii. 594.
——— *v.* Mary Meadow, i. 331.
——— *v.* Morgan, v. 48.
——— *v.* Pearſon, ii. 383. iii. 716.

Pearſon *v.* Perkins, v. 480.
——— *v.* Pully, v. 106.
Peaſe *v.* Parſons, i. 9.
Peaſe *v.* Stileman, i. 664.
Peat's caſe, iv. 508.
Peat *v.* Chapman, iv. 390.
Peate *v.* Ougly, vii. 311. 319.
Pechel *v.* Fowler, vii. 471.
Peck's caſe, vi. 219.
Peck *v.* Channel, iii. 234. v. 852.
— *v.* Creſſet, iii. 432.
— *v.* Parrot, i. 249.
Pecke *v.* Turner, vi. 584.
Peckham's caſe, iii. 50.
Peckham *v.* Peckham, iii. 408.
——— *v.* Wood, iv. 686.
Pedley, *ex parte*, i. 406.
——— *v.* Goddard, vii. 393, 394.
Peele *v.* Capel, vi. 193.
— *v.* Carliſle (Counteſs of), vi. 192.
Peers *v.* Whale, v. 447.
— *v.* Leeds (Mayor, &c. of), iv. 516.
Peeters *v.* Opie, vi. 460.
Pell *v.* Brown, iii. 240. iv. 293.
Pells *v.* Brown, v. 782. vii. 107, 108.
— *v.* Governor, &c. Royal Exchange Aſſurance, iv. 639.
— *v.* Jellow, vi. 229.
Pelham's caſe, iii. 223.
Pelham's (Sir William) caſe, v. 835.
Pelham *v.* Anderſon, i. 595.
——— *v.* Fletcher, v. 282.
——— *v.* Gregory, iv. 319.
——— *v.* Heming, i. 165.
——— (Lord) *v.* Pickerſgill, ii. 661.
Pemberton *v.* Skelton, vii. 25.
——— *v.* Sparrow, vi. 768.
Pemble *v.* Stern, ii. 417. iv. 76.
Pembroke's (Earl) caſe, ii. 475. vi. vii. 262.
——— (Lord) caſe, iii. 114. 245.
Pembroke (Earl) *v.* Bowden, i. 113.
——— *v.* Staniel, vi. 100.
——— (Lord) *v.* Jeffries (Lord), iii. 221.
Pendlebury *v.* Elmott, i. 246. v. 404.
Pendleton *v.* Grant, ii. 652.
Pendock *v.* Mackender, ii. 583. vii. 336.
Pendrel's caſe, i. 513.
Pengall (Lord) *v.* Roſs, i. 121.
Pengelly *v.* Forteſcue, iv. 275.
Penhallo's caſe, ii. 669.
Penhay *v.* Hurrel, vii. 126.
Penn *v.* Baltimore (Lord), i. 109. 112.
Pennant's caſe, vi. 30. vii. 68.
Pennington *v.* Sudal, iv. 560.
Penny, *ex parte*, i. 400.
——— *v.* Bailey, ii. 150.
——— *v.* Edgar, vii. 471.
——— *v.* Hooper, vi. 766.
Penoyer *v.* Brace, i. 13.
Penrice *v.* Penrice, ii. 394.
Penton *v.* Browne, ii. 737. vi. 172. 586.
Pepis's caſe, ii. 23.
Peplow *v.* Rowley, v. 474.
Pepper *v.* Winyeve, vii. 367.
Peppin *v.* Shakeſpear, vi. 610.
Pepplewell's caſe, vii. 87.
Pepy's caſe, vii. 22.
Pepys *v.* Low, i. 441.
Perigal *v.* Melliſh, i. 342.
Perkins *v.* Baynham, iii. 86. v. 27. vii. 182.
——— *v.* Baynton, iii. 681.
——— *v.* Kempland, i. 417.
——— *v.* Lamb, ii. 393.
——— *v.* Micclethwaite, vii. 321.
——— *v.* Proctor, i. 388. vi. 570. 609.
——— *v.* Sewell, iii. 238.
——— *v.* Smith, vi. 679. 691.
——— *v.* Thornton (Lady), i. 110.
——— *v.* Waller, vii. 116.
——— *v.* Woolaſton, vi. 422.
Perne *v.* Manners, vii. 60.
——— *v.* Oldfield, vi. 729.
Perrat *v.* Ballard, v. 79.
Perrin *v.* Blake, iv. 264.
Perrot *v.* Markworth, vi. 750.
——— *v.* Perrot, vii. 264.
Perrott *v.* Treby, vii. 181.
Perrow's caſe, vi. 439.
Perry *v.* Allen, iv. 211.
——— *v.* Bowes, i. 428.
——— *v.* Campbell, ii. 478.
——— *v.* Jackſon, iv. 479.
——— *v.* Nicholſon, i. 236.
——— *v.* Perry, iv. 367.
——— *v.* Woods, vii. 472.
Pery *v.* White, iv. 291.
Peſhall *v.* Layton, i. 19.
Pete *v.* Pemberton, v. 862.
Peter *v.* Ruſſel, iii. 301. v. 50.
——— *v.* Stafford, vi. 635.
Peterborough (Earl) *v.* Mordant (Sir John), vi. 100.
——— (Biſhop) *v.* Mortlock, iv. 426.
Peterken *v.* Sampſon, i. 341.

Peters *v.* Miligan, iv. 622.
Pether *v.* Shelton, vi. 465.
Pethouſe *v.* Crane, v. 732.
Petit *v.* Benſon, iv. 714.
—— *v.* Smith, ii. 173. 655. iii. 67, 68. 71.
Petler *v.* Yaleman, v. 671.
Petoe's caſe, ii. 431.
Petre *v.* Petre, iii. 410.
Petrie *v.* Hanway, i. 262. iii. 92.
—— *v.* White, i. 19.
Pett *v.* Pett, iii. 74.
Pettifer's caſe, ii. 501.
Pettifer *v.* James, ii. 255.
Petty's caſe, iii. 192.
Petty *v.* Styward, v. 39. 46.
Petyt *v.* Berkley, i. 59.
Pexhall's (Sir Richard) caſe, i. 519. ii. 76. iii. 588.
Peytoe's caſe, i. 203.
Peyton's caſe, iii. 437. vi. 463. 611.
Peyton *v.* Ayliffe, v. 256.
—— *v.* Bladwell, iv. 542.
—— *v.* Bury, i. 316. iv. 442.
Phaeſant's caſe, ii. 383. iii. 716.
Phelpe *v.* Winſcombe, v. 207.
Philips *v.* Brydges, vii. 464.
—— *v.* Bury, v. 199.
—— *v.* Carew, i. 102.
—— *v.* Hele, v. 36.
—— *v.* Knightly, i. 227.
—— *v.* Paget, iv. 430.
—— *v.* Philips, v. 23.
—— *v.* Vaughan, v. 89.
Phillips *v.* Barker, vi. 469.
—— *v.* Biron, vi. 569. 609, 610. 692.
—— *v.* Brown, vi. 122. vii. 409.
—— *v.* Bucks (Duke of), i. 110.
—— *v.* Bury, ii. 28. iv. 505.
—— *v.* Fowler, vi. 655. 657.
—— *v.* Garth, iv. 348. 350.
—— *v.* Gwynne, i. 171.
—— *v.* Hunter, vii. 406.
—— *v.* Kingſton, vi. 206.
—— *v.* Phillips, iii. 86. 683. 777.
—— *qui tam v.* Scullard, vi. 674.
—— *v.* Simes, vi. 746.
—— *v.* Smith, i. 297.
—— *v.* Wood, v. 448.
Philpot *v.* Hoare, i. 433. ii. 73.
Phiney *v.* Phiney, iii. 76.
Phipard *v.* Mansfield, iv. 291. v. 820.
Phipps *v.* Angleſey, vii. 327.
Phips *v.* Jackſon, v. 620.
Phorbes's caſe, ii. 452.
Phyſicians' (College of) caſe, vi. 371.
Phyſicians (College of) *v.* Butler, ii. 5.
—— —— *v.* Salmon (Dr.), ii. 5.
Pibus *v.* Mitford, v. 796. vii. 78. 103.
Pickering *v.* Gunning, iii. 594.
—— *v.* Stamford (Earl of), i. 590.
—— *v.* Thompſon, vi. 122.
—— *v.* Towers, iii. 27.
—— *v.* Truſte, vi. 482. vii. 515.
—— *v.* Vowles, iv. 225.
Pickerſgill *v.* Palmer, vi. 657.
Pickwood *v.* Wright, ii. 495.
Pidgeon *v.* Harriſon, v. 684.
Pie *v.* Cooper, vii. 48.
Pierce *v.* Bartram, i. 550.
—— *v.* Hopper, vi. 388. 392.
—— *v.* Parks, iii. 55.
—— *v.* Saunders, vi. 475.
Pierpont *v.* Cheney (Lord), iii. 410.
Piers Griffith *v.* Hugh Midleton, iv. 752. v. 236.
Piers *v.* Hoe, ii. 568. iii. 161.
—— *v.* Piers, vii. 291.
—— *v.* Turner, iii. 94.
—— *v.* Winn, iii. 445. v. 810.
Pierſon *v.* Dunlop, iv. 696. 713. 716.
—— *v.* Garnet, iv. 339. vii. 140.
—— *v.* Shore, vii. 153.
Piffin *v.* Fenton, iii. 775.
Pifrid's caſe, ii. 494.
Pigot's caſe, iv. 415. v. 176.
Pigot *v.* Pigot, vii. 15. 157.
Piggot *v.* Garniſh, iii. 415. iv. 141.
—— *v.* Palmer, ii. 329.
—— *v.* Penrice, iv. 325.
—— *v.* Piggot, v. 366.
—— *v.* Saliſbury (Lord), v. 856.
Pike *v.* Badmerino, vii. 336.
—— *v.* Haſſen, vii. 38.
—— *v.* White, i. 717.
Pilchard *v.* Kingſton, i. 265.
Pilkington's caſe, i. 366. iv. 584. v. 211. vi. 452. 455.
Pilkington *v.* Bayley, vii. 143.
—— *v.* Haſtings, i. 366.
—— *v.* Peach, i. 135.
—— *v.* Stanhope, i. 142.
Pillan *v.* Van Microp, iv. 596. 711. 712.
Pilſworth *v.* Pyett, iii. 161.
Pinbury *v.* Elkins, i. 249. iv. 310.
Pinchon's caſe, ii. 220.
Pinchon *v.* Harris, iii. 62.
Pincke *v.* Curteis, i. 109.
—— *v.* Thornycroſte, iii. 215.

Pine, *ex parte*, i. 462.
Pine's caſe, vi. 511. 541.
Pine *v.* Leiceſter (Counteſs of), i. 57.
Pinſold *v.* Northey, v. 256.
Pinkerton *v.* Marſhall, vii. 405.
Pinkney's caſe, vi. 601. 697.
Pinkney *v.* Collins, i. 59.
—— *v.* Eaſt Hundred (Inhabitants of), iii. 512.
—— *v.* Hall, iv. 609. 713. 748.
Pinnel's caſe, i. 42.
Pipe *v.* Agar, v. 474.
Pipen *v.* Pipen, i. 137.
Pippin *v.* Ekins, ii. 654.
Piſtor *v.* Dunbar, vii. 398.
Pit *v.* Pidgeon, iv. 361.
— *v.* Staple, iii. 292.
Pitcairne *v.* Braiſe, iv. 328.
—— *v.* Ogbourne, ii. 653. iv. 545.
Pitfield *v.* Morey, vi. 462.
Pitman *v.* Madox, ii. 636.
Pitt's caſe, iii. 527. v. 634. 636.
Pitt *v.* Coney, i. 333. vi. 415.
— *v.* Hunt, i. 479. 481.
— *v.* Jackſon, iv. 319.
— *v.* Snowden, ii. 341. 383. iii. 716.
Pitton *v.* Walter, ii. 634.
Pitts *v.* Gaince, i. 73, ii. 12. iv. 611.
— *v.* Mellor, i. 504.
— *v.* Polehampton, vi. 375.
Planche *v.* Fletcher, iv. 652. 658.
Plank *v.* Anderſon, ii. 514.
Plantamour *v.* Staples, iv. 632.
Platt's caſe, iii. 798.
Platt *v.* Hill, vi. 398.
— *v.* London (Sheriff of), vi. 387. 391.
— *v.* Sprigg, vii. 156.
Player *v.* Jenkins, i. 549.
— *v.* Roberts, vi. 679. 684.
— *v.* Vere, i. 549.
— *v.* Warn, ii. 273.
Player's caſe, v. 349. vi. 601. 697, 698.
Pleaſe *v.* Palfrey, i. 265.
Pleazance *v.* Higham, iv. 164.
Pledgard *v.* Lake, iii. 236. v. 861.
Pliſſe *v.* Smith, vi. 254.
Plomer *v.* Hockhead, vii. 66.
Plott *v.* Sleep, iv. 206.
Plumb *v.* Fluitt, v. 53.
— *v.* Pluitt, vii. 455.
Plumbe *v.* Carter, vii. 192.
Plume *v.* Beal, vii. 381.
—— *v.* Benthem, ii. 245. 248.
—— *v.* Marchant, iii. 83. v. 373.
—— *v.* Webb, ii. 489.
Plunkett *v.* Holmes, iii. 241. v. 768, 769.
—— *v.* Penſon, iii. 59. 462.
Plymouth (Counteſs of) *v.* Archer (Lady), vii. 294.
—— (Corporation of) *v.* Collings, ii. 50.
—— (Earl of) *v.* Hickman, vii. 139.
Pockley *v.* Pockley, iii. 85. 452. v. 23.
Pocklington *v.* Peck, vi. 125.
Pocock *v.* Lee, i. 497. 508. v. 35.
—— *v.* Naſh, vi. 215.
Podger's (Margaret) caſe, iii. 208. v. 829. 832.
Poe *v.* Mournford, vi. 215.
Pointer *v.* Pointer, i. 265.
Pole *v.* Pole, vii. 150.
Polhill *v.* Polhill, ii. 631.
Pollard *v.* Caſy, vi. 682.
—— *v.* Downes, vii. 185.
—— *v.* Greenvill, iv. 156.
—— *v.* Lutterall, iii. 215.
—— *v.* Scoley, vii. 190. 194.
Pollen *v.* Huſband, vii. 360.
Polyblank *v.* Hawkins, v. 336.
Pomeroy *v.* Partington, iv. 147.
Pomfret *v.* Riecroft, ii. 66.
—— (Earl) *v.* Windſor (Lord), iii. 419.
Pomp *v.* Ludvidgſon, i. 326.
Pond *v.* King, i. 14.
—— *v.* Underwood, i. 260.
Pool's caſe, i. 648. vii. 258.
Pool *v.* Broadfield, vi. 125.
—— *v.* Duncombe, vi. 76.
—— *v.* Longville, i. 166. ii. 345.
—— *v.* Neal, ii. 283. vi. 392.
Poole *v.* Boulton, ii. 45.
—— *v.* Needham, v. 844.
—— *v.* Shergold, i. 110.
—— *v.* Willis, vi. 121.
Poor *v.* Seymour, vi. 717.
Pope *v.* Biſh, vii. 394.
—— *v.* Bret, i. 219.
—— *v.* Craſhaw, i. 481.
—— *v.* Curl, iii. 651.
—— *v.* Harman, ii. 716.
—— *v.* Redfearne, v. 616.
—— *v.* Roots, i. 109.
—— *v.* Roſs, ii. 696.
—— *v.* St. Leger, iii. 339.
—— *v.* Skinner, iv. 59. vii. 29.
—— *v.* Vaux, iii. 446.
Popham *v.* Ayleſbury (Lady), vii. 147.
—— *v.* Bamfield, i. 642. iv. 265.
Poplet *v.* James, ii. 581.
Pordage *v.* Cole, ii. 62. 92. v. 338.

Port *v.* Cook, vi. 219.
—— *v.* Turton, i. 389.
Portchester (Lord) *v.* Petrie, ii. 122.
Porter's case, ii. 370.
Porter and Rochester's case, ii. 169.
Porter *v.* Bathurst, vi. 754.
—— *v.* Grey, ii. 53.
—— *v.* Hubbart, v. 109.
—— *v.* Shephard, vii. 425.
—— *v.* Swetnam, ii. 69.
Portington's case, i. 638. vi. 632.
Portington *v.* Rogers, vi. 371.
Portland (Countess of) *v.* Progers, iv. 244.
Portman *v.* Willis, iv. 352.
Portmore *v.* Morris, ii. 659.
Pory *v.* Wright, vi. 730.
Potkins's case, vii. 205.
Potter's case, ii. 289.
Potter *v.* Loveday, vi. 231.
—— *v.* North, i. 621.
—— *v.* Potter, i. 113. 117. iv. 248. vii. 323, 324. 329.
Pott's case, vi. 236.
Potts *v.* Durant, vii. 455.
—— *v.* Norton, iii. 411.
—— *v.* Potts, i. 32.
Poulteney *v.* Holmes, iv. 128.
Poulter's case, vi. 369. 390.
Poulter *v.* Cornwall, i. 37.
Povey's case, v. 625.
Powel *v.* Beresford, vii. 300. 311.
—— *v.* Rokesby, iii. 516.
Powell's case, ii. 577.
Powell *v.* Cleaver, iii. 411. iv. 381.
—— *v.* Glover, v. 50. vii. 101.
—— *v.* Hankey, i. 111. 482.
—— *v.* Hine and Adams, vii. 58.
—— *v.* Jones, vi. 216.
—— *v.* Little, i. 299.
—— *v.* Millbank, iv. 506.
—— *v.* Monnier, iv. 712, 713.
—— *v.* Morgan, iv. 209.
—— *v.* Peach, iii. 221.
—— *v.* Plunkett, vi. 250.
—— *v.* Portherch, i. 326.
—— *v.* Price, i. 113. vii. 168.
—— *v.* Weeks, vii. 443.
Power *v.* Jones, i. 295.
—— *v.* Portman, vi. 281.
—— *v.* Wells, i. 259. 263. vi. 682.
Powis's (Marquis) case, ii. 481.
Powis's case, vi. 648.
Powis *v.* Corbett, v. 83.
—— (Marquis of) *v.* Dorall, vii. 286.
—— (Lord) *v.* Kirtman, ii. 492.
Powle *v.* Godfrey, i. 91.
—— *v.* Veer, v. 759.
Powley *v.* Walker, i. 279. vii. 396.
Powys *v.* Andrews, vii. 380.
Powzelius *v.* Maddocks, v. 142.
Prat *v.* Taylor, vii. 59.
Pratt *v.* Colt, vii. 81, 82.
—— *v.* Phanner, v. 431.
—— *v.* Salt, v. 619.
—— *v.* Stocke, vii. 67.
—— *v.* Willey, vii. 197.
Pray *v.* Edie, ii. 57.
Preckington's case, vi. 230.
Prenson *v.* Sone, ii. 332.
Prescott, *ex parte*, i. 443.
Preston's (Lord) case, vi. 547.
Preston, *ex parte*, i. 386.
—— *v.* Eastwood, vii. 394.
—— *v.* Holmes, iv. 315.
—— *v.* Morceau, ii. 658.
Prettyman *v.* Lawrence, vi. 623.
Price's case, ii. 597.
Price, *ex parte*, i. 304.
—— *v.* Chewton (Hundred of), iii. 518.
—— *v.* Coa, i. 669.
—— *v.* Davis, iii. 193.
—— *et al. v.* Fastnedge, v. 82.
—— *v.* Goodrick, i. 310.
—— *v.* Jenkins, vi. 224.
—— *v.* Kenrick, v. 479.
—— *v.* Langford, iii. 196.
—— *v.* Lloyd, vii. 330, 331.
—— *v.* Mascal, vi. 748.
—— *v.* Neal, iv. 737.
—— *v.* Parkhurst, vi. 407.
—— *v.* Pratt, vi. 729.
—— *v.* Torrington (Earl of), ii. 636.
—— *v.* Warren, vi. 651.
—— *v.* Williams, i. 241.
Prick's case, iv. 452. vi. 225.
Priddle's case, ii. 583. vii. 7.
Priddle *v.* Napier, vi. 712.
—— *v.* Napper, vi. 756.
Pride *v.* Bath (Earl of), i. 518.
Prideaux *v.* Gibben, iv. 248.
—— *v.* Gibbon, i. 113.
—— *v.* Warn, ii. 239.
Priest *v.* Pidgeon, i. 388.
Prigg *v.* Adams, vii. 67.
Primrose *v.* Bromley, i. 411.
Prince's (The) case, ii. 137. vi. 394. 395. vii. 467.
Prince's case, iii. 14, 15. 580. iv. 136. vii. 65.
Prince and Green *v.* Chandler, iv. 150.

Prince v. Meulton, ii. 269.
Pring v. Henley, vi. 80.
—— v. Pring, ii. 655. iii. 67.
Pringle v. Hartly, iv. 650.
Prior v. Dawkes, v. 348. 409.
Pritchard v. Smith, vi. 230.
——— v. Stevens, vi. 56.
Probee v. Dorcheſter (Marquis of), iii. 182.
Probert v. Clifford, iii. 87.
Probey v. Lumley, iii. 122. vi. 93.
Proctor v. Bath and Wells (Biſhop of), vii. 492.
——— v. Burdet, ii. 86.
——— v. Cowper, v. 92. 101.
Prodgers v. Frazier (Lady), iv. 9.
——— v. Langham, iii. 317.
Prohurſt's caſe, iv. 505.
Proof v. Hines, i. 303. iii. 306, 307. vii. 203.
Proffer, *ex parte*, iii. 605.
——— v. Phillips, vi. 363.
Protector (The) v. Lumley (Lord), v. 233.
Proud v. Hawes, vi. 217.
—— v. Turner, iii. 77.
—— v. Willimote, v. 141.
Proudfoot, *ex parte*, i. 428. 458.
Prowſe v. Abingdon, iii. 87. iv. 401.
Pruer v. Moadman, vi. 207.
Pryn's caſe, ii. 171. v. 676.
Prynne v. Slaughter, vi. 115.
Pryor v. Powers, vi. 657. 669.
Puckeridge v. Brown, vii. 214. 216.
Pudſey v. Pudſey, vi. 208.
Pugh v. Goodtitle, ii. 503.
—— v. Leeds (Duke of), iv. 57. 387.
—— v. Robinſon, v. 332.
—— v. Smith, vii. 447.
Pullen v. Nicholas, v. 411.
—— v. Palmer, iii. 705. vi. 402.
—— v. Ready, iv. 423.
Pullin v. Stokes, vii. 454.
Pulteney v. Darlington, i. 114. vii. 448.
Purchaſe v. Jegon, i. 163. v. 368. 456.
Purdy v. Stacey, v. 195. vi. 247.
Purefoy v. Purefoy, v. 84. vii. 181.
——— v. Rogers, iii. 455. iv. 2,2. 298. v. 766.
Purflow v. Bailey, i. 204. vii. 49.
——— v. Parker, v. 781.
Puſey v. Deſbouvrie, ii. 253.
—— v. Puſey, iii. 65.
Puſhman v. Filliter, vii. 140. 493.
Putt v. Noſworthy, i. 30.
Putt v. Rawſtern, v. 442. vi. 704.
Pybus v. Mitford, v. 726. vii. 126.
——— v. Smith, i. 482. 507.
Pye v. Danbuz, i. 430.
—— v. George, vii. 154.
—— v. Rea, vi. 767.
Pyke v. Bath and Wells (Biſhop of), vii. 476.
—— v. Crouch, vii. 337.
—— v. Pyke, i. 110.
—— v. White, i. 725.
—— v. Williams, i. 121.
Pym v. Blackburn, vii. 457.
Pyne v. Dors, vi. 684.
Pyot v. Pyot, iv. 328.
—— v. St. John (Lady), i. 53. vii. 258.

Q.

Quantock v. England, i. 400.
Quick v. Ludburrow, v. 699.
Quilter v. Muſſindine, iv. 90, 91.
Quin v. Keep, v. 374. vii. 409.
Quincy, *ex parte*, vii. 258.
Quinton, *ex parte*, vii. 408.

R.

Raby v. Robinſon, vi. 632.
Rackfield v. Careleſs, ii. 655. iii. 71.
Rackham v. Jeſſup, i. 623. vi. 707.
Radcliffe v. D'Oyley, i. 98.
——— v. Graves, vii. 182.
——— v. Michael, vi. 246.
Radford v. Harbyn, v. 425. vi. 617.
Radley v. Rudge, vi. 700.
Radly v. Manning, vii. 203.
Radnor's (Pariſh of) caſe, i. 605.
Raikes v. Poreau, i. 393.
Rake v. Row, iii. 79.
Rakeſtraw v. Brewer, v. 19.
Raleigh's (Sir W.) caſe, vii. 186.
Ramſden v. Hylton, iii. 301.
——— v. Jackſon, iii. 87. vi. 123.
——— v. Langley, v. 104.
Ramſey v. Atkinſon, ii. 106. v. 359.
Ran v. Cartwright, v. 35. 44.
Randal's caſe, ii. 451.
Randal v. Harvey, i. 267.
——— v. Jenking, iii. 364.
——— v. Payne, iv. 414.
——— v. Scory, iii. 492.
Randall v. Bookey, iii. 67. vii. 142.
——— v. Cockan, iv. 649.
Randle v. Fuller, vii. 398.
Ranelagh (Lord) v. Hays, i. 108.

Rann v. Green, i. 258. v. 341. vi. 397.
—— v. Pickens, ii. 49.
Raſhleigh v. Maſters, vi. 25.
——— v. Salmon, ii. 276. iv. 740.
Raſt v. Roe, i. 2.
Raſtall v. Draper, ii. 287.
Ratcliff's caſe, vi. 562.
Ratcliff v. Davis, i. 663. vi. 687.
Ratcliffe's caſe, iii. 50. 404.
Ratcliffe v. Burton, ii. 55. 461.
——- v. Davis, vi. 455.
——- v. Shoolbred, iv. 652.
——- v. Tate, ii. 436.
Rattle v. Popham, iv. 152.
Rattray, *ex parte*, i. 415.
Ravenhill v. Danſey, v. 819.
Ravenſcroft v. Eyles, i. 90. ii. 516.
Raw v. Potts, iii. 299.
Rawden v. Shadwell, iii. 343.
Rawe v. Chicheſter, iv. 224.
Rawles v. Maſon, iii. 387.
Rawley v. Holland, v. 727. vii. 127.
Rawline v. Vincent, ii. 87.
Rawlins's caſe, iv. 189.
Rawlins v. Parry, v. 620.
——— v. Powell, i. 171.
Rawlinſon v. Gunſton, vii. 401.
——— v. Hutchins, v. 105.
——— v. Montague, i. 181.
——— v. Owens, iii. 609.
——— v. Shaw, iii. 11. v. 686.
——— v. Stone, iv. 707.
Rawſon v. Maynard, ii. 420.
Rawſtorne v. Bentley, iv. 239.
Ray v. Boaly, ii. 470.
Raymond v. Burbedge, v. 624.
——— v. Oking (Hundred of), iii. 512.
Raynal v. Champernoon, vi. 579.
Raynard v. Chaſe, iv. 574.
Rayner v. Brough, i. 326.
——— v. Grimſtone, vi. 227.
——— v. Mowbray, iv. 348. 350.
Raynes v. Spicer, vii. 505.
Razing v. Ruddock, vi. 405.
Rea v. Ramſey, i. 190.
Read's caſe, iii. 21, 22.
Read's (Sir John) caſe, v. 547.
Read's (Sir Thomas) caſe, vi. 127.
Read's (Sir William) caſe, i. 295.
Read v. Bowers, iii. 651.
—— v. Brookman, ii. 645. v. 170.
—— v. Chapman, iv. 621.
—— v. Crop, vii. 448.
—— v. Dawſon, v. 456. vi. 676.
Read v. Devaynes, iii. 27.
—— v. Duck, ii. 256.
—— v. Dupper, vii. 398.
—— v. Garnett, i. 238.
—— v. Hawkins, ii. 259.
—— v. Jewſon, i. 503.
—— v. Mature, iv. 763.
—— v. Naſh, iv. 85. 155. vii. 104.
—— v. Read, v. 523.
—— v. Redman, vi. 404, 405, 406.
—— v. Snell, iv. 310.
—— v. Truelove, iii. 44. vii. 183.
—— v. Wilmot, vi. 569.
Reade v. Chambers, v. 615.
Reading's caſe, iii. 672.
Reading v. Rawſterne, iii. 688.
——- v. Royſton, ii 304.
Real v. Macky, ii. 57.
Reaſon v. Ewbank, ii. 581.
——— v. Liſle, iii. 334.
——— v. Sacheveral, v. 81.
Rebow v. Beckerton, v. 663.
Record v. Bettenham, i. 139.
Redding v. Royſton, v. 730.
Redman v. Edolph, i. 148. 156.
——- v. Redman, iv. 542.
——- v. Winford, vi. 122.
Redridge v. Palmer, vii. 42.
Redſhaw v. Braſier, ii. 256.
——- v. Brooke, vi. 688.
——- v. Heſter, iii. 462.
Redſtone's caſe, vi. 229.
Redſtone v. Elliot, vi. 206. 240.
——- v. Pomfreict, vi. 228.
Reece v. Dacre (Lord), vii. 491.
Reech v. Kennigate, i. 118. vii. 139.
Reed v. Coats, iv. 728.
—— v. Harriſon, vi. 560.
—— v. Naſh, i. 123.
Reeks v. Groneman, i. 327.
Rees v. Abbott, i. 19. iv. 733.
—— v. Barrington, vii. 507.
—— v. Morgan, i. 166. vi. 86.
—— v. Parkinſon, vii. 504.
Reeve v. Farmer, vii. 396.
—— v. Holgate, vi. 218. 246. 248.
—— v. Long, iii. 583. v. 766.
—— v. Reeve, iii. 304.
Reeves v. Herne, iv. 412.
——— v. Probart, vi. 462.
Reg. v. Bedford, iv. 453.
—— v. Bentley, ii. 667.
—— v. Bewdley (Corporation of), vi. 669.
—— v. Blagden, v. 403.

Reg. v. Boſcawen, ii. 21.
—— v. Canterbury (Archbiſhop of), v. 459.
—— v. Cecill, iv. 582.
—— v. Clitheroe (Town of), iv. 516.
—— v. Coke, vi. 676.
—— v. Daniel, iv. 593.
—— v. Danvers, ii. 45.
—— v. Derby, i. 607.
—— v. Derby (Mayor, &c. of), i. 607. iv. 516.
—— v. Dye, vii. 208.
—— v. Ford, ii. 475.
—— v. Gold, iv. 569.
—— v. Guiſe, i. 599.
—— v. Helſton (Corporation of), vi. 659. 671.
—— v. Hill, ii. 667.
—— v. Ipſwich (Bailiffs, &c. of), ii. 5.
—— v. King, vi. 393.
—— v. Lane, vi. 431. 433.
—— v. Leich, v. 150.
—— v. London (Biſhop of), v. 561.
—— v. Maſon, v. 574.
—— v. Matthews, iii. 334.
—— v. Mawbridge, v. 122.
—— v. Newel, vii. 461.
—— v. Norwich (Biſhop of) and Ligh, vii. 481.
—— v. Norwich (Mayor, &c. of), iv. 518.
—— v. Paty, v. 626. 637.
—— v. Quaſh, vii. 460.
—— v. Rawlins, v. 355.
—— v. Robinſon, vii. 461.
—— v. Rutter, iv. 567.
—— v. Sewell, vii. 200, 201, 202.
—— v. Simpſon, vi. 391.
—— v. Smith, vii. 208. 213.
—— v. Strafford, v. 255.
—— v. Sturmey, vi. 641.
—— v. Sutton, ii. 17.
—— v. Templeman, iii. 185.
—— v. Thornton, v. 605. vii. 461.
—— v. Trubody, ii. 19.
—— v. Tutchin, i. 153.
—— v. Wakefield, iii. 786.
—— v. Williams, v. 146.
Regicides (The), caſe of, vi. 504. 508, 509. 541, 542.
Reg-Mother v. Challoner, v. 163.
Reignolds v. Vincent, vi. 735. 740.
Rejindez v. Randolph, ii. 55. 466.
Remington v. Stephens, vi. 135.
———— v. Taylor, vii. 48.
Rends v. Peck, ii. 276. 287.
Renew v. Axton, iv. 473. 685.
Reniger v. Fogaſſa, vi. 385. 387. 390.
Renneſey v. Parrot, iv. 441.
Repps v. Bonham, ii. 549.
Rereſby v. Newland, v. 819.
Reſcous v. Williams, ii. 591.
Reſvel v. Coats, i. 675.
Revell v. Johnſon, i. 739.
Revet v. Braham, iii. 655.
Rex v. Abbot, i. 561.
—— v. Abingdon (Mayor of), iv. 498. 515. 517.
—— v. Allen, vi. 434. vii. 202, 203.
—— v. Almon, iv. 458. v. 248.
—— v. Alresford, ii. 417.
—— v. Alſop, ii. 28.
—— v. Althoes, vi. 381.
—— v. Amery, ii. 26. 31. vii. 454.
—— v. Amies, iv. 566, 567.
—— v. Archer, vi. 334.
—— v. Arkwright, v. 592.
—— v. Armagh (Archbiſhop of), v. 389. vi. 381.
—— v. Armagh (Dean and Chapter of), iv. 506.
—— v. Armſtrong, vi. 676.
—— v. Aſhton, iv. 501.
—— v. Aſkew (Dr.), iv. 505.
—— v. Atkins, iii. 549.
—— v. Atkinſon, v. 304. 309.
—— v. Axbridge (Mayor, &c. of), iv. 514.
—— v. Aylett, v. 309.
—— v. Babb, ii. 635.
—— v. Badly, iv. 560.
—— v. Badouin, iii. 641.
—— v. Baggs, vi. 375.
—— v. Bailey, iii. 574.
—— v. Bainton, iii. 573.
—— v. Bakeſtraw, vii. 213.
—— v. Balme, iii. 500. 544.
—— v. Baltimore, i. 356.
—— v. Bambridge, vi. 429.
—— v. Bank of England, iv. 506.
—— v. Bankes, iv. 514.
—— v. Baptiſt Rebond, i. 327.
—— v. Barber, i. 286.
—— v. Barker, iv. 502.
—— v. Barlow, vi. 379.
—— v. Barnes, i. 611. ii. 681. iv. 577.
—— v. Barnfield, v. 577.
—— v. Barry, vi. 243.
—— v. Barwick, vii. 500.
—— v. Baſkerville, vi. 181. 517.
—— v. Baſs, i. 561.

Rex v. Bathurſt, iii. 248.
—— v. Baxter, iii. 570. iv. 454.
—— v. Bayley, iv. 452.
—— v. Bear, iv. 457. vi. 675.
—— v. Beardmore, i. 286.
—— v. Bedel (Inhabitants of), i. 513.
—— v. Bedingfield, iv. 454.
—— v. Bell, vi. 65.
—— v. Bellinger, ii. 17.
—— v. Belt, vi. 91.
—— v. Bennet, vi. 675.
—— v. Bennett and others, vi. 434.
—— v. Benſon, v. 568. vi. 650.
—— v. Berchett, vi. 380.
—— v. Berry, i. 572.
—— v. Betteſworth, i. 686. iii. 55. v. 508. v. 611.
—— v. Bewdley, i. 436.
—— v. Bewdly (Corporation of), vi. 654.
—— v. Bickerton, iii. 641. iv. 452.
—— v. Biddle, iii. 647.
—— v. Bigg, ii. 13.
—— v. Binſtead, iii. 646.
—— v. Bird, vi. 587.
—— v. Biſhop, iii. 574.
—— v. Biſſex, vi. 35.
—— v. Blagden, iii. 646. v. 380.
—— v. Blake, iii. 549.
—— v. Bland, i. 3.
—— v. Bland (Dr.), iv. 498.
—— v. Blaney, ii. 587.
—— v. Blatchford, vii. 460.
—— v. Bleaſdale, iii. 334.
—— v. Blower, iii. 562. iv. 502.
—— v. Blunt, v. 577. vi. 675.
—— v. Blythe, ii. 17.
—— v. Bodenham (Inhabitants of), iii. 500.
—— v. Bolten, i. 357. 562.
—— v. Bond, iii. 645. 646.
—— v. Bootie, iii. 549.
—— v. Boſworth, ii. 24[illegible].
—— v. Boudage, vii. 460.
—— v. Bowen, vi. 334.
—— v. Bowes, i. 358.
—— v. Boyall, iii. 549. vi. 394.
—— v. Bradford, vi. 110.
—— v. Braſier, ii. 577.
—— v. Bray, ii. 588.
—— v. Breton, i. 546.
—— v. Bridgman (Dr.), ii. 635.
—— v. Briſtow, iv. 510.
—— v. Britton, iv. 576.
—— v. Brooke, i. 358. iii. 502. 637. 643. 797.
—— v. Brotherton, iii. 573.
Rex v. Brough, iv. 754.
—— v. Broughton, ii. 588, 589. iv. 8.
—— v. Brown, iii. 646.
—— v. Buckland, ii. 675.
—— v. Budd, v. 225.
—— v. Burbage, iii. 422.
—— v. Burchett, i. 283.
—— v. Burdett, vii. 9.
—— v. Burell, iii. 124.
—— v. Burgum Andover, ii. 23.
—— v. Burke, vii. 498.
—— v. Burrard, ii. 672. 677.
—— v. Burrel (Dr.), v. 180.
—— v. Burton, v. 138.
—— v. Butler (Sir O.), iii. 110. vi. 111.
—— v. Caldwell, vii. 463.
—— v. Cambridge (Chancellor, &c. of), vii. 56.
—— v. Cambridge (Mayor, &c. of), ii. 16. iv. 514. 518.
—— v. Cambridge Univerſity, vii. 60.
—— v. Cann, iii. 645.
—— v. Canterbury (Guardians of Poor in), iv. 509.
—— v. Canterbury (Mayor, &c. of), ii. 23.
—— v. Carliſle (Biſhop of), iv. 502.
—— v. Carliſle (Mayor of), ii. 18.
—— v. Carmarthen (Burgeſſes of), vi. 643.
—— v. Carmarthen (Corporation of), iii. 644.
—— v. Carroll, i. 286.
—— v. Carter, ii. 15. iii. 644. 795. iv. 509.
—— v. Cartwright, vii. 51.
—— v. Catherine Hall (Maſter, &c. of), ii. 27. iv. 506.
—— v. Catherington, v. 20.
—— v. Cator, vi. 372.
—— v. Cauſey, i. 753.
—— v. Cawood, v. 486.
—— v. Chadderton (Inhabitants of), iii. 500. vii. 422.
—— v. Chalbury, iv. 570.
—— v. Chalke, ii. 19.
—— v. Chandler, iii. 334.
—— v. Chaplain, iv. 577.
—— v. Chapman, vi. 653.
—— v. Cheſter (Biſhop of), i. 356. ii. 27. iii. 381. iv. 506. 761. v. 602, 603. vi. 359.
—— v. Chetwynd, i. 356. v. 295.
—— v. Chicheſter (Biſhop of), i. 287. vi. 198.
—— v. Clapham, iv. 503. 518.
—— v. Clapp, iv. 569.

Rex

Rex v. Clark (Sir F.), v. 603. 609.
— v. Clarke, i. 68. 686. iii. 432. vii. 460.
— v. Clarke (James), iii. 438.
— v. Clarkſon, iii. 438.
— v. Clayton le Moors, vi. 358.
— v. Cliſton, i. 286.
— v. Clifton (Inhabitants of), vii. 122.
— v. Cogan, iii. 285.
— v. Colcheſter (Mayor of), iv. 506.
— v. Cole, vii. 387. 455.
— v. Coles, vi. 151.
— v. Collingburne, iv. 566. 568.
— v. Combrune, iii. 549.
— v. Cooper, vii. 416.
— v. Cornelius, ii. 635.
— v. Cornforth, iii. 408.
— v. Corum, vii. 422.
— v. Cotton, ii. 482. 734. vi. 35.
— v. Coventry (Mayor of), ii. 21, 22, 23.
— v. Cover, v. 213.
— v. Cowper, iii. 555.
— v. Cox, iii. 476. 802.
— v. Crackenthorpe, vii. 463.
— v. Croke, ii. 8. iii. 284.
— v. Croſsley, vii. 508.
— v. Croydon (Inhabitants of), iv. 503.
— v. Cumberland (Inhabitants of), vii. 413, 414.
— v. Curl, iii. 636. iv. 453.
— v. Dalton, i. 356.
— v. Daly, v. 565.
— v. Darby, iii. 549. 637.
— v. Davies, ii. 127. iii. 646. iv. 567.
— v. Davis, iv. 566. vi. 372. 675. vii. 455. 466.
— v. Dawbeny, iii. 645.
— v. Dawes, i. 323. iii 427.
— v. Day, iv. 510.
— v. Delaval (Sir F.), iii. 438. 637.
— v. Derby (Mayor, &c. of), ii 26.
— v. Derbyſhire (Juſtices of), iv. 508.
— v. Devonſhire (Earl of), v. 630.
— v. Dibbens, ii. 150.
— v. Dickin, iii. 645.
— v. Ditchingham, iv. 560.
— v. Dixon, iii. 550. v. 147.
— v. Doncaſter (Mayor of, &c.), ii. 18. 21. 26. iv. 519.
Rex v. Dorcheſter (Juſtices of), iii. 797.
— v. Douglas, vi. 430.
— v. Dowlin, v. 308. 309.
— v. Downes, iii. 646.
— v. Dryden, vi. 406.
— v. Dublin (Dean), i. 552.
— v. Dunage, iii. 549.
— v. Dunbar, ii. 524.
— v. Earbury, i. 607.
— v. Eaſt Knoyle, iv. 560.
— v. Eaſt Lidford (Inhabitants of), iii. 502.
— v. Eden, ii. 589.
— v. Edgar, iii. 647.
— v. Edwards, i. 286.
— v. Edyvean, i. 285.
— v. Egginton, i. 458.
— v. Elkins, i. 286. vi. 91.
— v. Ellis, ii. 17. 588.
— v. Elſee, v. 591.
— v. Elwell, iii. 249. 438.
— v. Ely (Biſhop of), iv. 505.
— v. Enes, iv. 452.
— v. Epiſc. Ceſtor, ii. 29.
— v. Epiſc. Dunelm, i. 27.
— v. Epiſc. Eliens, ii. 28, 29.
— v. Epiſc. Lincoln, ii. 30.
— v. Erle, iv 506.
— v. Eundem, iii 637.
— v. Evered, iv. 563. 565.
— v. Eveſham (Mayor, &c. of), iv. 498.
— v. Exeter (Earl), vii. 467.
— v. Exeter (Mayor of), iv. 521.
— v. Eyre, ii. 668. 677. vi. 103.
— v. Fairclough, vi. 759.
— v. Fairfax, iv. 569.
— v. Fearnly, iii. 573.
— v. Ferrers (Earl), iii. 432.
— v. Field, iv. 502.
— v. Fieldhouſe, iii. 547.
— v. Fielding, iii. 637. 802. v. 618.
— v. Filer, iii. 334.
— v. Filewood, iii. 643.
— v. Fiſher, iii. 573.
— v. Fitzgerald, iii. 438.
— v. Fitzwater (Lord), vi. 657.
— v. Fleet, iv. 570.
— v. Fletcher, ii. 581. vi. 319.
— v. Flint, iii. 555.
— v. Ford, ii. 589.
— v. Forreſt, iii. 797.
— v. Foſter, iii. 647.
— v. Fowler, ii. 666. v. 231. vi. 410.

Rex v. Fox, ii. 591. iii. 637. iv. 75.
—— v. Francis, iii. 644. 647. vi. 675.
—— v. Franklin, iii. 743.
—— v. Freeman, iii. 557. vi. 92.
—— v. Freſhford (Churchwardens of), iv. 509.
—— v. Fry, vii. 463.
—— v. Furſer, vi. 649. 656. 676.
—— v. Gailwick, i. 372.
—— v. Gamlingay (Inhabitants of), iii. 501.
—— v. Gardner, ii. 10. iii. 334.
—— v. Gaſt or Garth, vii. 207.
—— v. Gately, iv. 566.
—— v. Gaul, vii. 51.
—— v. Genge, i. 686.
—— v. Gilbert, vi. 676.
—— v. Gilham, vii. 469.
—— v. Gilliſ-r, iv. 579.
—— v. Gill, iii. 549. iv. 567.
—— v. Ginevar, vii. 413.
—— v. Glamorganſhire (Inhabitants of), i. 535.
—— v. Glaſtonry (Inhabitants of), vi. 390.
—— v. Glouceſter (Mayor of), iv. 505.
—— v. Godwin, iii. 645.
—— v. Goſper and Shire, ii. 488.
—— v. Goudge, i. 684.
—— v. Gough, vi. 655.
—— v. Gray's Inn, iv. 506.
—— v. Great Farringdon (Inhabitants of), vii. 441.
—— v. Green, vii. 461.
—— v. Greenwich, ii. 663.
—— v. Greenwood, i. 307. 356.
—— v. Griffith, ii. 56.
—— v. Grimes, ii. 17. iii. 647.
—— v. Groſvenor, iii. 641. v. 191. vi. 141.
—— v. Grundon, ii. 29.
—— v. Guerchy, i. 142.
—— v. Guilaford (Approved Men of), iv. 507.
—— v. Haalow, i. 174.
—— v. Haines, v. 295.
—— v. Hales, v. 295. vi. 645.
—— v. Hales Owen, iv. 566. 568.
—— v. Hall, i. 285. 612. iii. 573. iv. 457. v. 416. vi 395.
—— v. Hallam, v. 568.
—— v. Hammond, iii. 495.
Rex v. Hamſtall Ridwate, iii. 797. iv. 570.
—— v. Handy, v. 150.
—— v. Hanger, ii. 248.
—— v. Hankey, iii. 641.
—— v. Harburton, iv. 570.
—— v. Hare, v. 570.
—— v. Hare and Man, v. 477. vi. 120.
—— v. Harman, i. 561.
—— v. Harris, i. 599. iii. 544. vi. 394.
—— v. Harriſon, i. 548. vii. 387.
—— v. Harſey, i. 607.
—— v. Hart, iii. 743.
—— v. Hartford (Inhabitants of), iii. 502.
—— v. Harvey, vi. 323.
—— v. Harwood, i. 599. ii. 248.
—— v. Haſwell, iii. 641. iv. 452.
—— v. Hawkes, i. 69.
—— v. Hawkeſwood, vi. 363.
—— v. Hayes, iii. 571. vii. 20.
—— v. Hearle, iii. 646.
—— v. Heaſeman, iv. 566, 567.
—— v. Heath, ii. 16.
—— v. Heaven, ii. 25.
—— v. Hebden, iii. 647.
—— v. Hedon (Mayor of), iii. 646.
—— v. Hellier, vi. 434.
—— v. Hendon (Lord of the Manor of), i. 735.
—— v. Hendricks, iii. 641.
—— v. Henſey, i. 607.
—— v. Hertford, iii. 643.
—— v. Heydon, ii. 635.
—— v. Heyward, vi. 438. 442.
—— v. Hide and others, vi. 191.
—— v. Higgins, iii. 732.
—— v. Highnam, iv. 560.
—— v. Hill, iii. 334. v. 255.
—— v. Hindringham, iv. 563.
—— v. Holbeck, vi. 360.
—— v. Holland, i. 283. iii. 561. 637. vii. 89 135. 390.
—— v. Holt, ii. 609. vi. 655, 656.
—— v. Holy Trinity in Wareham, ii. 663.
—— v. Horne, iv. 454.
—— v. Horſley, i. 286.
—— v. Horton, iv. 509.
—— v. Hoſkins, i. 284.
—— v. Hoſtmen (Fraternity of), ii. 635.
—— v. Howard (Lord George), vi. 439.

Rex v. Howell, iii. 643.
—— v. Hoyte, vii. 420.
—— v. Huggins, ii. 589. vi. 600. vii. 20.
—— v. Hunt and another, vi. 347.
—— v. Hunter, vii. 46.
—— v. Hutchins, vi. 443.
—— v. Ingram, iv. 511.
—— v. Jackſon, i. 613. iii. 637. 802. vii. 414.
—— v. Jarvis, iii. 334.
—— v. Jenkinſon, i. 567.
—— v. Jenneam, iv. 452.
—— v. Jetherell, vii. 463.
—— v. Jetherell (Thomas), iii. 124.
—— v. Johnſon, iii. 46. 438. 547. 747. vi. 643.
—— v. Johnſon and others, iv. 508.
—— v. Jolliffe, i. 101.
—— v. Jones, i. 26. iii. 286. 549. 637.
—— v. Jotham, iv. 502.
—— v. Judd, i. 356, 357. 613.
—— v. Keat, ii. 667.
—— v. Kemp, v. 590. 602. 720.
—— v. Kendall, i. 607. 611.
—— v. Keſſel, iii. 427.
—— v. King, i. 561. iii. 574.
—— v. Kingſton (Mayor of), iv. 499.
—— v. Kinnerſley, iii. 549. 637.
—— v. Knight, iv. 451, 452.
—— v. Knollys, ii. 118. vi. 635.
—— et Reg. v. Knollys, v. 635.
—— v. Lacy and Parker, vi. 523.
—— v. Ladſingham, vii. 3.
—— v. Langham, iv. 570.
—— v. Langley, iv. 573.
—— v. Lanvair Duffryn Clwyd, iv. 560. vi. 360.
—— v. Larwood, v. 452.
—— et Reg. v. Larwood, vi. 141.
—— v. Latham, iii. 644, 645.
—— v. Layton, iii. 249.
—— v. Leap, iii. 574.
—— v. Leginham, vi. 393.
—— v. Leiceſter (Mayor of), ii. 25.
—— v. Leighton, iv. 561.
—— v. Lewis, i. 284. iv. 509. vi. 60. 434.
—— v. Lime Regis, iv. 519. 521.
—— v. Lincoln (Biſhop of), iv. 505.
—— v. Lincoln (Mayor of), iv. 578.
—— v. Liſten, iii. 344.
—— v. Little, ii. 19.
—— v. Liverpool (Mayor, &c. of), ii. 18, 105.
Rex v. Lloyd, v. 212.
—— v. Loggan, iii. 109.
—— v. London (Biſhop of), ii. 418. iv. 502. v. 530. vi. 383.
—— et Reg. v. London (Biſhop of) and others, vii. 481.
—— v. London (City of), iv. 504.
—— v. London (Mayor of), ii. 589. iv. 504.
—— v. Lone, i. 684. iii. 549.
—— v. Lookup, iii. 565. vi. 597.
—— v. Lord, iii. 249.
—— v. Lowther (Sir William), iii. 645.
—— v. Loxdale, iii. 798. vi. 382.
—— v. Lubbenham (Inhabitants of), i. 513.
—— v. Luckup, iii. 343.
—— v. Lyme Regis (Mayor of), i. 167.
—— v. Lyme Regis, ii. 24.
—— v. Lynn, iii. 549.
—— v. Mackintoſh, iii. 430.
—— v. Magrath, i. 356.
—— v. Malland, vi. 394.
—— v. Mancot, iii. 333.
—— v. Mannam, iv. 558.
—— v. Marſden, iii. 110. 643. 645.
—— v. Maſon, iii. 323.
—— v. Maſters, iv. 452.
—— v. Mathews, iii. 563. 571.
—— v. Mawbey, vi. 641. 656. vii. 468.
—— v. Mead, i. 174. ii. 635. iii. 420. 438.
—— v. Mein, iii. 645.
—— v. Middleton, iv. 459. vi. 36.
—— v. Middlezoy (Inhabitants of), ii. 649.
—— v. Midhurſt (Borough of), iv. 499.
—— v. Midlam, ii. 45.
—— v. Mierre, i. 686.
—— v. Miles, iii. 641. iv. 452. vii. 513.
—— v. Miller, ii. 17. vii. 420.
—— v. Minify, vi. 91.
—— v. Monday, ii. 17. 21.
—— v. Monkhouſe, vi. 56.
—— v. Montague (Lord), iv. 499.
—— v. Morgan, iii. 571. 643. 800. v. 300. vi. 371. 395.
—— v. Morris, v. 309. ii. 15.
—— v. Mortlock, iii. 645.
—— v. Munnery, ii. 667.
—— v. Munoz, iii. 323.
—— v. Muſters, v. 570.
—— v. Myddleton, vii. 469.

Rex v. Myers, iii. 476.
—— v. Nathan, i. 407. 612.
—— v. Nettle, &c. vi. 430.
—— v. Newling, iii. 646.
—— v. Newſham, ii. 17. iv. 514.
—— v. Nicholls, ii. 55.
—— v. North, vi. 418.
—— v. North (Lord) and Grey, iii. 430.
—— v. Northampton (Juſtices of), i. 203.
—— v. Northowram, iv. 560.
—— v. Norton, i. 356.
—— v. Norwich (Biſhop of), vi. 198.
—— v. Norwich (Dean and Chapter of), iv. 506.
—— v. Norwich (Mayor, &c. of), iv. 516.
—— v. Nottingham (Earl), v. 525.
—— v. Nottingham (Mayor, &c. of), vi. 641.
—— v. Nudigate, vii. 33.
—— v. Nunez, ii. 588, 589.
—— v. Nutley, ii. 663.
—— v. Nutt, iv. 458.
—— v. Old Arlesford, v. 319.
—— v. Oliver, vi. 55, 56.
—— v. Orme, iv. 454.
—— v. Oſborn, i. 566. iii. 549. iv. 454.
—— v. Oxendon, iv. 502.
—— v. Packington, vii. 460.
—— v. Paget, v. 624.
—— v. Palmer, iii. 637. 802.
—— v. Paris, ii. 588.
—— v. Parker, vi. 330.
—— v. Parnell (Doctor), ii. 635.
—— v. Paſſmore, ii. 31.
—— v. Pawlett, iii. 422.
—— v. Pawlin, vi. 374. 393.
—— v. Payne, iv. 457.
—— v. Payton, vii. 457.
—— v. Peach, iii. 641.
—— v. Peacock, iii. 645.
—— v. Pearſon, v. 300.
—— v. Peck, iv. 579.
—— v. Peckham, i. 284.
—— v. Pember, vi. 91.
—— v. Pemberton, iii. 570. iv. 577.
—— v. Penderryn (Inhabitants of), iii. 501.
—— v. Penſax, vi. 394.
—— v. Pergam, v. 204.
—— v. Perrott, i. 406.
—— v. Perry, iii. 742. v. 240.
—— v. Peters, vi. 658.
—— v. Pewtreſs, iii. 573.
Rex v. Pexley, vii. 213.
—— v. Philips, v. 129. 453.
—— v. Phillips, ii. 55. iii. 641. 646.
—— v. Phyſicians (College of), iv. 498.
—— v. Piddlerenthide, ii. 418.
—— v. Piercy, ii. 587.
—— v. Pilborough, iv. 459.
—— v. Pixley, i. 436.
—— v. Plummer, vii. 7. 37.
—— v. Plunkett, i. 286.
—— v. Plympton, iii. 637.
—— v. Pococke, iii. 549. 802.
—— v. Poland, ii. 44.
—— v. Ponſonby, ii. 25. iii. 645.
—— v. Portington, i. 581.
—— v. Portſea, iv. 561.
—— v. Powell, iii. 645.
—— v. Pratt, ii. 248.
—— v. Price, iii. 798. vii. 412.
—— v. Prieſt, vi. 381.
—— v. Pritchard, vi. 35.
—— v. Proſſer, ii. 584.
—— v. Pullen, iii. 334.
—— v. Py, iv. 450.
—— v. Pyke, iii. 645.
—— v. Raines (Sir Richard), iii. 7. iv. 507.
—— v. Raines, vii. 185.
—— v. Rayner, i. 360.
—— v. Reeding, ii. 579.
—— v. Reeks, vi. 359.
—— v. Rees, iv. 501.
—— v. Remnant, i. 356. 613.
—— v. Revel, iii. 549. 801, 802.
—— v. Reynolds, vii. 467.
—— v. Rhodes, ii. 588. iii. 34.
—— v. Richardſon, ii. 19. 21. 26.
—— v. Richmond (Duke of), vii. 470.
—— v. Ridpath, i. 360.
—— v. Ring, iii. 284.
—— v. Ripon, ii. 201.
—— v. Rippon (Mayor, &c. of), iv. 499. 515.
—— v. Riſpal, iii. 549.
—— v. Ritſon, i. 560.
—— v. Roberts, iii. 640. iv. 452. 455. v. 574. vi. 250.
—— v. Robinſon, iii. 544. 549. 641. vi. 394. vii. 387.
—— v. Rocheſter (Biſhop of), iii. 430.
—— v. Roddam, iii. 422. 431.
—— v. Roe, vi. 96.
—— v. Rogers, i. 542. iii. 645.
—— v. Rook, ii. 579. v. 211.
—— v. Routledge, i. 684.
—— v. Rowledge, vii. 57. 59.

Rex v. Rudd, i. 198. 356.
— v. Rudge, i. 284.
— v. Rye (Mayor, &c. of), iv. 517.
— v. Sadler, vi. 653.
— v. Sainſbury, iii. 549, 799, 800.
— et Reg. v. St. John's College, ii. 29, 30.
— v. St. Margaret's, Lincoln, iv. 569.
— v. St. Nicholas, Nottingham, iv. 569, 570.
— v. St. Paul's, Bedford, vi. 360.
— v. St. Peter's, Cheſter, iv. 560.
— v. St. Petrox in Dartmouth, iv. 560, 561. 563. 570. vi. 360.
— v. Saliſbury, i. 356.
— v. Saltern, iv. 569, 570.
— v. Sambourn (Inhabitants of), ii. 654.
— v. Sargent, vii. 470.
— v. Sargent (John), ii. 25.
— v. Sarmon, iii. 549.
— v. Sayer, v. 472.
— v. Scammonden (Inhabitants of), ii. 654.
— v. Scarſdale and Dupplin, i. 607.
— v. Sedley, iii. 549.
— v. Seton (Inhabitants of), vii. 414.
— v. Sewers Commiſſioners in Yorkſhire, i. 561.
— v. Sharples, iii. 549.
— v. Sharpneſs, i. 103.
— v. Shebbeare, iii. 438.
— v. Sheffield (Inhabitants of), iii. 498.
— v. Shelly, ii. 635.
— v. Shepherd, iii. 645.
— v. Shiever, iii. 431.
— v. Shrewſbury Juſtices, i. 561.
— v. Shrewſbury (Mayor of, &c.), ii. 18.
— v. Simons, vi. 661. vii. 19.
— v. Simpſon, iii. 43. 334.
— v. Smith, i. 611. iii. 323. 438. 502. 549. 571. 646. 764.
— v. Smithies, i. 285.
— v. Sneller, iii. 426.
— v. Solgard, i. 751. iii. 636.
— v. Southerly, vi. 35.
— v. South Lynn, ii. 584.
— v. Sparrow, i. 561. vi. 377.
— v. Spearing, iii. 645. 647.
— v. Spelman, vi. 418.
— v. Spencer, i. 546.
— v. Spriggins, iii. 641.
Rex v. Stacey, iii. 646.
— v. Stafford (Marquis of), iv. 506.
— v. Stafford (Mayor, &c. of), iv. 498. v. 142.
— v. Stanley and his Bail, vi. 437.
— v. Stapleton, ii. 487.
— v. Starling and other Brewers of London, iii. 637.
— v. Startifant, vii. 399.
— v. Stephens, iii. 645. vi. 413.
— v. Stevens, iii. 798.
— v. Steyning (Inhabitants of), iii. 502.
— v. Stokes, i. 285.
— v. Ston, iii. 549.
— v. Stone, ii. 587. iii. 334. vi. 547. 549. 676.
— v. Strangeways, ii. 18.
— v. Stratton, iv. 558.
— v. Street, iv. 506.
— v. Stroughton, iii. 555. v. 397.
— v. Stuart, vi. 650.
— v. Stubbs, vi. 377.
— v. Surgeons Company, i. 549.
— v. Sutton, iii. 574.
— v. Symonds, iii. 641. 646. 803.
— v. Tarrant, iii. 636.
— v. Taunton St. James's (Churchwardens of), iv. 518.
— v. Taylor, ii. 21. 24. iii. 636. v. 123.
— v. Tew, i. 306.
— v. Thead, ii. 667. 677. vi. 413.
— v. Thompſon, iii. 334. vi. 645.
— v. Tilly, ii. 587.
— v. Tippin, v. 224.
— v. Tod, iv. 509.
— v. Toley, vi. 645.
— v. Toller, v. 577.
— v. Tolpuddle, ii. 418.
— v. Topham, iv. 449.
— v. Tothill, ii. 487.
— v. Townſhend, iii. 501.
— v. Tranter, v. 125.
— v. Trevilian, iii. 574. iv. 569.
— v. Truebody, ii. 24.
— v. Tucker, iii. 573. vi. 96.
— v. Tuf , iii. 285.
— v. Tunſtead, iv. 570.
— v. Turkey Company, iv. 508. 578.
— v. Turlington, iii. 438.
— v. Twine, v. 607.
— v. Upton, vii. 208.
— v. Urlyn, vii. 21.
— v. Uttoxeter, i. 561.

Rex v. Vandeleer, iv. 567.
—— v. Varlo, ii. 17. iii. 645.
—— v. Vaughan, i. 286. iii. 636.
—— v. Vincent, iii. 34.
—— v. Wade, iii. 124.
—— v. Wagſtaffe, iv. 570.
—— v. Walker (Dr.), iv. 499. 510.
—— v. Walker, vii. 207.
—— v. Wallis, iii. 643.
—— v. Walton Dale, iv. 561.
—— v. Wanhope, iii. 256.
—— v. Ward, iii. 141. 280. iv. 498. 503. 516.
—— v. Warden of the Fleet, ii. 136.
—— v. Wardroper, iii. 645.
—— v. Warley, vi. 358.
—— v. Warminſter (Inhabitants of), i. 570.
—— v. Warre, iii. 573.
—— v. Warrington, iii. 732. vi. 162.
—— v. Watkinſon, ii. 580.
—— v. Watſon, iii. 636. iv. 451.
—— v. Webb, iii. 636. v. 568.
—— v. Webſter, iii. 637. 641. 802.
—— v. Weekes, vi. 95.
—— v. Wells (Corporation of), v. 210.
—— v. Weobly (Churchwardens of), iv. 509.
—— v. Weſton, iii. 573.
—— v. Whaley, ii. 28.
—— v. Wheatly, iii. 549.
—— v. Wheatman, iii. 334.
—— v. Wheeler, i. 229. 286, 287.
—— v. Whitbread, i. 561. iii. 800.
—— v. Whitchurch, iv. 558.
—— v. White, i. 84, 284. ii. 15. iii. 549.
—— v. Whiting, ii. 588, 589.
—— v. Whitwell, iii. 645.
—— v. Wigan (Inhabitants of), iii. 641.
—— v. Wigg, iii. 574.
—— v. Wildman, iv. 499.
—— v. Wilkes, i. 350. 607. iii. 635. iv. 453. v. 217. 247. 254.
—— v. Wilkins, vi. 91.
—— v. Willett, iii. 641.
—— v. Williams, iii. 573, 643. 645. 685. vi. 380.
—— v. Williamſon, vii. 414.
—— v. Willis, iv. 514.
—— v. Willis and Brown, vii. 46.
—— v. Wilſon, i. 103.
—— v. Wilts (Juſtices of), iii. 501. iv. 509.
—— v. Windham, ii. 29.
Rex v. Winton, iii. 426. 432. 435.
—— v. Withers, ii. 21.
—— v. Wiſeman, vi. 327.
—— v. Woodlands, ii. 585.
—— v. Woodrow, iv. 514. vi. 144.
—— v. Woodward, vi. 688.
—— v. Woolſtanton, iv. 570.
—— v. Woolſton, iii. 636. iv. 453. vi. 393.
—— v. Worceſter (Biſhop of), vi. 200.
—— v. Worſenham, ii. 635.
—— v. Wrexham (Churchwardens of), iv. 516.
—— Wright, i. 187. ii. 52. iii. 544. 574. 636. vi. 394.
—— v. Wyatt, iii. 334.
—— v. Wyke, iii. 797.
—— v. Wynd, iii. 565.
—— v. Wyndham (Dr.), ii. 13.
—— v. Wyndham, i. 353. iv. 509.
—— v. Yandell, v. 239, 240. 242. 247.
—— v. Yarmouth, iv. 560. vi. 360.
—— v. Yates, ii. 26.
—— v. York (Archbiſhop of), iv. 518.
—— v. York (Mayor of), iv. 498. 518, 519.
—— v. Young, iii. 802.
—— v. Younger, iii. 476.
Rey v. Stephens, i. 497. vi. 687.
Reynell v. Heal, v. 456.
Reyniſh v. Martin, iv. 414.
Reynold's (Sir George) caſe, i. 118.
Reynold v. Edwards, vii. 420.
Reynolds v. Buckle, v. 408. vi. 44.
——— v. Burling, vi. 137.
——— v. Clarke, vi. 556, 557.
——— v. Clayton, vii. 191. 198.
——— v. Hay, v. 653.
——— v. Perkins, v 44.
Rheeder v. Ower, iv. 393.
Rhetorick v. Chappel, ii. 495.
Rhodes's caſe, ii. 589.
Rice's caſe, ii. 456.
Rice v. Serjeant, iii. 297.
—— v. Shute, i. 19. v. 375. vi. 657.
Rich's caſe, ii. 393.
Rich v. Coe, iv. 615.
—— v. Doughty, vi. 571.
—— (Lord) v. Frank, iii. 23.
—— v. Jackſon, ii. 659.
—— v. Makepeace, vii. 262.
—— v. Pilkington, iv. 521.
—— v. Player, iii. 732. vi. 162.
—— v. Wilſon, iv. 400.
Richards v. Acton, vi. 59.

Richards *qui tam* v. Brown, i. 157.
——— v. Hodges, i. 666. v. 327. 451.
——— v. Seley, iv. 132.
——— v. Turner, ii. 42.
Richardſon's caſe, v. 665.
Richardſon, *ex parte*, i. 455.
——— v. Atkinſon, vi. 681.
——— v. Barnard, ii. 509. v. 667. vi. 166.
——— v. Bradſhaw, i. 391. 459.
——— v. Chancey, i. 237.
——— v. Chapman, iv. 339. vii. 140.
——— v. Deſborough, ii. 172. iv. 447.
——— v. Elphinſtone, iv. 371.
——— v. Goodwin, i. 461. iv. 608.
——— v. Greeſe, iv. 384.
——— v. Jelly, vi. 118.
——— v. Rickman, i. 282. ii. 290.
——— v. Sydenham, vii. 488.
——— v. Walker, vii. 54.
——— v. Williams, vi. 657.
Richman v. Cox, vi. 620.
Richmond v. Butcher, iii. 63. vi. 22.
——— v. Tayleur, iii. 614.
——— (Duke of) v. Wiſe, vii. 13.
Rickfield v. Udall, vi. 404.
Rickman v. Morgan, iv. 367.
Rico v. Galtier, v. 524.
Ride v. Atwick, iii. 681.
Rider v. Bickerſton, vii. 182.
——— v. Smith, i. 84. v. 336.
——— v. Wager, iii. 87. iv. 355, 356. v. 684. vii. 368. 373.
Ridges v. Mills, vi. 239.
——— v. Morriſon, iv. 361.
Ridgway's caſe, v. 457.
Riding v. Edwin, vi. 163.
Ridler v. Ridler, iii. 539.
Ridley v. Pawnal, v. 184.
Ridout v. Brough, i. 443. vi. 137.
——— v. Johnſon, ii. 585.
——— v. Lewis, i. 482.
——— v. Pain, iv. 253. 328.
——— v. Plymouth (Earl of), iv. 287.
——— v. Wheeler, vi. 421, 422.
Rigden v. Hedges, ii. 179.
——— v. Valliere, i. 731. iii. 679. 685.
Right v. Price, vii. 313.
——— v. Proctor, ii. 429. iv. 161.
——— v. Ruſſell, iv. 255.
——— v. Sidebotham, iv. 255.
Right v. Thomas, iv. 147.
Riley v. Adams, vi. 195.
——— v. Parkhurſt, vi. 614.
Ringſtead v. Laneſborough, i. 386.
Rios v. Belliſante, i. 326.
Rippon v. Dawding, i. 507.
Riſby v. Wentworth, vi. 200.
Riſden v. Inglet, i. 216.
Riſney v. Selbey, i. 80. iii. 296.
River's (Earl) caſe, vi. 413.
Rivers's caſe, iv. 328.
Rivers v. Couſin, v. 628.
——— v. Lite, vi. 234.
Rivetts v. Godſon, vi. 84.
Roach v. Garvan, iii. 410, 411. 413.
——— v. Hammond, iv. 350.
Roades v. Barnes, i. 43. 281.
Robards v. Stoker, ii. 93.
Robbins v. Standard, ii. 261.
Robert's (Dr.) caſe, iv. 505.
Roberts's caſe, v. 650.
Roberts, *ex parte*, i. 414. iii. 528.
——— v. Appleton, vii. 518.
——— v. Bennet, v. 685.
——— v. Cadd, iv. 621.
——— v. Cook, ii. 440.
——— v. Dixon, iii. 369.
——— v. Dixwell, ii. 222. iv. 269. vii. 137. 179.
——— v. Downes, vi. 652.
——— v. Ewer, iv. 640. 644.
——— v. Founereau, iv. 651.
——— v. Harnage, v. 155. 163.
——— v. Higman, iv. 343.
——— v. Hughes, vi. 464.
——— v. Kingſley, i. 113. vii. 169.
——— v. Marries, iv. 214.
——— v. Marriot, v. 450.
——— v. Middleton, iii. 109.
——— v. Newbold, i. 208.
——— v. Peake, iv. 697.
——— v. Piſing, vi. 108.
——— v. Roberts, iv. 549.
——— v. St. John, i. 112.
——— v. Thomas, vi. 176.
——— v. Tremoyl, vii. 207.
——— v. Trenayne, vi. 190. 198, 199.
——— v. Wetheral, ii. 318.
——— v. Wilkin, v. 524.
——— v. Young, vi. 455.
Robin's caſe, ii. 56.
Robins v. Crutchley, ii. 395. v. 449.
Robinſon's caſe, iv. 260. v. 440. vi. 518.
Robinſon v. Ampton, ii. 63. 81.
——— v. Bell, iii. 388.

Robinſon

Robinſon *v.* Bland, i. 276. ii. 269. iii. 343. vi. 768.
——— *v.* Button, iii. 389.
——— *v.* Cumming, i. 35. 183. iii. 242.
——— *v.* Davis, i. 238.
——— *v.* Daviſon, v. 62.
——— *v.* Drybrough, vi. 363.
——— *v.* Duſgale, iv. 340.
——— *v.* Fitzherbert, iv. 321.
——— *v.* Gee, iii. 86. v. 23. 26.
——— *v.* Hardcaſtle, i. 113.
——— *v.* Harrington, v. 61.
——— *v.* Jago, v. 17.
——— *qui tam v.* Lequeſne, vi. 674.
——— *v.* Litton, vii. 264.
——— *v.* May, vii. 205.
——— *v.* Pett, iii. 43. vii. 180.
——— *v.* Railey, v. 381. 444. 462.
——— *v.* Robinſon, iv. 266. 291.
——— *v.* Taylor, vii. 142. 144.
——— *v.* Tonge, iii. 87. 468.
——— *v.* Waller, ii. 353.
——— *v.* Webb, ii. 248.
Robſon *v.* Culze, i. 455.
——— *v.* Eaton, i. 261. 296.
Roche *v.* Cary, i. 327.
Rochell *v.* Steedle, vii. 18.
Rocheſter's (Biſhop of) caſe, iv. 115.
Rock *v.* Leighton. iii. 87.
Rockingham (Marquis of) *v.* Griffith, vi. 194.
——— (Lord) *v.* Penrice, vi. 23.
Rodgers *v.* Maylor, iv. 648.
Rodney *v.* Strode, ii. 273.
Roe *v.* Aſhburner, iv. 164.
—— *v.* Avis, iv. 327.
—— *v.* Baldwere, vii. 126. 442.
—— *v.* Bolton, iv. 255.
—— *v.* Collis, iv. 265.
—— *v.* Doe, ii. 408. 454.
—— *v.* Doe *on dem.* Cholmondly, vi. 644.
—— *v.* Ellis, ii. 412.
—— *v.* Exeter (Biſhop of), vi. 749.
—— *v.* Grew, iv. 278.
—— *v.* Griffith, v. 729. vii. 374.
—— *v.* Hanway, ii. 635.
—— *v.* Harriſon, iv. 220.
—— *v.* Hickes, i. 724.
—— *v.* Hodgſon, iii. 406.
—— *v.* Jones, i. 250. iv. 250.
—— *v.* Lees, ii. 241.
—— *v.* Lowe, ii. 430. vii. 418.
—— *v.* Mitton, iii. 319.
—— *v.* Parker, ii. 632.
Roe *v.* Perkins, ii. 597.
—— *v.* Popham, ii. 656. vii. 88.
—— *v.* Quartley, v. 729, 730.
—— *v.* Tranmer, iii. 393.
—— *v.* Ward, vii. 488.
—— *v.* Wilkinſon, iv. 181. 192.
Roebuck *v.* Dean, vii. 472.
——— *v.* Hammerton, iv. 674.
Rogers, *ex parte*, i. 449.
——— *v.* Berkmire, ii. 347.
——— *v.* Briggs, iv. 255.
——— *v.* Davis, iv. 660.
——— *v.* Mayhoe, vi. 420.
——— *v.* Reeves, i. 275. vi. 181.
——— *v.* Rogers, vii. 146.
——— *v.* Stevens, iv. 730, 731.
Roles *v.* Roſewell, ii. 84.
Rolfe *v.* Budder, i. 482.
—— *v.* Caſlon, vii. 409.
Rolleſton *v.* Hibbert, i. 435. iv. 747.
Rollin *v.* Mills, i. 326.
Rolt and another *v.* Litchfield (Biſhop of), vi. 201.
Rolt *v.* Somerville, vii. 291.
Rolvend's (Vicar of) caſe, ii. 617.
Rolwell *v.* Vaughan, i. 80.
Rondeau *v.* Wyatt, i. 117. 123.
Rook's caſe, ii. 212.
Rook *v.* Warth, vii. 154.
Rooke, *ex parte*, i. 419. 451.
——— *v.* Rooke, iv. 325.
Rooket *v.* Gomerſel, vi. 723.
Rookwood's caſe, vi. 545.
Roop *v.* Scritch, ii. 39.
Roote *v.* Molyn, vi. 230.
Roper *v.* Lloyd, vi. 44.
—— *v.* Radcliffe, vii. 365.
—— *v.* Radclyffe, v. 277. 281.
—— *v.* Streater, v. 595.
Rorke *v.* Dayrell, i. 436. ii. 735.
Roror *v.* Eſcort, ii. 470.
Roſcarrick *v.* Barton, v. 44.
Roſe's caſe, vii. 430.
Roſe *v.* Aiſtrop, ii. 550.
—— *v.* Bartlett, iv. 328.
—— *v.* Chriſtfield, vi. 427.
—— *v.* Green, i. 396, 397.
—— *v.* Hill, iii. 685.
Roſs *v.* Ewer, iv. 244.
—— *v.* Hodges, i. 221.
—— *v.* Hunter, iv. 644, 645.
—— *v.* Levett, ii. 514.
—— *v.* Roſs, i. 105. 725. ii. 553.
—— *v.* Thwaite, iv. 632.
—— *v.* Walker, iv. 620.
Roſſe's caſe, v. 375. vii. 18.

Roſſe v. Hodges, i. 221.
—— v. Pie, i. 678. vi. 419. 439.
Roſwell's caſe, vii. 287.
Roſwell v. Every, vii. 139.
Rotch v. Edie, iv. 643.
Rothwell v. Huſſey (Sir Cha.) iv. 137.
Rottenhoffer v. Lenthall, vi. 420.
Round v. Hope Byde, i. 396.
Rous v. Etherington, ii. 461. 503.
—— v. Noble, iii. 8.
Rouſe v. Bardin, iii. 495.
—— v. Paterſon, vi. 59.
Routledge v. Dorrell, iv. 319.
Row v. Dawſon, i. 412. 435.
—— v. Huntington, iv. 173. vii. 7.
Rowden v. Maltſter, i. 710.
Rowe v. Bellaſeys, vi. 123. vii. 193.
Rowell v. Walley, v. 31.
Rowlandſon, *ex parte*, i. 460, 461.
Rowley's caſe, v. 124.
Rowning v. Goodchild, i. 76. 558.
Royden v. Batty, vi. 482.
Royſton v. Cordary, ii. 290.
—— v. Eccleſton, ii. 419.
Rudd v. Berkenhead, iv. 482.
Rudder v. Price, ii. 281. 287. v. 350.
Ruddock's caſe, v. 703. vi. 403. 405.
Rudge v. Birch, i. 249. v. 163. vi. 137.
—— v. Thomas, iv. 90. 93.
Rudiard v. Miller, i. 652.
Ruding v. Newel, iv. 522.
Rudley v. Egglesfield, ii. 185.
Rudſtone v. Anderſon, vii. 345.
Rudyard's caſe, iii. 434. vi. 441.
Ruiſhbrook v. Puſanies, v. 385.
Rumball v. Murray, vii. 392.
Rumbold v. Rumbold, vii. 447.
Ruſh v. Baker, vi. 691.
—— v. Oxford (Chancellour, &c. of), vii. 59.
Ruſher v. Hurdis, vii. 391.
Ruſholm v. Chapman, v. 472.
Ruſhton v. Aſpinall, iv. 734.
Ruſhworth's caſe, vii. 430.
Ruſhworth v. Courier, ii. 616.
Ruſſel's (Lady) caſe, v. 204. 785.
Ruſſel v. Ball, vi. 660. 665.
—— v. Broker, v. 385.
—— v. Corne, i. 244. 502. iv. 552. vi. 562.
—— v. Hammond, iii. 316.
—— v. Langſtaffe, iv. 710.
—— v. Lee, ii. [illegible]
—— v. More, [illegible]
—— v. Smith, [illegible]
Ruſſell's caſe, [illegible]
Ruſſell v. Boheme, iv. 672.
—— v. Darwin, ii. 79. iv. 230.
—— v. Devon (the Men of), i. 50.
—— v. Palmer, i. 93.
—— v. Ruſſell, 44. 122. 412. 442. ii. 93.
Ruſt v. Cooper, i. 436.
Ruſton v. Aſpinall, vii. 43.
Rutherford v. Scott, iii. 438.
Rutland's (Count de) caſe, iv. 87.
—— (Counteſs of) caſe, iii. 618. vi. 680. vii. 91. 259.
Rutland (Duke of) v. Hodgſon, vi. 447. 454.
—— (Duke of) v. Rutland (Ducheſs of), ii. 655. iii. 71.
—— (Counteſs of) v. Rutland (Earl of), vii. 31.
Rutter v. Hereford (Biſhop of), vii. 62.
—— v. Miles, ii. 426.
—— v. Redſtone, ii. 467.
Ryal v. Rowles, i. 434, 435. vi. 381.
—— v. Ryal, vii. 143.
Ryall v. Larkin, i. 443. vi 136.
—— v. Rolle, iv. 353.
Rybot v. Buckingham, vi. 179.
—— v. Peckham, ii. 721.
Ryding v. Edwin, ii. 520.
Rye v. Croſſman, vii. 45.
Ryley v. Hicks, iv. 219.
Ryſwicke, *ex parte*, i. 420.

S.

Sabbarton v. Sabbarton, iv. 297.
Saccar's caſe, vii. 267.
Sacheveral v. Frogate, iii. 62. vi. 23.
—— v. Porter, i. 618. iii. 385. 397.
—— v. Sacheveral, ii. 628.
Saddington v. Kinſman, i. 432. 481.
Sadgrove v. Kirby, vii. 416.
Sadler v. Buſh, v. 57.
—— v. Hobbs, iii. 31. vii. 183, 184.
Sadlers (Company of) v. Badcock, iv. 676.
Saffin's caſe, iii. 207. iv. 196. 479.
Sagittary v. Hyde, iii. 86.
St. Alban's (Abbot of) caſe, v. 675.
—— (Duke of) v. Shore, ii. 93. v. 338.
St. Aubin v. Cox, vii. 384.
St. Bar v. Williams, vi. 656.
St. Clement's (Inhabitants of) v. St. Andrew's (Inhabitants of), vi. 373.
St. David's (Biſhop of) caſe, v. 649.
St. John's caſe, vi. 159.
St. John (Lord) v. Abbot, vii. 12.
—— v. Comyn, v. 476.

St.

St. John *v.* Halford, v. 81.
——— *v.* Pettit, iv. 96.
——— *v.* Turner, iii. 218. v. 93.
St. John's College (Preſident, &c. of) *v.* Norris (Lord), iv. 12.
——— College *v.* Toddington, ii. 29. v. 661.
St. Leger *v.* Adams, vii. 337.
——— *v.* Pope, ii. 287.
St. Nicholas *v.* St. Peter's, Ipſwich, iv. 563.
St. Paul's (Dean of) *v.* Capel, vi. 423.
——— (Dean and Chapter of) *v.* Capell, i. 333.
——— (Canons of) *v.* Crickett, vii. 520.
St. Saviour's (Southwark), caſe of, iv. 558.
Saliſbury's (Biſhop of) caſe, iii. 120. v. 181. 183. vii. 259.
——— (Earl) caſe, i. 355.
Saliſbury (Lord) *v.* Arthur (Charles), vi. 100.
——— (Earl) *v.* Bennet, i. 643. iv. 417.
——— *v.* Hurd, i. 716. ii. 399.
——— *v.* Lambe, iii. 685. vii. 473.
——— (Biſhop of) *v.* Phillips, i. 693.
——— *v.* Proctor, vi. 650.
——— *v.* Townſon, iv. 664.
Sallows *v.* Gilling, i. 211.
——— *v.* Gurling, i. 216.
Salmon's caſe, i. 218.
Salmon *v.* Aldrich, vi. 469.
——— *v.* Rake, iii. 653.
——— *v.* Slade, iii. 433.
——— *v.* Smith, v. 383.
——— *v.* Swann, iv. 206.
Salomon *v.* Gordon, vi. 578.
Salomons *v.* Niſſen, iv. 683, 684.
——— *v.* Stavely, iv. 734.
Salop's (Counteſs of) caſe, vi. 593.
Saloucci *v.* Johnſon, iv. 643. 670.
——— *v.* Woodmeſs, iv. 670.
Salter, *ex parte*, iii. 410.
—— *v.* Bottler, v. 826.
—— *v.* Brown, vi. 210.
—— *v.* Brundſen, ii. 350.
—— *v.* Butler, ii. 567.
Saltern *v.* Saltern, iv. 306.
Salvador *v.* Hopkins, iv. 640.
Salvin *v.* Clerk, iii. 211. v. 842.
——— *v.* Thornton, iii. 242.
Sambridge *v.* Houſley, ii. 476.
Samin *v.* Norton, i. 205.
Samme's caſe, vi. 10. vii. 77.
Sammes *v.* Rickman, vii. 182.
Samon's caſe, i. 266.
Samon *v.* Jones, vii. 101.
Sampſon *v.* Quinſey, ii. 301.
Sams *v.* Pitt, i. 213.
Samuel *v.* Evans, i. 322. vi. 183. 376.
——— *v.* Payne, i. 687. vi. 88. 572.
Samways *v.* Eldſly, i. 204.
Samwell *v.* Wake, iii. 85.
Sanchar's (Lord) caſe, vi. 653.
Sandbank *v.* Turvy, i. 163. v. 365.
Sandby, *ex parte*, i. 417.
Sander *v.* Eſterlie, iii. 97.
Sanders *v.* Bournford, iv. 208.
——— *v.* Mark, ii. 287.
——— *v.* Moſe, iii. 495.
——— *v.* Owen, v. 189.
Sanderſon *v.* Glaſs, i. 303.
——— *v.* Thwaites, i. 170.
Sandford *v.* Remington, ii. 580.
Sandiford *v.* Bean, ii. 267.
Sandon, *ex parte*, i. 460.
Sands's (Sir Geo.) caſe, iii. 49.
Sands *v.* Child, ii. 43, 44.
—— *v.* Child and Lynch, iv. 595.
—— *v.* The Cuſtom-houſe Officer, ii. 585.
—— *v.* Darrel, vi. 133.
—— *v.* Eaſt India Company, iv. 765.
—— *v.* Maleverer, v. 412.
—— (Sir John) *v.* Packſal Brocas, v. 145.
—— *v.* Treſuſis, v. 336.
Sandwich's (Lord) caſe, vi. 643.
Sandwich *v.* Miller, i. 59. vi. 101.
Sandys *v.* Sandys, v. 819.
Sanford's caſe, iv. 479.
Sanford *v.* Cutcliff, i. 45.
Sanſun v. Bragington, iv. 626.
Sapsford *v.* Fletcher, vi. 82. 136. 448.
Sare v. Shelton, ii. 478. 741. vi. 426.
Sarfield *v.* Witherly, iv. 596.
Sargent *v.* Millward, ii. 127.
——— *v.* Read, ii. 241.
Saunders's caſe, ii. 397. vi. 281. vii. 252. 255. 279.
Saunders *v.* Crawley, v. 464.
——— *v.* Darling, vi. 60.
——— *v.* Dehew, v. 65. 101.
——— *v.* Edwards, iv. 460.
——— *v.* Freeman, vii. 3.
——— *v.* Hard v. 91.
——— *v.* Hardinge, i. 186, 187, 188.
——— *v.* Hawkins, vii. 366.
——— *v.* Saunders, v. 722.

Saunders *v.* Tucker, v. 830.
——— *v.* Vincent, vi. 688.
Saunderſon's caſe, ii. 174.
Saunderſon *v.* Baker, vi. 156.
——— *v.* Marr, iii. 604. vii. 65.
——— *v.* Rowles, i. 388.
Sauſmerez, *ex parte*, i. 454.
Savage's (Sir John) caſe, ii. 220. v. 210. vii. 448.
Savage *v.* Dent, ii. 415. vi. 33.
——— *v.* Robery, vi. 218.
——— *v.* Tatcham, vi. 574.
——— *v.* Taylor, i. 110, 111. iii. 306.
——— *v.* Weſt, i. 347.
Savern *v.* Smith, iv. 15.
Saverne *v.* Smith, i. 745.
Savery *v.* Dyer, i. 181.
——— *v.* Tey, iii. 177.
Savier *v.* Lenthal, i. 255. v. 198.
Savignac *v.* Roome, vi. 557. 599.
Savil's caſe, ii. 420.
Savil *v.* Thornton, ii. 493.
Savile *v.* Blacket, iv. 360.
——— *v.* Borlaſe, ii. 422.
Saville's caſe, vii. 260.
Savory *v.* Dyer, iii. 654.
Savoy Court *v.* Sandford, v. 668.
Sawbridge *v.* Benton, vii. 518.
Sawer *v.* Shute, vii. 412.
Sawley *v.* Gower, iii. 462.
Sawyer *v.* Bunce, vii. 391.
——— *v.* Mercer, iii. 83.
——— *v.* Wilkinſon, ii. 354.
Say *v.* Harwood, ii. 171.
——— *v.* Smith, iii. 201.
——— *v.* Smith and Fuller, iv. 176.
Say and Seal's (Lord) caſe, ii. 580.
Say and Seal (Lord) *v.* Stephens, ii. 481. vi. 97.
Sayer *v.* Chaytor, i. 20.
——— *v.* Glean, i. 674. ii. 282. 444.
——— *v.* Hardy, i. 631.
——— *v.* Maſterman, iv. 278.
——— *v.* Pierce, i. 33.
——— *v.* Sayer, iv. 426.
Sayre *v.* Minns, ii. 88.
——— *v.* Rochford (Earl of), i. 607.
Scambler *v.* Watts, v. 184.
Scarborough's (Corporation of) caſe, iv. 514.
Scarborough (Mayor, &c. of) *v.* Butler, v. 406.
——— (Earl of) *v.* Hunter, vi. 713.
Scarfield *v.* Howes, vii. 183.
Scarlett *v.* Jennings, vi. 251.
Scarr *v.* Trinity College, vi. 715, vii. 517.
Scatterwood *v.* Edge, iv. 299.
Scavage *v.* Parker, iv. 59.
Scawen *v.* Garret, v. 621. vii. 48.
Schinotti *v.* Bumſtead, vii. 386.
Scholaſtica's caſe, v. 468. 803. 811.
Scholes *v.* Hargreaves, i. 619.
Schoole *v.* Noble, ii. 45.
Schulbred *v.* Nutt, vi. 657.
Schuldam *v.* Bunniſs, i. 55.
Scoble *v.* Lee, vi. 210.
Scole *v.* Lowther, vi. 725.
Scolefield *v.* Whitehead, i. 111.
Scot *v.* Aldberry, iv. 253.
——— *v.* Hilliers, vi. 237.
——— *v.* Main, i. 654. ii. 81.
——— *v.* Stevens, i. 269. v. 168.
Scott *v.* Airey, vii. 519.
——— *v.* Allgood, vi. 746. vii. 521.
——— *v.* Breſt, vii. 212.
——— *v.* Fenhoulet, vii. 122.
——— *v.* Houghton, iii. 589.
——— *v.* Peacock, ii. 521.
——— *v.* Scott, v. 777.
——— *v.* Shepherd, i. 243. vi. 556, 557, 558.
——— *v.* Stephens, iii. 90.
——— *v.* Tyler, iv. 419.
——— *v.* Whalley, vii. 459.
——— *v.* Wray, i. 109.
Screſby *v.* Holias, i. 594.
Scrimſhaw *v.* Proctor, vii. 44.
Scrimſhire *v.* Alderton, i. 437. iv. 602.
Scriven *v.* Turner, iv. 504.
Scroggs *v.* Mordant (Lord), ii. 460.
Scroope *v.* Scroope, iii. 673. vii. 149.
Scrope *v.* Offley, iii. 300.
Scudamore, *ex parte*, vii. 405.
——— *v.* Scudamore, i. 113.
Scurfield *v.* Howes, iii. 31.
Seaborne *v.* Blackſton, i. 499.
Seabourne *v.* Seabourne, v. 19.
Seagood *v.* Hone, v. 786.
——— *v.* Meale, i. 121.
——— *v.* Neal, i. 118.
Seale *v.* Seale, iv. 319.
Sealing *v.* Crawley, i. 494.
Seamaine's caſe, vi. 586, 587, 588.
Seaman *v.* Barnes, v. 349.
——— *v.* Bigge, vi. 214.
——— *v.* Browning, iv. 585.
——— *v.* Founereau, iv. 652.
Seamer *v.* Bingham, iii. 603.
Searle's caſe, ii. 173. v. 673.

Searle *v.* Barrington (Lord), i. 530. ii. 637. v. 177.
Seaton's (Doctor) caſe, i. 138.
Seaton *v.* Henſon, v. 167.
Sebly *v.* Robinſon, ii. 241.
Seddon *v.* Tutop, vii. 396.
Sedgwick v. Goſton, ii. 433.
Sedgworth *v.* Overend, vii. 385.
Sed *v.* Bradford, iv. 377.
—— *v.* Wolfenden, v. 661.
Seeman *v.* Cuppledick, i. 245.
Seers *v.* Hind, i. 433.
Seignior *v.* Walmer, iv. 583.
Selby *v.* Bank, vi. 718. 735. 740.
—— *v.* Crew, vii. 409.
Seliard *v.* Everard, v. 225.
Sellack *v.* Harris, lii. 302. vii. 139.
Sellas *v.* Dawſon, i. 21.
Sellock *v.* Harris, i. 118.
Selſby *v.* Ruſſel, i. 226.
Selwin *v.* Brown, ii. 656. iii. 12. v. 687.
——— *v.* Selwin, i. 249. iv. 250. vii. 374.
Semaine's caſe, ii. 736. iii. 506. vi. 170. 172. vii. 80.
Semphill *v.* Bayley, iv. 418.
Sendhill's caſe, iii. 509.
Senhouſe *v.* Chriſtian, iii. 495.
——— *v.* Earle, v. 79. 102.
Sergeſon *v.* Sealy, iii. 531.
Serjeant *v.* Fairfax, v. 456.
——— *v.* Puntis, vii. 312.
Serle *v.* St. Eloy, i. 170. iii. 86.
Serocold *v.* Hamſon, v. 253.
Seton *v.* Sinclair, iii. 201.
Seward *v.* Baker, i. 258.
Sewers *v.* Newburgh, ii. 214.
Seymour's caſe, ii. 328. iii. 204. vii. 230. 238.
——— (Sir Thomas) caſe, vi. 430. 434.
Seymour *qui tam v.* Day, vi. 674.
——— *v.* Courtenay (Lord), v. 318, 319.
——— *v.* Grenvill, ii. 730. vi. 107.
——— *v.* Noſworthy, vii. 351.
Shadford *v.* Houſton, ii. 56.
Shaftſbury's (Lord) caſe, i. 59. iii. 411.
Shafto *v.* Shafto, iii. 86. v. 27.
Shaftſbury *v.* Hannam, iii. 408.
Shakeſpear *v.* Peppin, vii. 416.
Shales *v.* Shales, vii. 147.
Shandos (Lady) *v.* Simpſon, vii. 48.
Shank *qui tam v.* Payne, ii. 588. vii. 213.
Shapcott *v.* Mugford, vi. 556, 557.
Shapland *v.* Smith, i. 111. iv. 273. vii. 124.
Sharp *v.* Coult, vi. 748.
—— *v.* Hobart, v. 653.
—— *v.* Sheriff, vii. 401.
Sharpe *v.* Brice, vi. 668.
Sharrington *v.* Strotton, vii. 87. 97. 99.
Sharſton *v.* Hipſley, i. 304.
Shaw, *ex parte*, vii. 408.
—— *v.* Barber, ii. 333. v. 696.
—— *v.* Pickering, i. 302.
—— *v.* Standiſh, iii. 316.
—— *v.* Taylor, iii. 490. 492.
—— *v.* Thompſon, vi. 207.
—— *v.* Wakeman, vi. 217.
—— *v.* Weigh, iv. 274. v. 820.
—— *v.* Wright, iv. 251. vi. 133.
Shawe *v.* Cunliffe, vii. 498.
Shearman *v.* Shearman, v. 524.
Sheat *v.* Oxenbridge, vii. 135.
Sheddon *v.* Curnes, i. 341.
Sheepſhanks *v.* Lucas, ii. 457. 475. 488. iii. 244.
Sheffield's (Lord) caſe, vii. 74.
Sheffield *v.* Buckingham (Ducheſs), vii. 336.
——— *v.* Ratcliffe, vi. 373. 378. vii. 73. 186.
Shelbur *v.* Scotford, i. 282.
Shelburne (Lady) *v.* Inchiquin (Lord), ii. 654.
Sheldon *v.* Baker, i. 327.
——— *v.* Brett, vi. 188.
——— *v.* Clipſham, v. 329.
——— *v.* Cox, ii. 580.
——— *v.* Cox *et al.* v. 74. 78.
——— *v.* Forteſcue Aland, iii. 530.
——— *v.* Weldman, iv. 473.
Shelf *v.* Bailey, i. 208.
Shelling *v.* Farmer, ii. 635.
Shelly's caſe, iv. 331. v. 731. 749. vii. 77, 78.
Shelly *v.* Winſon, ii. 182.
—— *v.* Wright, iv. 737.
Shephard *v.* Adams, i. 728.
Shepherd and Baily *v.* Orchard, ii. 487.
——— *v.* Charter, ii. 276.
——— *v.* Greg, iii. 152.
——— *v.* Mackreth, vii. 421.
——— *v.* Shepherd, vii. 365.
——— *v.* Shorthouſe, v. 436.
——— *v.* Twoulfie, iv. 90.
——— *v.* Wakeman, i. 87.
Sheppard *v.* Bailie, v. 221.

Sheppard *v.* Gibbons, iii. 680.
——— *v.* Gosnold, vi. 280, 281. 392.
Shepperd *v.* Titley, v. 59.
Sher and Pled *v.* Stratton, vii. 98.
Sherfom *v.* Bostock, vii. 441.
Shergold *v.* Halloway, iv. 581. vi. 570.
Sheriff *v.* Wrotham, i. 249.
Sherington *v.* Flewood, vi. 716. 742.
Sherland *v.* Heaton, vi. 598.
Sherley *v.* Fagg, v. 60.
Sherman *v.* Alverez, i. 26.
——— *v.* Collins, iv. 406.
——— *v.* Cox, v. 102.
Sherrard *v.* Sherrard, v. 25.
——— *v.* Smith, vi. 79. 428.
Sherry *v.* Richardson, i. 226.
Sherson *v.* Oxlade, i. 186.
Sherwin *v.* Bowes, vi. 417.
——— *v.* Cartwright, iv. 472.
——— *v.* Clarges (Sir Thomas), vi. 646.
Sherwood *v.* Noone, v. 340.
Shields *v.* Atkins, vii. 153.
Shingleton *v.* Smith, i. 247.
Shipley's case, iii. 89. v. 381.
Shipman *v.* Henbest, vi. 371.
——— *v.* Stevens, iii. 617.
Shires *v.* Glasscock, vii. 310. 313.
Shirk *v.* Clark *et al.* v. 80.
Shirley's case, v. 637.
Shirley *v.* Collis, i. 60.
——— *v.* Ferrers (Earl), i. 102. ii. 608.
——— *v.* Martin, iv. 542.
——— *v.* Newman, vii. 487.
——— *v.* Sackville, vii. 50.
——— *v.* Watts, v. 36.
——— *v.* Wilkinson, iv. 654.
Shirly *v.* Wright, ii. 508. 710. vi. 167.
Shode *v.* Parker, i. 114.
Shoolbred *v.* Nutt, iv. 657.
Shopland *v.* Ridler, iii. 414. iv. 139.
Shorer *v.* Shorer, i. 113.
Short *v.* Pruen, v. 337.
——— *v.* Wood, ii. 442.
Shortbridge *v.* Hiern, v. 53. 142.
Shortridge *v.* Lamplugh, vii. 90. 131.
Shotter *v.* Friend, iv. 447. vi. 765.
Shove *v.* Pincke, iii. 393.
——— *v.* Webb, i. 187, 188. 263.
Shrapnel *v.* Vernon, i. 189.
Shrewsbury's (Earl of) case, v. 606.
——— (Gaoler of) case, i. 284.
Shrubb *v.* Barrett, ii. 45.
Shudal *v.* Jekyll, iv. 373. 376.
Shutford *v.* Buroughs, iv. 474.
Shuttleworth *v.* Barber, iii. 450. v. 806.
——— *v.* Garrat, i. 257. iii. 92.
——— *v.* Lawick, v. 84.
Sibbet *v.* Russel, i. 300.
Sibley *v.* Cook, iv. 392.
——— *v.* Rawlins, v. 703.
Sibthorp *v.* Moxam, iv. 387. v. 684.
Siddon *v.* Charnell, v. 60.
Sidenham *v.* Man, vii. 20. 34.
Sidnam *v.* Mayo, vi. 227.
Sidner *v.* Calvert, iv. 90.
Sidney's case, ii. 664. vi. 510.
Sidney *v.* Etherington, iii. 656.
——— *v.* Sidney, ii. 384.
Silby *v.* Hinckly, ii. 619.
Silk *v.* Kennet, i. 7.
—— *v.* Prime, iii. 59. 462. vii. 160.
Sill *v.* Worswick, i. 434.
Silvester *v.* Wilson, vii. 125.
Sim's case, vi. 430.
Simmonds *v.* Du Barre, i. 139.
——— *v.* Middleton, vi. 118.
Simmons *v.* Cornelius, i. 121.
Simon *v.* Metivier, i. 123.
Simond *v.* Boydell, iv. 670.
Simons *v.* Sweet, vi. 442.
Simpson, *ex parte*, i. 403. 420. 456.
——— *v.* Bithwood, ii. 240.
——— *v.* Harcourt, ii. 344.
——— *v.* Jackson, iii. 616.
——— *v.* Turner, vii. 85.
——— *v.* Vaughan, vii. 506.
Sims *v.* Barnett, vi. 732, 733.
Singleton *v.* Bawtree, v. 383.
——— *v.* Singleton, iv. 343.
Sintzenick *v.* Lucas, vii. 456.
Sippora *v.* Basset, vi. 562. 599. 626.
Skeat *v.* Oxenbridge, ii. 549. vii. 276.
Skelton *v.* Howling, iii. 87. vi. 123.
Skerne's case, ii. 73. iii. 383.
Skidness *v.* Hodson, vi. 679.
Skinner *v.* Land, iii 247.
——— *v.* Rebow, vii. 499.
——— *v.* Stacy, vii. 503.
Skip, *ex parte*, i. 426.
——— *v.* Huey, vii. 506.
Skipwith *v.* Green, v. 431.
Skirn *v.* Bond (Lady), v. 810.
Skirne *v.* Bond, i. 639.
Skutt *v.* Woodward, i. 168.
Slackman *v.* West, v. 436.
Slade's case, i. 256. ii. 279. 286. v. 227. vii. 221.

Slade *v.* Drake, vi. 757.
—— *v.* Thompſon, i. 677.
Slader v. Smallbrooke, v. 674.
Slaney *v.* Vawtrey, iii. 176.
Slaning's caſe, i. 632.
Slaning *v.* Style, i. 482. 508.
Slater *v.* Baker and Stapleton, i. 93.
—— *v.* Franks, vi. 223.
—— *v.* Slater, iii. 431.
Slaughter *v.* Talbot, iii. 620.
Slawney's caſe, vi. 379.
Sleech *v.* Thorington, iv. 349. 425.
Sliford *v.* Goodrick, vi. 606.
Slipper *v.* Maſon, ii. 509. vi. 167.
—— *v.* Slidſtone, vi. 136.
Sloane (Sir Hans) *v.* Paulet (Lord William), v. 60.
Slocomb's caſe, vi. 249.
Slocomb *v.* Hawkins, iv. 154.
Slocombe *v.* Glubb, iii. 603.
Sloman *v.* Walter, i. 111.
Sly *v.* Finch, ii. 736.
Smalcom *v.* Buckingham, vi. 179.
Small's caſe, iv. 63.
Small *v.* Brackley, iii. 304.
—— *v.* Cole, ii. 412.
—— *v.* Oudley, i. 392.
—— *v.* Wing, iv. 286.
Smallman *v.* Onions, vii. 288.
Smallpiece *v.* Bokenham, iv. 487.
Smalt *v.* Whitmill, ii. 595.
Smart *v.* Wolff, ii. 180.
Smartle *v.* Penhallow, i. 722. iii. 487.
—— *v.* Williams, ii. 631. 636. 646.
Smink *v.* Barker, vii. 217.
Smith's caſe, iv. 508.
—— (Sir James) caſe, ii. 31.
Smith, *ex parte*, i. 392. 414. 420. 422. 426. 446. 449. 461.
—— and others, *ex parte*, i. 422.
—— *v.* Abbot, iv. 715.
—— *v.* Abell, ii. 570. v. 831.
—— *v.* Airey, v. 329.
—— *v.* Andrews, vi. 217.
—— *v.* Aſh *et ux.* v. 220.
—— *v.* Aykwell, iii. 651.
—— *v.* Baker, i. 725.
—— *v.* Barnardiſton, ii. 440.
—— *v.* Batterton, ii. 38.
—— *v.* Belay, v. 759.
—— *v.* Birch, iv. 558.
—— *v.* Boheme, iv. 697.
—— *v.* Bole, iii. 149. iv. 84.
—— *v.* Bouchier, vi. 609.
—— *v.* Bowen, i. 269. 270. iii. 606.
—— *v.* Bower, iv. 483.
Smith *v.* Bowles, vi. 416.
—— *v.* Brockleſby, vi. 398.
—— *v.* Bromley, i. 262. 455.
—— *v.* Broomhead, vii. 403.
—— *v.* Buſbie, vii. 98.
—— *v.* Butterfield, vi. 615.
—— *v.* Cattle, i. 97.
—— *v.* Cave, vi. 425.
—— *v.* Cheſter, iv. 737.
—— *v.* Clifford, iii. 224.
—— *v.* Coffin, iv. 256. vii. 404, 405.
—— *v.* Cotleſhill, v. 195.
—— *v.* Davis, ii. 635.
—— *v.* Delafontaine, iv. 715.
—— *v.* De Silva, i. 462.
—— *v.* Dovers, v. 381. vii. 212.
—— *v.* Dudley, i. 326.
—— *v.* Dunce, ii. 43, 44.
—— *v.* Edge, vii. 421.
—— *v.* Evans, v. 819. vii. 308.
—— *v.* Farnaby, iii. 236.
—— *v.* Fellows, ii. 251.
—— *v.* Feveral, i. 624.
—— *v.* Foaves, vii. 6. 37.
—— *v.* Frampton, vi. 662.
—— *v.* Gatewood, v. 699.
—— *v.* Gould, vi. 575. 686.
—— *v.* Haile, vii. 423.
—— *v.* Hale, v. 627.
—— *v.* Harman, vi. 383.
—— *v.* Harmer, vi. 125.
—— *v.* Havens, iv. 142.
—— *v.* Haward, ii. 270.
—— *v.* Higgins, iii. 459. vi. 664.
—— *v.* Hill, iv. 479.
—— *v.* Hodſon, i. 444.
—— *v.* Hoff, vi. 649.
—— *v.* Jameſon, vii. 501.
—— *v.* Johnſon, vi. 475. vii. 393.
—— *v.* Kemp, vi. 584.
—— *v.* Key, v. 333. vi. 451.
—— *v.* Laſcelles, iv. 671.
—— *v.* Lidcote, vi. 650.
—— *v.* Loader, iii. 305.
—— *v.* Low, iii. 612.
—— *v.* Mapleback, ii. 341. iv. 218.
—— *v.* Miles, i. 440. ii. 734. v. 563.
—— *v.* Miller, vi. 691. vii. 401.
—— *v.* Muller, i. 214. v. 332.
—— *v.* Nicholſon, ii. 478.
—— *v.* Niſſen, iv. 712.
—— *v.* Norfolk, iii. 23.
—— *v.* Odyham, ii. 492.
—— *v.* Oxenden, iv. 600.
—— *v.* Page, vi. 662.

Smith *v.* Painter, i. 336.
— *v.* Parker, iii. 468.
— *ex dem.* Dormer *v.* Parkhurſt, v. 838. vi. 664.
— *v.* Parks, vi. 359.
— *v.* Payne, vii. 405.
— *v.* Pickering, i. 440.
— *v.* Pierce, iv. 200.
— *v.* Powdich, i. 558.
— *v.* Prager, vii. 213.
— *v.* Raydon, v. 333. vi. 451.
— *v.* Read, v. 282.
— *v.* Reynolds, vi. 598.
— *v.* Riſley *et al.* vii. 98.
— *v.* Rookes, vi. 219.
— *v.* Shelborn, vi. 188.
— *v.* Shepherd, ii. 479.
— *v.* Slone, vi. 589.
— *v.* Smallwood, v. 448.
— *v.* Smith, i. 268. ii. 54. iii. 13. iv. 399.
— *v.* Smoult, v. 37.
— *v.* Stapleton, iii. 203.
— *v.* Stoneard, ii. 472.
— *v.* Stowel, i. 583.
— *v.* Tillebois, ii. 635.
— *v.* Tonſtall, i. 87. iii. 296.
— *v.* Tracey, iii. 75.
— *v.* Triggs, i. 709. v. 730. vii. 442.
— *v.* Trinder, iv. 18. 69.
— *v.* Turner, vi. 229.
— *v.* Villars, v. 636.
— *v.* Wallis, ii. 43.
— *v.* Ward, vi. 233. 239. 244.
— *v.* Warren, v. 798.
— *v.* Wheeler, vii. 120. 135. 185.
— *v.* Whiſtler, v. 141.
— *v.* Williams, vi. 247.
— *v.* Wiſdome, vi. 227.
— *v.* Wood, vi. 254.
— *v.* Wyatt, vi. 732, 733.
— *v.* Yeomans, v. 174. 377.
Smithies *v.* Harriſon, vi. 253.
Smithſon's caſe, v. 523. vi. 442.
Smithſon *v.* Thompſon, v. 60.
Snag *v.* Fox, iii. 488.
— *v.* Gray, vi. 216.
Snagg *v.* Gee, vi. 238.
Sneaps, *ex parte*, i. 424.
Snee *v.* Preſcott, i. 437. iv. 683.
Sneers *v.* Briton, ii. 86.
Snelgrave *v.* Bailey, iv. 338.
——— *v.* Bolville, iii. 466.
Snell *v.* Timbrell, vi. 673.
— *v.* Webling, vi. 228.
Snellgrove *v.* Morris, v. 469.
Snelſon *v.* Corbett, iii. 87. iv. 353.
Sneyd *v.* Sneyd, ii. 372.
Snow's caſe, v. 123.
Snow *v.* Como, ii. 274.
—— *v.* Cutler, iii. 583. iv. 246. 295. v. 794.
—— *v.* Wiſeman, v. 383.
Snowden *v.* Herring, i. 605. v. 672.
Soby *v.* Molins, vi. 721.
Soldier's (The) caſe, vi. 390.
Solicitor (The caſe of), i. 262.
Solomon *v.* Agnel, v. 300.
Solomons *v.* Niſſen, i. 438.
——— *v.* Roſs, i. 434.
Some *v.* Barwiſh, iii. 706.
Somers *v.* Houſe, vi. 234.
Somerſet's (Earl of) caſe, vii. 186.
Somerſet (Duke of) *v.* France, i. 734. ii. 585.
——— *v.* Somerſet, iv. 365.
Sommerſet's caſe, vi. 575.
Sonley *v.* Clockmakers' Company, vii. 140.
Soprani *v.* Skurrs, v. 346.
Soreſby *v.* Sparrow, v. 169.
Sorrel *v.* Carpenter, v. 64.
Sothwell *v.* Allom, iii. 661.
Soulle *v.* Gerrard, v. 784.
South *v.* Alleine, vii. 123.
Southby *v.* Stonehouſe, iv. 244. 295.
Southcot *v.* Rider, i. 38.
——— *v.* Stowel, vii. 103. 128.
——— *v.* Watſon, iii. 67, 68.
Southcote's caſe, i. 368. 374. vi. 584. 685.
Southcote, *ex parte*, iii. 529.
——— *v.* Braithwaite, i. 334.
Southern *v.* How, i. 75. vi. 584. 600.
Southerton *v.* Willock, iii. 612.
Southouſe *v.* Allen, v. 332.
South-Sea Company *v.* D'Oliffe, ii. 653.
——— — ——— *v.* Wymondſell, iv. 476.
Southwell *v.* Wade, iii. 383. 392. 400.
Sowerby *v.* Harris, i. 187.
Sowley *v.* Jones, i. 452.
Spalding's caſe, iv. 258.
Spalding *v.* Mure, vii. 400.
——— *v.* Shalmer, vii. 155. 183.
——— *v.* Spalding, iv. 294.
Sparham *v.* Pye, vi. 237.
Sparin *v.* Drax, ii. 622.
Spark *v.* Purnall, iii. 369.
—— *v.* Spark, ii. 288. v. 733.

Spark v. Stafford, ii. 179.
Sparke v. Denne, iv. 353.
Sparks v. Crofts, iii. 18.
——— v. Spicer, vi. 662.
——— v. Wood, vii. 384.
Sparrie's caſe, vi. 607.
Sparrow v. Carruthers, i. 504. iv. 633.
——— v. Hardcaſtle, vii. 344.
——— v. Matterſock, ii. 711.
——— v. Reynold, v. 195.
——— v. Weigh, iv. 263.
Sparry's caſe, i. 23. v. 440.
Speed v. Perry, vi. 228. 237.
Speering v. De Grave, iv. 616.
——— v. Lynn, i. 171.
Spencer's caſe, i. 30. ii. 70. iii. 665. vii. 228, 229. 240.
Spenſer v. Durant, ii. 68. v. 164.
——— v. Goter, vii. 47.
——— v. Marlborough (Duke of), iv. 317.
Spicer v. Spicer, iv. 251. 253.
Spieres v. Parker, vi. 395. vii. 44.
Spiller v. Andrews, ii. 394.
Spink v. Lewis, vii. 142. 145.
——— v. Tenant, ii. 259.
Spinks v. Robins, iv. 375.
Spittle v. Davis, i. 638. v. 811.
Spong v. Hog, vi. 671.
Spooner v. Milward, vii. 49.
Spragge v. Stone, vii. 64.
Spratley v. Griffith, i. 109.
Spratt v. Frederick, vi. 423.
Sprigg v. Neal, v. 407. vi. 610.
Sprightly v. Dunch, ii. 409.
Spring v. Biles, iv. 247.
——— v. Ceſar, i. 641. v. 806.
Springate v. Springate, i. 302.
Sprout v. Mathews, iv. 712. 715. 721.
Sprye v. Mill, ii. 464.
Spurrett v. Spiller, iii. 305.
Spurrier v. Mayoſs, vii. 195, 196.
Squib v. Wyn, i. 480. iii. 55.
Squibb v. Hole, v. 667. ii. 510.
Squibbs v. Hole, vi. 167.
Squire v. Archer, vi. 476.
——— v. Dean, i. 481.
——— v. Grevill, i. 230.
——— v. Johns, vi. 219.
——— v. Perſhall, vii. 329. 389.
Stacey v. Clerk, iv. 32.
——— v. Hulſe, i. 437.
Stackpole v. Beaumont, vii. 494.
——— v. Earle, i. 274.
Stadholme v. Hodgſon, iv. 480.
Stafford's (Lord) caſe, i. 355. iii. 184.
Stafford v. Macdonnough, ii. 421.
——— v. Thompſon, vi. 649.
——— (Lord) v. Thynne, v. 630.
Stainer v. Droitwich (Burgeſſes of), ii. 634.
Stainfield *et ux.* v. Bindon (Viſcount), ii. 376.
Stainton *et ux.* v. Jones, ii. 247.
Staley's caſe, vi. 532.
Stamford (Earl of) v. Hobart (Sir John), vii. 174, 175.
——— v. Needham, ii. 481. 712.
Stamma v. Brown, iv. 644.
Stamp v. Hyde, vi. 442.
——— v. White, vi. 236. 238.
Stamper v. Milbourne, vii. 402.
Standen v. Oxford (Univerſity of), vi. 370. 381. vii. 61.
Standgroom, *ex parte*, i. 435.
Standiſh v. Short, vii. 342.
Stanhope's caſe, vi. 230.
Stanhope v. Blith, vi. 207. 211. 223.
——— v. Smith, iii. 339.
——— v. Thacker, iii. 247.
——— v. Toppe, i. 109.
——— v. Verney, v. 51.
Stanley v. Boſwell, vi. 217.
——— v. Stanley, iii. 75, 76. v. 819.
Stannian v. Davis, ii. 107.
Stanton v. James, v. 231.
——— v. Smith, vi. 218, 219. 248.
Stanway v. Stiles, iv. 369.
Stanynough v. Couſins, ii. 438. vi. 625.
Stanyon v. Davis, iii. 667. v. 360.
Stapilton v. Stapilton, vii. 90. 95.
Staples v. Maurice, iii. 680.
Stapleton v. Stapleton, i. 111.
Star v. Cuckow, ii. 496.
——— v. Elliot, vi. 756.
Starchy's caſe, v. 407.
Starke v. Cheeſeman, iv. 686. 695. 735.
Starkey v. Barton and Gore, v. 678.
——— v. Brooke, vii. 144.
——— v. Starkey, iii. 369. vii. 179.
Starkie v. Wilkes, v. 470.
Starr v. Wade, vi. 663.
Startup v. Dodderidge, vi. 748.
Stationers' Company v. Carnan, v. 596.
——— ——— v. Partridge, v. 596.
——— ——— v. Wright, v. 596.
Stawell (Ld.) v. Atkyns, vii. 521.
Stead v. Heaton, ii. 636.
Steadman v. Palling, ii. 231.
——— v. Purchaſe, vii. 391.
Steane v. Holmes, i. 18. ii. 143.

Stebbing *v.* Walker, iv. 349.
Stebbs *v.* Goodlake, vi. 735.
Stedman *v.* Bates, i. 692.
—— *v.* Hay, v. 672.
—— *v.* Page, i. 691.
Steed *v.* Berrier, vii. 342.
—— *v.* Whitaker, ii. 580. v. 76.
Steel *v.* Spight, ii. 270.
Steele *v.* Sowerby, vii. 389.
Stent *v.* Bailes, i. 109.
Stephens *v.* Bittridge, ii. 322. v. 741. 852. vii. 99.
—— *v.* Elliot, iv. 129.
—— *v.* Hanham, ii. 691.
—— *v.* Haughton, ii. 355. v. 407.
—— *v.* Hunham, i. 249.
—— *v.* Snow, v. 709.
—— *v.* Sole, i. 434.
—— *v.* Squire, v. 620.
—— *v.* Stephens, 297.
Stephenſon *v.* Brookes, ii. 595.
—— *v.* Hayward, v. 58.
—— *v.* Wilſon, iii. 88.
Stepney *v.* Lloyd, ii. 403. vi. 181.
Sterling *v.* Lydiard, vii. 346.
—— *v.* Tanner, ii. 472.
Stevens *v.* Evans, vi. 692.
—— *v.* Savage, iii. 410.
—— *v.* Tyrrell, i. 726.
—— *v.* Winning, iii. 199.
Stevenſon's caſe, iii. 769.
Stevenſon *v.* Hardy, i. 280.
—— *v.* Snow, iv. 671.
Steventon *v.* Gardiner, vii. 304. 380.
Steward *v.* Biſhop, vi. 229.
Stewart *v.* Careleſs, i. 117.
—— *v.* Denton, i. 121.
—— *v.* Dunlop, iv. 654.
—— *v.* Tucker, i. 250.
Stibbs *v.* Clough, v. 172. 414.
Stileman *v.* Aſhdown, iii. 311. vii. 150.
Stiles's caſe, iv. 51. vi. 723.
Stiles *v.* Baxter, v. 443.
—— *v.* Cowper, iv. 126.
—— *v.* Walford, iv. 253.
Still *v.* Rogers, ii. 55.
Stilman *v.* Cromer, vi. 740.
Stinton *v.* Hughes, vii. 400.
Stock *v.* De Smith, i. 236, 237.
—— *v.* Fox, iii. 228.
—— *v.* Harris, i. 558.
Stocker *v.* Edwards, v. 779, 780.
Stockman *v.* Hampton, v. 434.
Stocks *v.* Booth, i. 85. v. 335.
Stockwell *v.* Terry, vi. 742.
Stodden *v.* Hervey, vi. 593.
Stodhart *v.* Johnſon, vi. 473.
Stokeld *v.* Collingſon, i. 263.
Stokes *v.* Lewis, i. 271.
—— *v.* Martin, i. 118.
—— *v.* Ruſſell, ii. 73. v. 20.
—— *v.* Stokes, v. 703. 711.
—— *v.* Woodeſon, vii. 397.
Stone's caſe, v. 610.
Stone *v.* Atwoll, iii. 617.
—— *v.* Cartwright, vii. 386.
—— *v.* Forſyth, ii. 53. iv. 244.
—— *v.* Grubham, iii. 316.
—— *v.* Knight, vii. 67.
—— *v.* Lingwood, vi. 696.
—— *v.* March, iii. 616.
—— *v.* Newman, iii. 270.
—— *v.* Theed, iv. 241.
—— *v.* Tuffin, iii. 654.
Stonehewer *v.* Thompſon, v. 36.
Stonehouſe *v.* Elliot, vi. 572.
—— *et ux. v.* Evelyn, vii. 308.
—— *v.* Evelyn, vii. 142. 144. 316.
—— *v.* Ewen, ii. 711.
—— *v.* Mullins, ii. 525. 529.
Stonelake *v.* Babb, vi. 362.
Stones *v.* Hartley, iii. 679, 680.
Stonner *v.* Gibbons, v. 477.
Stonor *v.* Strange, vii. 286.
Stores *v.* Tong, ii. 58.
Storey *v.* Robinſon, ii. 344.
Stork *v.* Herbert, v. 332.
Story *v.* Windſor (Lord), iii. 689. vii. 153.
Stoteſbury *v.* Smith, i. 272. iii. 109.
Stoughter's caſe, v. 565.
Stoughton *v.* Day, i. 362. vi. 152.
Stoutfield's caſe, vi. 713.
Stow, *ex parte*, i. 408. v. 618.
Stowel *v.* Zouch, iii. 206. vi. 380.
Stowell *v.* Weeks, ii. 370.
Strachey's caſe, vi. 242. 251.
Strachy *v.* Francis, vii. 286.
Stradling *v* Morgan, vi. 374. 377. 382. 384. 395.
Stradwick *v.* Pargiter, iii. 416. 615.
Strafford's caſe, i. 680.
Strafford *v.* Buckley, i. 177.
—— (Earl) *v.* Wentworth (Lady), vi. 24.
Strande *v.* Hoſkins, v. 653.
Strange *v.* Harris, iv. 448.
Strangford *v.* Green, i. 208. 223. v. 684.
Strangways *v.* Newton, vii. 106.
Straphon *v.* Thompſon, vi. 469.
Strata Marcella's (Abbot of) caſe, v. 579. vi. 630. 634. 635.

Stratfield *v.* Dover, v. 844.
Stratford *v.* Neale, v. 661.
Strathmore (Counteſs of) *v.* Bowes, vii. 294.
Straton *v.* Burgis, iii. 617.
——— *v.* Raſtall, i. 187.
Stratton *v.* Beſt, iii. 677. 680.
——— *v.* Burgiſs, i. 295.
——— *v.* Payne, iv. 319.
Straunge *v.* Croker, vi. 387. 390.
Streatfield and others *v.* Halliday, i. 53.
——— *v.* Halliday, i. 441.
——— *v.* Streatfield, i. 113. vii. 446.
Street *v.* Hopkinſon, ii. 499. 503. 505.
Streter's caſe, vii. 453.
Stringer *v.* Phillips, iii. 679. 684. vii. 472.
Strithorſt *v.* Græme, iv. 479.
Strode *v.* Berager, vii. 322.
——— *v.* Byrt, v. 335.
——— *v.* Holmes, vi. 214.
——— *v.* Hunt, vi. 602.
——— *v.* Parker, v. 14.
——— *v.* Ruſſell, iv. 326.
Strong *v.* Harwood, ii. 56.
——— *v.* Teat, iv. 327.
——— *v.* Watts, v. 439.
Stroud's caſe, v. 551.
Stroud *v.* Andrews, v. 815.
——— *v.* Marſhall, iii. 537.
——— *v.* Tilly, i. 61.
——— *v.* Willis, v. 431.
Strudwick *v.* Pargiter, i. 171.
Strudwicke's caſe, ii. 677.
Strutt *v.* Baker, vii. 519.
Stuart *v.* Wilkins, i. 259.
Stubbs *v.* Rightwiſe, iii. 23.
Stuckley *v.* Bulhead, vi. 213.
Studd *v.* Acton, vi. 181.
Studholme *v.* Morriſon, vi 195.
Studley *v.* Sturt, i. 346.
Sturdy *v.* Arnaud, i. 141. v. 176.
Sturgeon *v.* Painter, iv. 164.
Sturton (Lord) *v.* Chaffin, vi. 99.
Stutter *v.* Freſton, i. 559.
Style *v.* Herring, iv. 191.
Styles *v.* Baxter, vi. 242.
Sucklin *v.* Green, vi. 62.
Suckling *v.* Coney, vi. 447.
Sudal *v.* Wytham, ii. 516.
Suegoe's caſe, vi. 216.
Suffolk (Earl of) *v.* Green, vii. 204.
Sullivaine *v.* Seagrave, ii. 420. 465.
Sullivan *v.* Greaves, iv. 631.
Sully *v.* Arundel, i. 26.
Summers *v.* Partridge, ii. 223.
Sumner *v.* Brady, i. 455.
Sumner *v.* Gree, iv. 677.
Surman *v.* Shelleto, ii. 40.
Surry (Sheriff of) *v.* Alderton, vi. 88.
Surry *v.* Brown, iii. 62. vi. 22.
Suſſex's (Earl of) caſe, i. 644.
Suſſex and Sydney College (Maſter, &c. of) *v.* Davenport, ii 6.
Suſſex (Earl of) *v.* Temple, iii. 677. 689.
Suſſex *v.* Wroth, iv. 154.
Sutherland *v.* Murray, i. 37.
——— *et ux. v.* ———, i. 312.
Sutton's caſe, iv. 8.
——— (The Marſhal) caſe, vii. 182.
Sutton *v.* Bryan, ii. 56.
——— *v.* Fenn, vii. 50.
——— *et ux. v.* Jewke, iv. 416.
——— *v.* Johnſtone, ii. 503.
——— *v.* Mitchell, i. 555. iv. 614.
——— *v.* Moody, iii. 325, 326.
——— *v.* Rodd, v. 112.
——— *v.* Rolf, ii. 376. iii. 671.
——— *v.* Stone, i. 709. v. 101. 103.
——— *v.* Sutton, vii. 137. 355.
Swailes *v.* Bateman, vii. 210.
Swain *v.* Carter, vi. 195.
Swaine *v.* Demattos, i. 401.
Swall *v.* Leaver, vi. 649.
Swallow's caſe, iii. 436.
Swallow *v.* Emberſon, iii. 32.
Swan *v.* Broome, iii. 244.
—— *v.* Freeman, vi. 467.
—— *v.* Searles, ii. 69.
Swans (The caſe of), ii. 204.
Swayn *v.* Rogers, iii. 183.
Swayne *v.* Crammond, i. 347.
——— *v.* Wallinger, i. 400.
Sweet *v.* Anderſon, iv. 238.
——— *v.* Hole, i. 230.
——— *v.* Southcote, v. 80.
Sweetapple *v.* Bindon, i. 113. ii. 220. vii. 172.
Swetnam *v.* Archer, v. 656.
Swift *v.* Heath, ii. 327.
—— *v.* Nott, ii. 493.
—— *v.* Roberts, iv. 246. vii. 369.
Swine's caſe, v. 775.
Swinfen *v.* Digby, vi. 719. 723. 736.
Swinglehurſt *v.* Altham, i. 217.
Swinſtead *v.* Lyddal, vi. 572.
Swire *v.* Bell, ii. 592.
Swithin *v.* Vincent, i. 54. 504.
Sword-blade Company *v.* Dempſey, ii. 466.
Sydebotham, *ex parte*, i. 385.
Sydnam *v.* Capps, iv. 33.
Syeds *v.* Hay, vi. 680.

Syers *v.* Bridge, iv. 641.
Syllivan *v.* Stradling, vi. 82.
Sylveſter's caſe, i. 139. iv. 598.
Symance *v.* Tattam, vii. 157.
Symmers *v.* Regem, iii. 644. 647. v. 453.
Symmons *v.* Bing, v. 254.
——— *v.* Bingoe, vi. 405.
——— *v.* Knox, vi. 137.
Symonds *v.* Cockerill, vii. 193.
——— *v.* Cudmore, iv. 22. 35. 37. vii. 126.
——— *v.* Darknol, v. 341.
——— *v.* Parminter, iii. 746. iv. 719. 735. 738. v. 221. 332. 438.
——— *v.* Walſh, iii. 732.
Symondſon *v.* Tweed, i. 117.
Symons *v.* Mortimer, i. 187.
——— *v.* Rutter, i. 113.
——— *v.* Smith, ii. 86. v. 340.
——— *v.* Symons, vi. 593.
Sympſon *v.* Gray, vi. 106.
——— *v.* Hornſby, i. 35. iv. 335.
——— *v.* Southern, i. 732. v. 779, 780.
Syms's caſe, iii. 697.
Syms *v.* Syms, iii. 51.

T.

Tabor *v.* Greaves, v. 39.
Talbot's caſe, iii. 488.
Talbot, *ex parte*, i. 419.
——— *v.* Godbolt, iv. 588. v. 161.
——— *v.* Hubble, iii. 799.
Talker *v.* Wrigg, v. 347.
Tallent *v.* Germyn, iv. 762.
Talory *v.* Jackſon, iv. 471.
Taltarum's caſe, iii. 223.
Tanfield *v.* Finch, vii. 193.
——— *v.* Rogers, iv. 84. vi. 13.
Tankerville (Earl) *v.* Fawcett, iii. 86. v. 28.
Tanner *v.* Hobbs, iii. 385.
——— *v.* Morſe, iv. 253.
Targett *v.* Grant, iv. 308.
Tarleton *v.* Staniforth, iv. 675.
Tarlton *v.* Wragg, vi. 469.
Tarrant *v.* Maur, v. 650.
Tarton *v.* Clayton, vi. 768.
Taſhburne *v.* Havelock, vi. 647.
Taſker *v.* Salter, v. 368.
Taſſel *v.* Lewis, iv. 728.
Taſter *v.* Marriott, iv. 223.
Taſwell *v.* Stone, vi. 119.
Tate *v.* Auſtin, i. 497. 508. v. 35.
——— *v.* Hilbert, iv. 337, 338.
Tate *v.* Wellings, vii. 195, 212.
Tatem *v.* Chaplin, vii. 424.
Tatler *v.* Alwin, vi. 216.
Tatlock *v.* Harris, iii. 278. iv. 735.
Taunton's caſe, i. 653.
Taverner's caſe, v. 221. vi. 181.
Taverner *v.* Cromwell, i. 707. 744.
Taw's caſe, v. 162.
Tawney *v.* Crowther, i. 118. vii. 388.
Tayler *v.* Herbert, vii. 209.
——— *v.* Neville, i. 108.
Taylor's caſe, iii. 436. 474.
——— (Mat.) caſe, ii. 333. 372.
Taylor *v.* Allen, iii. 9.
——— *v.* Atkins, iii. 231.
——— *v.* Atwood, iii. 615.
——— *v.* Baker, ii. 719.
——— *v.* Barebone, ii. 47.
——— *v.* Bath (Mayor of), ii. 21.
——— *v.* Beach, i. 117.
——— *et al. v.* Bell, &c. vii. 204.
——— *v.* Biddulph, iv. 296.
——— *v.* Bird, i. 673.
——— *v.* Bydall, iv. 246. v. 798.
——— *v.* Chamber, iii. 116.
——— *v.* Cole, ii. 714. vi. 174. 611. vii. 456.
——— *v.* Dobbins, iv. 733.
——— *v.* Dulwich College, ii. 9.
——— *v.* Fiſher, v. 425. vi. 612. 617. 628.
——— *v.* Fitzgerald, iv. 175.
——— *v.* Hall, vi. 212. 227.
——— *v.* Horde, ii. 334. iv. 159.
——— *v.* How, vi. 241.
——— *v.* James, vi. 695.
——— *v.* Jones, vi. 358.
——— *v.* Lewis, i. 299.
——— *v.* Lowe, v. 301.
——— *v.* Markham, i. 247.
——— *v.* Mather, iv. 708.
——— *v.* Mills, i. 425. 458.
——— *v.* Page, i. 38.
——— *v.* Perkins, vi. 212.
——— *v.* Rochford, iii. 307.
——— *v.* Sayer, iv. 329.
——— *v.* Sharp, i. 102.
——— *v.* Shaw, i. 737.
——— *v.* Taylor, v. 779, 780. vii. 148.
——— *v.* Waſteneyes, i. 329.
——— *v.* Wells, v. 348.
——— *v.* Wheeler, i. 412. v. 42.
——— *v.* Whitehead, v. 453.
——— *v.* Willes, vii. 21.
——— *v.* Woodmeſs, iv. 669.

Tempeſt

Tempeſt *v.* Metcalf, ii. 56.
Temple's (Sir Richard) caſe, v. 631.
Temple *v.* Killingworth, i. 97.
Templeman's caſe, vi. 590. 691. vii. 344.
Templeman *v.* Beke, iii. 462.
Tenacy *v.* Brown, v. 342.
Tenant *v.* Goldwin, v. 336.
Tennant *v.* Stubbing, vi. 718. 735.
——— *v.* Wilſmore, vii. 390.
Terry *v.* Brown, iii. 153.
——— *v.* Duntze, vii. 425.
——— *v.* Hooper, vi. 219.
Teſmond *v.* Johnſon, vi. 702.
Tew *v.* Winterton (Earl), v. 156.
Tey's caſe, ii. 456.
Teynham *v.* Webb, iv. 349.
Thames *v.* Oſey, vi. 471.
Thanet *v.* Snatchbull, vi. 654.
Thatcher *v.* Stevenſon, ii. 476.
Theadle *v.* Miller, i. 619.
Thelluſon *v.* Ferguſon, iv. 669.
——— *v.* Fletcher, iv. 648. 659.
Theobald *v.* Duffey, i. 249.
——— *v.* Long, v. 437.
Thermollin *v.* Cole, vi. 655.
Thetford's (School of) caſe, i. 587.
Thine *v.* Rigby, i. 218.
Thomas, *ex parte*, i. 402. 422.
——— *v.* Bennet, i. 482. iv. 369.
——— *v.* Biſhop, iv. 588. 713.
——— *v.* Britnell, iv. 285.
——— *v.* Butler, iii. 55.
——— *v.* Hale, iv. 328. 350.
——— *v.* Hole, iv. 348. 350.
——— *v.* Howel, i. 677.
——— *v.* Kemiſh, iv. 209.
——— *v.* Nichols, vi. 608.
——— *v.* Powell, ii. 56.
——— *v.* Pritchard, v. 472.
——— *v.* Sorrel, v. 535.
——— *v.* Thomas, iv. 340. vii. 456.
Thomaſin *v.* Mackworth, iii. 209.
Thomee *v.* Lloyd, v. 622.
Thomond (Earl) *v.* Suffolk (Earl), i. 485. iv. 356, 357.
Thompkins *v.* Hill, vi. 659.
Thompſon's caſe, iii. 31.
Thompſon, *ex parte*, i. 426.
——— *v.* Briſtow, ii. 719.
——— *v.* Clerk, vi. 178.
——— *v.* Councel, i. 451.
——— *v.* Dow, iv. 408.
——— *v.* Freeman, i. 436.
——— *v.* Harvey, i. 646.
——— *v.* Leach, ii. 422. iii. 538. 601. iv. 210. v. 766. vii. 65.
Thompſon *v.* Marſhall, v. 333.
——— *v.* Noel, i. 239. v. 404.
——— *v.* Simmons, vii. 45.
——— *v.* Spencer, vii. 24.
——— *v.* Stockdale, v. 361.
——— *v.* Symonds, iii. 651.
——— *v.* Taylor, iv. 636.
Thomſon *v.* Baker, ii. 487.
——— *v.* Berry, ii. 37.
——— *v.* Clerk, ii. 716.
——— *v.* Harcourt, i. 107.
——— *v.* Roubell, i. 339.
——— *v.* Stanhope, iii. 651.
——— *v.* Trafford, iv. 61.
Thorn *v.* Coward, iii. 528.
——— *v.* Rolf, ii. 372.
——— *v.* Shering, v. 387.
Thornborough *v.* Whitaker, ii. 266.
Thornby *v.* Fleetwood, v. 269.
Thorndide *v.* Allington, vi. 8.
Thorndike *v.* Allington, i. 181.
Thorne *v.* Thorne, vii. 116.
Thornhill *v.* Evans, v. 14.
Thornton *v.* Barnard, vi. 699.
——— *v.* Dallas, i. 458.
——— *v.* Jobſon, vi. 213, 214.
——— *v.* Moulton, vi. 448.
——— *v.* Proctor, vii. 581.
——— *v.* Wade, v. 474.
Thoroughgood's caſe, iii. 145.
Thoroughgood *v.* Herbert, iv. 121.
Thorowgood *v.* Johnſon, vii. 33.
——— *v.* Sewys, ii. 492.
Thorp *v.* Wingfield, vii. 283.
Thorpe *v.* Bendlowes, vi. 715.
——— *v.* Thorpe, i. 267. 269. v. 712.
Thrale *v.* Cornwall, i. 56.
——— *v.* London (Biſhop of), v. 389.
——— *v.* Vaughan, i. 333.
Threadneedle *v.* Lynam, iv. 85. vi. 392.
Throgmorton *on dem.* Fairfax *v.* Bentley, ii. 411.
——— *v.* Church, v. 231.
——— *v.* Tracy, iii. 163.
Throp *v.* Thompſon, iv. 324.
Thruſtout *v.* Badwell, ii. 414.
——— *v.* Cunningham, v. 730. vii. 371.
——— *v.* Denny, iv. 294.
——— *v.* Foot, ii. 413.
——— *v.* Grey, ii. 414.
——— *v.* Holdfaſt, vii. 444.
Thurban *v.* Pantry, iii. 247.
Thurle *v.* Madiſon, i. 469. 473.

Thurmau *v.* Cooper, ii. 545.
Thurſby *v.* Halburt, i. 213.
Thurſfield *v.* Jones, ii. 10, 11.
Thurſton *v.* Nutton, iii. 616.
Thwait *et ux.* *v.* Aſhfield (Lady), v. 351.
Thyn *v.* Corie, ii. 473.
Thynn *v.* Cholmly, vi. 40.
——— *v.* Thynn, iii. 227. vii. 139.
Tichburne *v.* White, i. 556.
Ticknell *v.* Snelling, vi. 219.
Tidderley's caſe, ii. 21.
Tie *v.* Atkins, ii. 501.
Tierney *v.* Etherington, iv. 639.
Tilburgh *v.* Barbut, iv. 260.
Tilden *v.* Waller, vi. 722.
Tilley *v.* Simpſon, iv. 253.
Tilly *v.* Baily, ii. 414.
— *v.* Bridges, i. 33.
— *v.* Richardſon, vi. 423.
Tilney *v.* Norris, ii. 72. iii. 96.
Tilſly *v.* Throckmorton, vii. 182.
Timewell *v.* Perkins, iv. 254. 351.
Timmins *v.* Rowliſon, vi. 43.
Tindal *v.* Brown, vi. 657, 658.
——— *v.* Browne, iv. 726. 729.
——— *v.* Moore, vi. 242.
Tinkler *v.* Poole, vi. 688, 689.
Tinney *v.* Tinney, ii. 383. iii. 716.
Tintagel's (Borough of) caſe, iv. 514, 515.
Tipling *v.* Pexal, ii. 7.
Tippin's caſe, vii. 130. 152.
Tippin *v.* Coſin, vii. 127.
Tipping *v.* Coſſins, v. 730.
——— *v.* Piggott, vii. 154.
——— *v.* Tipping, iii. 86, 87.
Tirringham's caſe, vi. 575.
Titner, *ex parte*, i. 404.
—— *v.* Titner, vii. 369.
Todd, *ex parte*, i. 424.
— *v.* Haſtings, vi. 247.
Toddard *v.* Middleton, ii. 87.
Toft *v.* Tomkins, v. 854.
Toldervy *v.* Allen, i. 187. vii. 391.
Tomkins *v.* Barnet, i. 262. vii. 204.
——— *v.* Ladbroke, ii. 251.
——— *v.* Tomkins, iv. 349.
Tomkyns *v.* Pinſent, vi. 17.
Tomlin *v.* Brookes, iii. 616.
Tomlinſon *v.* Arriſkin, i. 224. 232.
——— *v.* Blackſmith, vii. 390.
——— *v.* Gill, i. 123.
Toms *v.* Mytton, i. 401.
Tonge *v.* Watts, iv. 636.
Tonkin *v.* Croker, vii. 439.
Tonna *v.* Edwards, i. 327.
Tooke *v.* Hartley, iii. 650.
——— *v.* Haſtings, i. 182.
——— *v.* Hollingworth, i. 437. vii. 407.
Tooker's caſe, v. 321.
Tookes *v.* Beaufort (Duke of), ii. 617.
Tooley's caſe, vi. 573.
Tooms *v.* Chandler, ii. 64.
Topham *v.* Tallie, v. 706.
Toplady *v.* Sealey, vi. 581.
Topliff *v.* Waller, i. 147. vii. 206.
Toplis *v.* Baker, iv. 388. v. 685.
Topping *v.* Ryan, vi. 427.
Topſall *v.* Edwards, ii. 40. iv. 470.
Torriano *v.* Legge, vi. 749.
Toſer *v.* Davis, vi. 254.
Totterdell *v.* Glaſby, i. 552.
Totty *v.* Neſbitt, v. 170.
Toulſon *v.* Grout, i. 434.
Tourle *v.* Rand, v. 52.
Tourſon's caſe, iii. 537.
Touſſaint *v.* Martinnant, i. 257. 420, 421.
Tovey *v.* Pitcher, ii. 73. 286.
——— *v.* Young, vi. 672.
Towers *v.* Barret, i. 263.
——— *v.* Oſborne, i. 123.
Townley *v.* Sherborn, vii. 183, 184.
Townſend's caſe, iv. 578. v. 829.
Townſend *v.* Aſh, i. 35.
——— *v.* Duppa *et al.* vii. 53.
——— *v.* Ives, vii. 329.
——— *v.* Lawton, vii. 156.
——— *v.* Pearce, vii. 356.
——— *v.* Row, ii. 590.
——— *v.* Townſhend, iv. 473. vii.
——— *v.* Wales, i. 316.
——— (Lord) *v.* Wyndham, i. 482. iii. 311.
——— *v.* Aſh, iii. 198.
——— *v.* Hughes (Dr.), vi. 100, 101. 666. 138.
Townſon *v.* Guyon, iv. 662.
Trafford *v.* Aſhton, iv. 286. 330.
——— *v.* Berrige, iv. 351.
——— *v.* Boehm, i. 113. ii. 442. vii. 180.
——— *v.* Trafford, v. 677.
Traherne *v.* Greſſingham, ii. 437.
——— *et al.* *v.* Sadlier *et. al.*, v. 20.
Trail *v.* Edwards, vi. 123.
Trap, *ex parte*, i. 452.
Tratle *v.* King, ii. 288.
Travel *v.* Garteret, v. 606.

Travell v. Danvers, vii. 185.
Travers v. Stafford (Lord), iii. 655.
Traviban v. Lawrence, vii. 40.
Travis v. Ox on, vi. 745. vii. 519.
Treacle v. Coke, ii. 73.
Treaſurer (Lord) v. Barton, iv. 214.
Trebec (Dr.) v. Keith, ii. 672.
Tredinwick v. Peryman, ii. 237.
Tredway's caſe, v. 268.
Tregame v. Fletcher, vii. 92.
Trehern v. Claybrook, i. 656.
Trelawney v. Thomas, ii. 588.
——— v. Wincheſter (Biſhop of), v. 183.
Trench v. Trewin, v. 338.
Treport's caſe, ii. 574. v. 850.
Treſham v. Ford, v. 402.
Treſwell v. Middleton, vii. 35.
Trethewy v. Ackland, v. 446.
Trevelian v. Seecomb, v. 237.
Treves v. Townſhend, i. 413. vii. 182.
Trevill v. Ingram, v. 711.
Trevillian v. Lane, v. 854.
——— v. Pyne, v. 397. vi. 621.
Trevis v. Scott, ii. 470.
Trevor v. Trevor, i. 113. iii. 214. vii. 161.
——— v. Wall, ii. 505. 510.
Trewynnard's caſe, v. 637.
Trimmer v. Jackſon, vii. 317.
Trinder v. Shirley, i. 343.
——— v. Watſon, i. 333.
Tripp v. Frank, i. 84.
Triſtram v. Baltinglaſs, i. 636. iv. 143. vi. 29.
Tritton v. Foot, ii. 79. iv. 230.
Trobarefoot v. Greenway, ii. 273.
Trodd v. Downs, iii. 680.
Trollop's caſe, vi. 637.
Trot v. Spurling, ii. 706.
—— v. Vernon, iv. 284.
Troughton v. Troughton, v. 83.
Trowl v. Methurſt, vii. 453.
Trueman v. Fenton, i. 112. 270. 459. iv. 484.
——— v. Hurſt, iii. 585, 586. 595.
Trueſloe v. Yewer, iv. 162.
Trulack v. White, i. 623.
Trundell v. Eames, iii. 680.
Truſcott v. Carpenter, i. 245, 246. vi. 570. 616. 620.
Truſtant v. Brocklehurſt, v. 359.
Trygurn v. Fletcher, v. 422.
Tryon v. Carter, v. 173. 176.
Tryppit v. Eyres, i. 212.
Tubb v. Woodward, vii. 438.
Tucker's caſe, vi. 541, 542.
Tucker v. Goldburne, v. 342.
Tuckerman v. Jefferies, iii. 681.
Tuckfield v. Buller, iii. 606.
Tudor v. Anſon, i. 112. 725.
——— v. Sanizne, i. 481.
Tudway v. Bourne, i. 434. 454. 458.
Tuerlcote v. Morriſon, i. 138.
Tuffnell v. Page, i. 726. iv. 253. vii. 314, 315.
Tullidge v. Wade, ii. 586. vi. 562.
Tullitt v. Tullitt, iii. 417. vii. 154.
Tully's caſe, ii. 592.
Tully v Peachy, vi. 176.
——— v. Richardſon, i. 334.
——— v. Sparks, i. 424. ii. 58. 467.
Tunſtall v. Brachen, iv. 408.
Turberville v. Stamp, vi. 655.
Turbill's caſe, v. 618.
Turing v Jones, i. 340. v. 331.
Turnam v. Thorn, vi. 210.
Turner's caſe, i. 479 481.
Turner, *ex parte*, i. 449.
——— v. Baynes, vii. 415.
——— v. Buck, vii. 296.
——— v. Cowper, i. 16.
——— v. Crane, v. 39.
——— v. Davies, iii. 51.
——— v. Davis, i. 313. ii. 723.
——— v. Felgate, ii. 740.
——— v. Goodwin, ii. 92.
——— v. Gwinn, v. 15.
——— v. Horton, ii. 40.
——— v. Neal, ii. 179.
——— v. Ogden, vi. 211.
——— v. Palmer, i. 154.
——— v. Pearte, vi. 672.
——— v. Schomberg, i. 331.
——— v. Sterling (Sir Samuel), i. 91.
——— v. Triſby, iii. 596.
——— v. Turner, i. 177. 181. iii. 227. 620.
——— v. Vaughan, i. 112.
——— v. Warren, i. 330. iii. 345. vii. 467.
——— v. Watſon, i. 112.
——— v. Winter, v. 593.
Turton v. Hayes, i. 329.
——— v. Reignolds, vi. 585.
Turvill's caſe, i. 7.
Turvill v. Aynſworth, ii. 8.
——— v. Tipper, 315.
Tuthill v. Milton, vi. 218. 245.
Tutton v. Andrews, vi. 666.
Tweddell v. Tweddell, iii. 86. v. 32.
Tweedale v. Coventry, iii. 86. 468. v. 23.
Twine's caſe, iii. 310. v. 227. vi. 510.

Twining v. Morrice, i. 111.
Twiſden v. Birt, v. 820.
Twiſs v. Maſſey, i. 456. 459.
Twiſſe v. Blunt, vi. 728.
Tybbald v. Tregott, ii. 586.
Tye's caſe, iii. 195. 217.
Tyers v. Walton, vi. 739.
Tyffin v. Wingfield, v. 332.
Tyle v. Morrice, i. 556.
Tyler v. Horne, iv. 656.
—— v. Wall, iv. 485.
Tyrie v. Fletcher, iv. 670.
Tyrrell's (Lady) caſe, vii. 143.
Tyrrell v. Hope, i. 119. 411.
Tyſon v. Gurney, iv. 670.
—— v. Hillyard, ii. 472.
—— v. Paſke, iii. 125.
Tyſſen v. Benyon, ii. 446.
—— v. Clarke, vi. 659.
Tyte v. Glode, vii. 422.
—— v. Willis, iv. 259. 288.

U.

Udall v. Tindall, vi. 734.
Ughtred's caſe, ii. 92.
Ulrick v. Litchfield, ii. 657.
Umble v. Fiſher, vi. 17.
Underhay v. Underhay, iii. 162.
Underhill v. Matthews, v. 176.
Underwood v. Gibbon, vi. 715. 731.
—— —— v. Hewſon, i. 243. vi. 569.
—— —— v. Mordant, ii. 715.
—— —— v. Morris, iv. 422, 423.
—— —— v. Parks, vi. 252.
Ungly v. Peale, iv. 334.
Unwin v. Oliver, i. 396.
—— v. Wolſeley, iv. 627.
Upcher v. Betts, vi. 251.
Uppom v. Sumner, ii. 735.
Upſheer v. Betts, v. 407.
Upton v. Baſſet, vi. 66.
—— v. Dawkins, v. 319. vi. 584.
—— v. Fold, vi. 228.
—— v. Pinfold, vi. 246.
—— v. Wells, ii. 434.
Upwell v. Halſey, v. 721.
Uſher v. Buſhell, vi. 602, 603.
—— v. Edmonds, vi. 469.
Utterſon v. Mair, iii. 8.
—— v. Vernon, i. 458.
Uvedal v. Uvedal, v. 758.
Uvedale v. Ettrick, vii. 185.

V.

Vachel v. Jefferies, iii. 67.
Vailor's caſe, v. 136.
Valentine v. Faucett, vi. 85.
—— v. Penny, v. 416.
Valleio v. Wheeler, iv. 644.
Van v. Clarke, iv. 402.
Van Henbeck's caſe, vii. 200. 206.
Vandenaker v. Deſbrough, i. 432. 438.
Vandergee v. Willis, v. 85.
Vanderplanken v. Griffith, vi. 398, 399.
Vandlore v. Trip, i. 213.
Vandrink v. Archer, vi. 679. 690.
Vane's (Lord) caſe, vi. 433.
—— (Sir Henry) caſe, i. 528. v. 493.
Vane v. Bernard (Lord), vii. 290.
Van Morſel v. Julian, i. 326.
Vaſper v. Edwards, vi. 582.
Vaſſie v. Delaval, vi. 657. 669.
Vauchell v. Lemon, v. 721.
Vaughan's caſe, vi. 514. 516, 517. 541. 548, 549.
Vaughan v. Brown, iii. 26.
—— v. Burſlem, v. 722.
—— v. Davies, vii. 398.
—— v. Ellis, vi. 220.
—— v. Evans, v. 664.
—— v. Farrer, i. 595.
—— v. Guy, iv. 484.
—— v. Lewis, ii. 25. iv. 521. vii. 24.
—— v. Lloyd, ii. 493.
—— v. Norris, vi. 59.
—— v. Thomas, i. 109. 111.
Vaux's (Lord) caſe, v. 485.
Vaux v. Waltham (Lord), i. 171.
Vavaſor's caſe, vii. 93.
Vavaſor v. Baile, vi. 119.
—— v. Vaux, ii. 461.
Veal v. Priour, iii. 120.
—— v. Warner, i. 232.
Velthaſen v. Ormſley, v. 649.
Vere v. Lewis, iv. 732.
Verelſt v. Rafael, ii. 466.
Verhorne v. Brewin, vii. 338.
Vermuden v. Heathetal, v. 234.
Verney (Earl) v. Macnamara, i. 171. v. 309.
—— v. Verney, v. 31.
Vernon's caſe, ii. 382. iii. 711. v. 705. vi. 382. vii. 82. 121.
Vernon, *ex parte*, iii. 605.
—— v. Aſſop, i. 649.
—— v. Goodrick, v. 335. vi. 602.
—— v. Hall, i. 439.
—— v. Hankey, i. 397. 439. vi. 671.
—— v. Hanſon, i. 439.

Vernon *v.* Jones, vii. 358. 370.
——— *v.* Stephens, i. 109.
——— *v.* Vaudrey, vii. 153.
——— *v.* Vernon, iii. 614. v. 25. vii. 140. 154.
——— *v.* Wynne, vi. 83.
Vezey *v.* Harris, v. 391.
Vezian *v.* Grant, iv. 668.
Vicars *v.* Hayden, ii. 412.
——— *v.* Langham, iii. 764.
——— *v.* Worth, vi. 210. 256.
Vicary's case, ii. 623.
Vicary *v.* Farthing, vii. 10. 13, 14.
Vice *v.* Burrow, ii. 466.
Vick *v.* Edwards, iii. 687.
Victoria *v.* Cleeve, iv. 669.
Vigers *v.* Aldrich, ii. 719.
Villa *v.* Dimock, i. 5.
Villa Real *v.* Galway (Lord), ii. 383. iii. 716.
Villars *v.* Cary, vii. 209.
Villers *v.* Beamont, iii. 313.
——— *v.* Beaumont, vii. 125.
——— *v.* Manfley, iv. 450.
Villiers *v.* Villiers, iv. 252. vii. 122.
Vincent, *ex parte*, i. 403.
——— *v.* Alpy, vi. 254.
——— *v.* Brady, i. 452.
——— *v.* De Laar, ii. 150.
——— *v.* Lefney, vi. 599. 601.
Viner *v.* Francis, iv. 344.
Vinkinfton *v.* Ebden, ii. 204.
Vintner *v.* Pix, iv. 416.
Vipont (Charles) *v.* Rowley, iv. 230.
Virtue *v.* Bride, i. 77.
Viyard *v.* Longdale, iii. 717.
Vokens *v.* Cull, vii. 385.
Voll *v.* Smith, i. 121.
Vouxe's (Lord) case, v. 749.

W.

Wade's case, vi. 447. 449, 450.
Wade *v.* Atkinfon, iii. 94.
——— *v.* Batch, v. 824.
——— *v.* Hatcher, vi. 601. 699.
——— *v.* Paget, i. 114.
——— *et ux. v.* Smith, ii. 486.
——— *v.* Wadman, iii. 95.
Wadham *v.* Marlow, i. 457. ii. 72.
Wadhurft *v.* Damme, v. 394.
Wadfworth *v.* Handifide, v. 642.
Waggoner's case, i. 547.
Wagborne *v.* Fields, vii. 399.
Wagoner's case, ii. 238. 247.
Wagftaff *v.* Bedford, i. 35.
——— *v.* Wagftaff, vii. 314.
Wainwright's (Dr.) case, v. 679.
Wainwright *v.* Bagfhaw, i. 605.
——— ——— *v.* Bendlows, iii. 85.
Waite Stoke (Hundred of), iii. 510.
Waite *v.* Whorwood, vii. 183.
Waites *v.* Briggs, ii. 291. 527.
Wake *v.* Rufs, vii. 517.
——— *v.* Wake, ii. 383, 384. iii. 716. vii. 447. 449.
Wakefield's case, ii. 595.
Wakefield *v.* Child, i. 34. ii. 396.
Wakeman *v.* Blackwell, iii. 246.
Walcot *v.* Hall, i. 457. iv. 398. 428.
Walden *v.* Mitchell, vi. 209. 211.
Waldgrave *v.* Ogden, vi. 680.
Waldron *v.* Berrie, iii. 88.
Wale *v.* Buckley, iii. 420.
Walgrave *v.* Somerfet, vii. 269.
——— *v.* Taylor, iii. 476.
Walkenden *v.* Haycock, vi. 236.
Walker's case, vii. 268.
——— (Dr.) case, ii. 30. 284.
Walker and Woodbridge, *ex parte*, i. 437.
Walker, *ex parte*, i. 388.
——— *v.* Birch, iv. 601.
——— *v.* Burnell, i. 436.
——— *v.* Burrows, i. 432.
——— *v.* Childs, i. 584.
——— *v.* Denne, v. 497.
——— *v.* Drawater, vi. 113.
——— *v.* Giblet, i. 458.
——— *v.* Grofvenor (Earl), vii. 397.
——— *v.* Hamerfly, vi. 190.
——— *v.* Harris, vii. 425.
——— *v.* Jackfon, iii. 85.
——— *qui tam v.* Keene, vi. 477.
——— *v.* King, ii. 49.
——— *v.* Lamb, v. 186.
——— *v.* Nevill, ii. 394.
——— *v.* Penrin, v. 105.
——— *v.* Penry, vii. 189.
——— *v.* Perkins, i. 113.
——— *v.* Reeves, ii. 72. v. 20.
——— *v.* Rich, iv. 551.
——— *v.* Riches, ii. 709.
——— *v.* Robinfon, ii. 35.
——— *v.* Scott, vi. 672.
——— *v.* Wakeman, iv. 145.
——— *v.* Walker, i. 442. 716.
——— *v.* Whitter, ii. 279. 287. iii. 82. v. 350.
Wallace, *ex parte*, i. 420.

Waller *v.* Campion, iv. 197.
—— *v.* Croot, ii. 90. v. 410.
—— (Sir Thomas) *v.* Hanger, i. 14.
—— *v.* Holton, iv. 575.
—— *v.* Lamb, iii. 630.
—— *v.* Norwich (Dean and Chapter of), ii. 81.
—— *v.* Sands, iv. 684.
—— *v.* Travers, vi. 272.
—— *v.* Weedale, ii. 716.
Wallis's caſe, ii. 234.
Wallis *v.* Cox, ii. 96.
—— *v.* Delancey, vii. 456.
—— *v.* Everard, ii. 396.
—— *v.* Grimes, i. 642.
—— *v.* Hodſon, iii. 75. vi. 382.
—— *v.* Savill, ii. 352.
—— *v.* Wallis, vii. 318.
Wallop, *ex parte*, i. 515.
—— *v.* Irwin, i. 15.
Wallround *v.* Pallard, iv. 103.
Walls *v.* Rymes, vi. 209.
Walmeſley *v.* Booth, i. 299. 303. iii. 307.
Walmſley *v.* Booth Bernard, i. 114.
Walnough *v.* Houghton, vi. 476.
Walpole (Lord) *v.* Cholmondeley, vii. 457.
—— *v.* Ewer, iv. 680.
—— *v.* Pulteney, iv. 719.
Walrend *v.* Winroll, v. 614.
Walrond *v.* Franſham, i. 326.
Walſall *v.* Heath, iv. 14.
Walſh *v.* Biſhop, ii. 272.
—— *v.* Paterſon, v. 784.
—— *v.* Troyte, vii. 438.
—— *v.* Walſh, iii. 75.
Walſingham's caſe, vii. 95.
Walſingham *v.* Comb, v. 368, 369.
Walſton Dixe's caſe, v. 835.
Walter *v.* Drew, iv. 292.
—— *v.* Jackſon, iv. 27.
—— *v.* Rumball, ii. 350.
—— *v.* Ruſſel, iii. 659.
—— *v.* Saunders, i. 479. 481.
—— *v.* Sherlock, i. 424.
—— *v.* Stokoe, ii. 461.
Walton, *ex parte*, i. 420.
—— *v.* Bent, i. 347.
—— *v.* Kerſop, vi. 72.
—— *v.* Shelly, ii. 587. 592.
—— *v.* Stanton, i. 298.
—— *v.* Tryon, vi. 720, 721.
—— *v.* Waterhouſe, ii. 90.
Walwin *v.* Herbert, ii. 723.
Walwyn *v.* Smith, vi. 392.
Waples *v.* Eames, iv. 635.
Warcomb *v.* Carroll, iii. 218.
Ward's caſe, vi. 559.
—— (Dr.) caſe, v. 151.
Ward, *ex parte*, i. 398. 400. 415.
—— *v.* Ayre, vi. 580.
—— *et al. v.* Brampſton, i. 54.
—— *v.* Bridgwin, vi. 449.
—— *et ux. v.* Dettenſam, vii. 282.
—— *v.* Dudley (Lord), iii. 86.
—— *v.* Ellard, i. 502.
—— *v.* Evans, iv. 586.
—— *v.* Lant, iii. 77. iv. 366. vii. 347.
—— *v.* Lawrence, v. 615.
—— *v.* Lenthal, vii. 115.
—— *v.* Lumbard, vii. 98.
—— *v.* Periam, i. 240.
—— *v.* Petifer, ii. 418.
—— *v.* Rich, v. 416.
—— *v.* St. Paul, iii. 408.
—— *v.* Saville, vi. 72.
—— *v.* Snell, ii. 34. 58.
—— *v.* Turner, iv. 338.
—— *v.* Waddington, vii. 268.
—— *v.* Warthew, ii. 325.
Wardell, *ex parte*, i. 419.
—— *v.* Wardell, vii. 446.
Warder, *ex parte*, i. 415.
Waring *v.* Danvers, iii. 83.
—— *v.* Dewberry, vi. 34.
—— *v.* Griffiths, v. 336.
Warne *v.* Player, iii. 178.
Warneford *v.* Warneford, vii. 308.
Warner's caſe, iii. 422.
Warner, *ex parte*, iii. 411.
—— *v.* Booſley, v. 722.
—— *v.* Collins, iii. 255.
—— *v.* Fleetwood, vii. 257.
—— *v.* Harding, vi. 447.
—— *v.* Hone, iii. 683.
—— *v.* Theobald, v. 362.
—— *v.* Wainsford, v. 373.
—— *v.* White, iv. 335.
Warren's caſe, ii. 23. iv. 500.
Warren *v.* Conſet, ii. 291.
—— *v.* Grenville, ii. 613. iii. 230.
—— *v.* Ives, v. 447.
—— *v.* Lapdon, vi. 598.
—— *v.* Mathews, v. 499.
—— *v.* Morſe, i. 272.
—— *v.* Sainthill, *v.* 336.
—— *v.* Stawell, iii. 461.
—— *v.* Wakely, ii. 422.
—— *v.* Warren, iv. 382.
Warrick *v.* Warrick, ii. 580.

Warriner v. Giles, ii. 635.
Warwick's (Counteſs of) caſe, vii. 104.
Warwick (Counteſs of) v. Edwards, i. 482.
——— v. Figg, vi. 424.
——— (Counteſs of) v. Litchfield (Biſhop), v. 405.
——— v. Warwick, v. 75. vii. 170.
——— v. White, ii. 150. vi. 392.
Waſe v. Pretty, v. 690.
Waſhborne v. Downs, vii. 185.
Waſhburn v. Birch, i. 187.
Waſhman v. Rowe, ii. 496.
Waſſel v. Yelton, iii. 177.
Waterman v. Yea, vi. 85.
Waters v. Ebral, iii. 416.
——— v. Ogden, iii. 88.
——— v. Weigall, vii. 50.
Watkin v. Aſtwick, i. 662.
Watkins v. Aſhwicke v. 113. vi. 447.
——— v. Barry, v. 382.
——— v. Edwards, iv. 567.
——— v. Hanbury, i. 298.
——— v. Johns, v. 208.
——— v. Parry, i. 347.
——— v. Towers, i. 59.
Watkinſon v. Mann, iv. 49.
——— v. Pacy, v. 654.
Watkyns v. Watkyns, i. 494.
Wats v. Philips, i. 220.
Watſon's caſe, vi. 505.
Watſon v. Baker, vi. 192.
——— v. Bernard, ii. 463.
——— v. Clerke, iii. 444.
——— v. Cox, iii. 247.
——— v. Goodman, iii. 768.
——— v. Hinſworth, iv. 239.
——— v. Johnſon, v. 142.
——— v. Lincoln (Earl), iv. 379.
——— v. Lockley, iii. 247.
——— v. Norbury, v. 442.
——— v. Shaw, i. 327.
——— v. Sneed, v. 158.
——— v. Sutton, ii. 511.
——— v. Thorpe, v. 455.
——— v. Turner, i. 123.
——— v. Vanderlaſh, vi. 216, 217.
Watton v. Weddington, ii. 92.
Watts's caſe, iv. 759.
Watts v. Baker, vi. 451.
——— v. Ball, vii. 137.
——— v. Birkitt, iii. 193.
——— v. Bullas, vii. 418.
——— v. Creſſwell, v. 48.
——— v. Maidwell, iv. 215.
——— v. Millard, vii. 392.
Watts v. Robinſon, v. 225. 577.
Waugh v. Auſtin, i. 21.
——— v. Carver, vii. 501.
Way v. Modigliani, iv. 606.
——— v. Yally, i. 57.
Waymell v. Reed, vii. 395.
Wayne v. Sands, ii. 404.
Weale v. Lowe, vii. 185.
——— v. Lower, v. 791.
Wealthy v. Boſville, iv. 292.
Weatherſtone v. Hawkins, vi. 225.
Weaver v. Cariden, vi. 207.
——— v. Ward, vi. 568, 569. 589. 609.
Weavers' Company v. Forreſt, v. 331. 438.
Webb's caſe, i. 255. ii. 193.
——— (John) caſe, v. 197, 198.
Webb v. Bell, ii. 344.
——— v. Biſhop, i. 274.
——— v. Cleverden, iii. 322. vii. 379.
——— v. Cook, v. 675.
——— v. Diville, i. 669.
——— v. Hargrave, iv. 94.
——— v. Harvey, vi. 121.
——— v. Hearing, iv. 252. v. 786.
——— v. Hind, vi. 63.
——— v. Jones, iii. 85.
——— v. Martin, iv. 474.
——— v. Poor, vi. 229.
——— v. Potts, vi. 760.
——— v. *qui tam* v. Punter, vi. 477.
——— v. Ruſſell, ii. 73. v. 20.
——— v. Stone, vii. 398.
——— v. Thompſon, ii. 525.
——— v. Turner, vi. 624.
——— v. Ward, vii. 409.
——— v. Warner, vi. 718. 747.
——— v. Webb, iv. 308. 341.
——— v. Withers, vi. 94.
——— and Jucks v. Worfield, vii. 213.
Webber v. Farmer, iv. 545.
——— v. Taylor, vi. 748.
Webſter v. Biſhop, i. 236.
——— v. De Taſtet, vii. 503.
Wedderburne v. Carr, i. 118.
Weedon v. Harding, vi. 735.
Weekes v. Truſſel, vi. 762.
Weeks v. Gore, ii. 445.
——— v. Peach, i. 177. iii. 236.
Wegerſloff v. Keen, iv. 686. 734.
Wegg v. Villers, v. 755, 756. 762, 763, 764.
Welberry v. Liſter, vi. 651.
Welby v. Andrews, ii. 521.
——— v. Canning, vi. 635.

Welcock v. Hammond, v. 779, 780. 803. 806.
Welcome v. Lake, v. 677.
Weld v. Acton, vii. 376.
—— v. Bradbury, iv. 347.
Welden v. Grey, vi. 107.
—— v. Vezey, iii. 122. vi. 392.
Welford v. Beazely, i. 118.
Weller v. Goyton, v. 141.
Welles v. Middleton, iii. 307.
Wellington v. Arten, i. 19. ii. 143.
—— v. M'Intosh, i. 236.
—— v. Wellington, vii. 64.
Wellis v. Nicholson, i. 301.
Wellock's case, iv. 53. vi. 759.
Wells's case, ii. 588.
Wells v. Fenton, v. 775.
—— v. Treguson, i. 649.
—— v. Watling, i. 625.
—— v. Wells, i. 269.
—— v. Williams, i. 6. 139. iv. 598.
Wenman's (Lord) case, iii. 532.
Wentmouth v. Collins, ii. 669. v. 675.
Wentworth's case, ii. 375.
Wentworth v. Squib, i. 2.
—— v. Wentworth, i. 668.
West's case, vi. 371.
West v. Davis, vi. 699.
—— v. Erisley, i. 113. vii. 167. 169, 170, 171.
—— v. Eyles, ii. 529.
—— v. Skipp, i. 436. 461.
—— v. Sutton, i. 140. vi. 120. 124. vii. 48.
—— v. Trolop, v. 330.
Westbrooke v. Strutville, i. 244.
Westerdell v. Dale, vii. 413.
Western v. Wildy, iv. 681.
Westfaling v. Westfaling, iii. 468, 469.
Westlake v. Perse, v. 682.
Westley's case, ii. 517. vi. 160.
Westley v. Clarke, iii. 31. vii. 183.
Weston's case, ii. 185. vi. 373.
Weston v. Danby, iii. 463.
—— v. Downes, i. 263.
—— v. Mason, i. 362.
—— v. Pool, i. 301. 303.
—— v. Withers, ii. 52. 57. v. 301.
Westover v. Dabbinet, vi. 226.
Wetherell v. Hall, ii. 121.
Wetherley v. Wetherley, iii. 424.
Weyland v. Weyland, ii. 254.
Whaley v. Bagenal, i. 120, 121.
—— v. Lambert, i. 600.
Whalley v. Reede, iii. 456.
—— v. Tancred, v. 830.
Whalley v. Whalley, v. 76. vii. 142. 153.
Wharam v. Broughton, i. 13. vi. 134.
Whareham v. Brown, iv. 341.
Wharton v. Charles, i. 592.
—— v. Gresham, iv. 279.
—— v. King, vii. 419.
—— v. Lisle, vi. 731.
—— v. Musgrave, vi. 121.
—— v. Pitts, v. 649.
—— v. Richardson, vi. 123.
—— (Lord) v. Robinson (Sir John), ii. 590.
—— v. Wharton, i. 171.
Whately v. Kemp, vii. 164.
Wheatley v. Cudmerton, v. 361.
—— v. Lane, ii. 291.
—— v. Thomas, v. 739. vi. 373.
Wheatly v. Stone, iii. 181. vi. 558.
Wheeler's case, iv. 505. v. 620. 675.
Wheeler v. Bingham, iv. 418.
—— v. Caryll, iii. 318.
—— v. Copeland, i. 326.
—— v. Danby, iv. 123.
—— v. Hayden, iv. 94. vii. 19.
—— v. Pitt, vi. 663. 671.
—— v. Sheers, iii. 67.
—— v. Shove, i. 586.
—— v. Thoroughgood, iv. 195.
—— v. Walroon, iv. 325.
Whelpdale's case, ii. 390. v. 165. vi. 182. vii. 26. 68.
Whelpdale v. Cookson, vii. 181.
Whetstone (Lady) v. Saintsbury, ii. 574. v. 17.
Whidner v. Conyers, vi. 414. 426.
Whip v. Thomas, i. 262.
Whiskard v. Wilder, i. 347.
Whistler's case, iii. 397. v. 603. 605.
Whittler v Lee, ii. 489.
—— v. Mainwaring, i. 107.
—— v. Webster, vii. 447.
Whitaker's (Serjeant) case, ii. 19.
Whitaker v. Burrough, vi. 644, 645.
Whitbread v. Brockhurst, i. 117. 121.
—— v. Brookbank, i. 260.
Whitby v. Loftus, iv. 563.
—— v. Sanders, iv. 51.
Whitchurch, *ex parte*, i. 209. 442. 446.
—— v. Bevis, i. 117.
Whitcomb v. Jacob, iv. 600.
Whitcombe v. Whitcombe, ii. 298.
—— v. Whiting, iv. 484. 740.
White, *ex parte*, i. 449.
—— v. Bodinam, v. 400.
—— v. Carter, iv. 272.

White v. Cleaver, v. 178. 411.
——— v. Collins, iv. 264.
——— v. Cuyler, v. 155.
——— v. Dunſter, v. 251.
——— v. Giffard, i. 483.
——— v. Graham, vi. 700.
——— v. Hayward, vi. 134.
——— v. Heigh, iii. 447.
——— v. Holland, vi. 361.
——— v. Ledwick, iv. 698.
——— v. Love, vii. 53.
——— v. Milner, vii. 397.
——— v. Morgan, vi. 424.
——— v. Riſden, i. 52.
——— v. Sayer, ii. 236.
——— v. Sealy, ii. 84.
——— v. Shaw, i. 244. vi. 598.
——— v. Small, iii. 305.
——— v. Smith, ii. 35.
——— v. Taylor, i. 171.
——— v. Thomas, ii. 459. iii. 457.
——— v. Thornburgh, vii. 171.
——— v. Weſt, iii. 236.
——— v. White, i. 586.
——— v. Whitſhire, ii. 737. vi. 172.
——— v. Willis, i. 23.
——— v. Woodhouſe, vi. 466. 476.
Whitechapel's (Commiſſioners of Sewers for) caſe, ii. 213.
Whitechurch v. Whitechurch, iii. 615. vii. 122. 314.
Whitehead v. Vaughan, i. 444.
Whitelegg v. Whitelegg, vii. 286.
Whiteman v. King, i. 624.
Whitfield, *ex parte*, iii. 614.
——— v. Bewit, vii. 296.
——— v. Faucett, v. 73. 170.
——— v. Hunt, i. 258. 736.
——— v. Le Deſpencer (Lord), i. 76. 553. iv. 585.
——— v. Powell, vi. 212. 255.
Whithorne v. Harris, iv. 350.
Whiting v. Reynel (Sir George), ii. 526.
——— v. Welkins, iv. 258.
Whitlock's caſe, iv. 21. 151.
Whitlock v. Horton, iii. 696. iv. 132.
——— v. Squire, vi. 463.
Whitmore v. Weld, iii. 580.
Whitnel v. Cook, v. 404.
Whitrong v. Blaney, v. 382.
Whittend v. Fuller, vi. 708.
Whitter, *ex parte*, i. 414.
——— v. Whitter, iv. 223.
Whittingham's caſe, iii. 165. 608.
Whitton v. Weſton, vi. 756.
Whitwick v. Hovenden, v. 255.
Whorewood v. Jackſon, ii. 273.
——— v. Whorewood, i. 494.
Whytham v. Cawthorn, vii. 161.
Whytmore v. Porter, iii. 26.
Whywall v. Champion, iii. 594.
Wick's caſe, vii. 191.
Wickes v. Strahan, i. 456.
Wickham v. Enfield, ii. 369. vi. 639.
——— v. Hobart, v. 628.
Wicks v. Dagley, v. 621.
Widmore v. Corporation of Queen Anne's Bounty, i. 586.
——— v. Woodroffe, i. 595. iv. 350.
Wier's caſe, ii. 184.
Wigg's caſe, iii. 799.
Wigg v. Wigg, i. 639. v. 65.
Wiggins v. Ingleton, iv. 617.
Wiggleſworth v. Dalliſon, ii. 234.
Wightman v. Mullens, ii. 512.
Wigley v. Morgan, v. 616.
——— v. Peachy, ii. 354.
Wigmore v. Wells, v. 164.
Wigſton v. Garrett, iv. 203.
Wilbraham v. Snow, ii. 720. vi. 565. 685. 691.
Wilcock's caſe, v. 616.
——— (Thomas) caſe, vii. 56, 57.
Wilcocks v. Bradell, vii. 56, 57.
——— v. Wilcocks, vi. 131.
Wilcox's caſe, vii. 357.
Wilcox v. Huggins, iv. 480.
——— v. Proſſer, vi. 119.
——— v. Skipwith, vii. 42.
Wild's caſe, v. 747.
Wild v Clarkſon, ii. 84.
——— v. Stradling, vii. 295.
Wilde v. Clarkſon, v. 156.
Wilder v. Handy, vi. 598. vii. 390.
Wildman, *ex parte*, i. 420.
Wilford v. Greaves, v. 232.
Wilker v. Boddington, i. 440. v. 76.
Wilkes's caſe, i. 357. iii. 424. v. 217. 247. vi. 436.
Wilkes v. Broadbent, ii. 235. 241.
——— v. Earl of Halifax, i. 27. v. 338.
——— v. Wood, v. 477.
Wilkins v. Carmichael, i. 444. iv. 621.
——— v. Perrott, iii. 161. 399.
——— v. Shalcroft, vii. 56.
——— v. Wilkins, i. 37.
——— v. Wingate, vii. 442.
Wilkinſon v. ———, vii. 363.
——— *qui tam* v. Allott, i. 70. ii. 34.
——— v. Belcher, v. 298. 301.
——— v. Collett, vi. 43.
——— v. Lutwich, iv. 711. 715.

Wilkinſon v. Matthews, ii. 525.
——— v. Merryland, iv. 254.
——— v. Meyer, vi. 371.
——— v. Payne, vi. 662.
Wilks's caſe, vi. 239.
Wilks v. Eames, iii. 746.
—— v. Ruſſel, iii. 98.
Willamore v. Bamford, vi. 601. 624.
——— v. Barford, vi. 697.
Willan v. Geordini, i. 452.
Willats v. Cay, i. 412.
Willet v. Earle, iii. 82.
——— v. Edmonds, i. 388.
——— v. Sandford, i. 594.
——— v. Sanford, vii. 354.
——— v. Tidey, ii. 49.
——— v. Winnel, v. 6.
Willets v. Cay, i. 507.
Willett v. Chambera, iv. 604.
William v. Barkley, vi. 384.
Williams's caſe, vi. 510.
Williams, *ex parte*, i. 301.
——— v. Attorney General, ii. 56.
——— v. Bolton (Duke of), vii. 288.
——— v. Browne, iv. 291.
——— v. Callow, i. 494.
——— v. Carey, iii. 98.
——— v. Cheney, vii. 387.
——— v. Frith, i. 302.
——— v. Fry, i. 639.
——— v. Gwinn, ii. 389. 492.
——— v. Harriſon, iii. 586. iv. 686.
——— v. Hoſkins, vi. 119.
——— v. Jackſon, i. 326.
——— v. Jacques, vi. 180.
——— v. Jaques and Griffen, i. 311, 312.
——— v. Jones, i. 245. vi. 647.
——— v. Lamb, ii. 396.
——— v. Leaper, i. 123.
——— v. Linford, vi. 221.
——— v. Owen, vii. 374.
——— v. Pen, v. 700.
——— v. Pritchard, vi. 385.
——— v. Riley, i. 54.
——— v. Roberts, vii. 58.
——— v. Springfield, v. 89, 90.
——— v. Steadman, iv. 682.
——— v. Thomas, i. 562.
——— v. White, ii. 501.
——— v. Williams, iii. 603.
Williamſon, *ex parte*, i. 393.
Willing v. Baine, iv. 391.
Willis v. Bennet, vi. 655.
——— v. Fineux, v. 17.
Willis v. Poole, iv. 675.
——— v. Shorrall, iii. 210.
——— v. Ternegan, i. 109.
——— v. Whitewood, iii. 414. iv. 139.
Willock v. Hammond, i. 639. iii. 365. 455. iv. 251.
Willoughby's caſe, iii. 549.
——— (Lord) caſe, vii. 72. 103, 104.
Willoughby v. Brook, v. 431.
——— v. Willoughby, v. 65, 66. vii. 122, 123.
Willow v. Lydcot, iv. 325.
Wills v. Palmer, iv. 334. v. 746. vii. 128.
——— v. Turner, v. 655.
Wilmot v. Barry, i. 298. ii. 404.
Wilsford v. Berkley, vi. 667.
Wilſon's caſe, ii. 291. v. 401.
Wilſon, *ex parte*, i. 391.
——— v. Bayly, vii. 473.
——— v. Berkley (Lord), v. 551.
——— v. Bragg, vii. 294.
——— v. Carliſle (Biſhop of), vi. 735.
——— *ex dem.* Eyres v. Carter, iv. 62.
——— v. Chambers, v. 341. vi. 700.
——— v. Darlington (Earl), iii. 86. v. 28.
——— v. Dodd, vi. 610.
——— v. Duckett, iv. 655.
——— v. Fielding, iii. 86. 462.
——— v. Gary, vi. 93.
——— v. Greaves, ii. 669.
——— v. Harman, v. 115. vi. 25.
——— v. Ingolſby, ii. 466.
——— v. Kennedy, vii. 463.
——— v. Macreth, vi. 567.
——— v. Mount, vii. 447.
——— v. Phillips, ii. 256.
——— v. Poulter, vi. 693.
——— v. Powell, vi. 624.
——— v. Raſtall, i. 61. ii. 580. vi. 675.
——— v. Redman, vi. 754.
——— v. Rich, iv. 13.
——— v. Robinſon, iv. 253.
——— v. Sewell, iv. 215. vii. 483.
——— v. Smith, iv. 647.
——— v. Vanſittart, iv. 322.
——— v. Watſon, i. 444. iv. 603.
——— v. Weddal, i. 729.
Wilton v. Fairfax, iii. 247.
Wiltſhire v. Lloyd, i. 7.
——— v. Smith, v. 114.
Wimbiſh v. Tailboys, vi. 384, 385. 389.
——— v. Willoughby, i. 29.

Winch v. Fenn, vii. 196.
——— v. Keeling, i. 249.
——— v. Keely, i. 437.
——— v. Page, i. 481.
——— v. Pardon, v. 176.
——— v. Saunders, i. 220.
Winchcomb v. Pulleſton, vi. 183. 198. vii. 478, 479.
Winchelſea (Town of) caſe of, v. 511.
——— (Earl of) v. Norcliff, iii. 417. 614.
Wincheſter's (Biſhop of) caſe, vi. 726. 752.
——— (Lord) caſe, vi. 99.
——— (Marquis of) caſe, ii. 453. 457. iii. 229, 269. vii. 301.
——— (Mayor, &c. of) caſe, iv. 48.
Wincheſter (Biſhop of) v. Knight, vii. 294.
Wind v. Jekyll, i. 249. iv. 248. v. 705.
Winder v. Barnes, iii. 464.
Windham's caſe, vii. 102.
Windham v. Clere, i. 95.
——— v. Wither, iv. 736.
Windſmore v. Hobert, iii. 162. v. 724.
Windſor's (Lady) caſe, i. 260. v. 142.
Windſor (Dean and Canons of) v. Perwin (Sir Gilbert), iv. 45.
——— v. Seywell, v. 230.
Winford v. Woollaſton, v. 336.
Wingfield v. Bell, v. 400. vi. 455.
——— v. Stratford, iii. 334.
——— v. Wheley, i. 111.
Winkſworth v. May, vii. 56.
Winne v. Lloyd, ii. 54.
Winnington's caſe, ii. 699.
Winſcombe v. Pigott, vii. 66.
Winſmore v. Hubbard, ii. 563.
Winter's caſe, vi. 13.
——— (Sir John) caſe, iii. 565.
Winter v. Loveday, iv. 158.
——— v. Payne, vii. 397.
——— v. Slow, v. 301.
Winton (Biſhop of) v. Markham, vi. 99.
——— v. Pinkney, vi. 11.
Wiſcot's caſe, iii. 698.
Wiſe's caſe, vii. 224.
Wiſe v. Bennet, vi. 75.
—— v. Lawrence, i. 325.
Wiſeman's caſe, iii. 238. v. 555. 841.
Wiſeman v. Baldwin, i. 638.
——— v. Beake, iii. 307.
——— v. Cotton, vi. 381.
——— v. Crow, iii. 224.
Wiſeman v. Vandeput, i. 437.
——— v. Wiſeman, vi. 230. 232. 243.
Wit v. Buck, vi. 743.
Witham v. Hill, i. 70. ii. 34.
Witherington's caſe, iv. 505.
Witherington v. Banks, v. 18.
Witherley v. Sarsfield, ii. 505. iv. 701.
Withers v. Henley, vi. 426, 427. 572.
——— v. Withers, i. 713.
Withes v. Caſſon, iii. 389. iv. 172.
Witter v. Witter, vii. 153.
Witterſheim v. Carliſle (Counteſs of), iv. 475.
Wittingham v. Thornborough, iv. 655.
Witton v. Bie, v. 707, 708.
Wodell v. Hungate, iii. 79.
Wodnorth v. Cobham (Lord), ii. 637.
Wolf v. Daviſon, ii. 509. v. 231.
Wolfe v. Collingwood, i. 323.
Wolferſton v. Manwaring, vi. 746.
Wolfreſton's caſe, vi. 94.
Wollaſton v. Walker, iii. 56.
Wolſtoncroft v. Long, iii. 461.
Wood's caſe, i. 357. iii. 424. vi. 381.
Wood v. Avery, i. 650.
—— v. Bates, i. 676.
—— v. Bryant, iv. 376.
—— v. Butts, v. 396.
—— v. Chiver, iv. 125.
—— v. Fenwick, v. 24.
—— v. Freeman, vi. 130.
—— v. Gunſton, vi. 225. 654. 659. 666.
—— v. Harburn, ii. 719.
—— v. Holland, v. 391.
—— v. Ingerſole, v. 677.
—— *qui tam* v. Johnſon, ii. 49.
—— v. Mortimer, v. 83.
—— v. Mitchell, vii. 401.
—— v. Newton, vi. 452.
—— v. Payne, ii. 420.
—— v. Reignold, v. 774. vii. 106. 133.
—— v. Smith, vi. 602. 679. 698. 701.
—— v. Story, i. 102.
—— v. Webb, i. 101. 285.
—— v. Wenman, v. 356.
—— v. Witerick, iii. 585.
Woodbridge v. Hilton, i. 241.
Woodcock's caſe, ii. 628. v. 412.
Woodcocke v. Brooke, vii. 59.
Woodford v. Eades, vi. 665.
Woodgate v. Fuller, i. 170, 171.
——— v. Knatchbull, iii. 122. vi. 156.

Woodhouſe v. Hoſkins, vii. 158.
——— v. Shepley, iv. 547.
Woodin v. College, i. 285.
Woodley v. Exeter (Biſhop of), v. 530.
Woodman v. Blake, i. 643.
——— v. Skute, ii. 403.
Woodroffe v. Farnham, iii. 336.
——— v. Wickworth, iii. 55.
Woodruff v. Greenwood, ii. 82.
Woodſon v. Newton, i. 623.
Woodward's caſe, vi. 579.
Woodward v. Fox, v. 519.
——— v. Gyles, i. 111. iii. 650.
Woody's caſe, ii. 495. v. 349. vii. 207.
Woodyer v. Greſham, vi. 116.
Woolaſton v. Webb, v. 333.
——— v. Wright, vii. 521.
Woolcombe v. Woolcombe, iv. 352, 353.
Wooldridge (Aſſignee of) v. Blaquiere and others, v. 649.
——— v. Boydell, iv. 665.
Wooley v. Cobbe, i. 458.
——— v. Idle, i. 548.
Woolley v. Briſcoe, v. 368.
——— v. Cobbe, i. 343.
——— v. Drag, vii. 504.
Woolliſon v. Bambridge, iii. 389.
Woolmer v. Muilman, iv. 651. 670.
Woolmerſton's caſe, vi. 716.
Woolpeſton v. Manwaring, vi. 768.
Woolſey v. Shepherd, vi. 397.
Woolſton v. Aſton, v. 10.
——— v. Scott, iv. 552.
Worceſter's (Biſhop of) caſe, iii. 115.
——— (Dean and Chapter of) caſe, iv. 80. 87. vii. 265.
Worceſter v. Stone, vi. 31.
——— (Earl) v. Trade, ii. 491.
Workington (Mayor of) v. Johnſon, i. 546.
Worley's caſe, vii. 191.
Worly v. Purly, i. 473.
Worrall v. Marlar, i. 412.
Worſeley's caſe, vii. 98.
Worſely v. De Mattos, i. 395. iii. 310.
Worſley, *ex parte*, vii. 387.
——— v. Johnſon, iv. 328.
——— v. Scarborough (Lord), v. 63. 75. vii. 183.
Wort v. Clifton, v. 650.
Worthington's caſe, v. 615.
Wortley v. Birkhead, v. 61.
——— v. Holt, vi. 417. 424.
——— v. Rayner, i. 503. ii. 59. vi. 116.
——— Montague v. Sandwich (Lord), iv. 474.
Wotton v. Hale, i. 496.
Wotton v. Salter, i. 624.
——— v. Shirt, vi. 48.
Wray v. Liſter, ii. 267.
Wreathock v. Bingham, vii. 45.
Wrentford v. Gyles, iv. 182.
Wrey v. Thorn, vi. 660.
Wrigall v. Waters, vi. 137.
Wright's caſe, vi. 552.
——— (Margaret) caſe, ii. 723.
Wright, *ex parte*, vii. 403. 404.
——— v. Beal, i. 278.
——— v. Bull, i. 675.
——— v. Cadogan, i. 507. iv. 245.
——— v. Campbell, iv. 683, 684.
——— v. Canning, ii. 466.
——— v. Dixon, i. 418.
——— v. Fawcett, iv. 518.
——— v. Grove, vi. 417.
——— v. Hammond, iv. 299.
——— v. Hiccocks, v. 789.
——— v. Holford, v. 820. iv. 291.
——— *ex dem.* Clymer v. Littler, vi. 674.
——— v. Moorhouſe, vi. 213.
——— v. Norwich (Biſhop of), v. 563.
——— Bart. (Executors of) v. Nutt, ii. 497.
——— v. Pearſon, iv. 275. vii. 178.
——— v. Pelling, v. 57.
——— v. Pinder (Paul), v. 467.
——— v. Reed, i. 187. v. 112. vi. 450.
——— v. Row, vii. 147.
——— v. Sharp, i. 530.
——— Executor v. Swaine, vi. 478.
——— v. Treeweeke, ii. 473.
——— v. Wheatly, ii. 419.
——— v. Wickham (Mayor of), ii. 498. iii. 193.
——— v. Wright, vi. 742.
——— v. Wyvell, iv. 290.
Wrightſon *et al.* v. Hudſon *et al.*
Wroth's (Sir Thomas) caſe, v. 604.
Wroth v. Elſey, vi. 152.
——— v. Suſſex (Counteſs of), vi. 388.
Wrotſley's caſe, v. 863.
Wrotteſley v. Bendiſh, iii. 615.
Wyatt v. Markham, iii. 441.
——— v. Wigges, i. 751.
Wych v. Eaſt India Company, vii. 138.
——— v. Meal, ii. 12.
——— v. Packington, vii. 144.
Wyller v. Wilkes, i. 417.
Wyndham's (Sir William) caſe, i. 607.
Wyndham v. Bowen, vi. 192.
——— v. Chetwynd, vii. 333.
——— v. Egremont (Earl of), iv. 209.

Wyndham *v.* Jennings, v. 82.
——— *et al. v.* Richardſon (Lord), v. 56.
——— *v.* Wyndham, vii. 498.
Wynn *v.* Lloyd, ii. 474. 499. iii. 246.
Wynne *v.* Cookes, vii. 419.
——— *v.* Hawkins, iv. 339. vii. 140.
——— *v.* Middleton, ii. 127.
——— *v.* Wynne, iii. 244.
Wyvill *v.* Stapleton, ii. 55.

Y.

Yalden *v.* Hubbarb, ii. 269.
Yale *v.* Gough, vi. 112.
Yallop *v.* Holworthy, iii. 419. 588.
Yard *v.* Ford, iii. 111.
Yarmouth (Mayor of) *v.* Eaton, vii. 513.
——— (Earl) *v.* Ruſſell, i. 299.
Yarroth *v.* Seys, vi. 132.
Yates's caſe, ii. 21.
Yates *v.* Boen, iii. 537. v. 161.
—— *v.* Compton, i. 316. iv. 281.
—— and others *v.* Delamayne, ii. 737.
—— *v.* Fettiplace, iv. 399.
—— *v.* Freckleton, i. 299.
—— *v.* Gough, ii. 723.
—— *v.* Hambly, iv. 91. 98.
—— *v.* Harris, ii. 634.
—— *v.* Hull, iv. 616.
—— *v.* Plaintain, i. 340.
—— *v.* Windham, ii. 488.
Yaxley's caſe, i. 607. 612.
Yaxley *v.* Rainer, i. 735.
Yea *v.* Fouraker, iv. 483.
—— *v.* Lethbridge, vi. 60.
—— *v.* Yea, vii. 398.
Yeardley *v.* Rowe, v. 616.
Yeates *v.* Delamayne, vi. 170.
Yeats *v.* Grove, i. 436.
Yelverton *v.* Richardſon, v. 786.
——— *v.* Yelverton, vii. 102. 133.
Yeoman *v.* Barſton, vii. 211.
Yeomans *v.* Bradſhaw, iii. 38. iv. 685.
——— *v.* Roſs, vi. 477.
York's (Duke of) caſe, i. 560.
—— (William) caſe, iii. 581.
York *v.* Greenough, vi. 694.
—— *v.* (Archbiſhop of) *v.* Newcaſtle (Duke of), vi. 748.
—— (Abbot of) *v.* Norwich (Biſhop of), vi. 199.
—— (Mayor, &c. of) *v.* Pilkington, iii. 649.
—— (Archbiſhop of) *v.* Sedwick, vii. 55.
——— ——— *v.* Stapleton (Sir Miles), vi. 738. 768.
—— *v.* Stone, iii. 697.
—— *v.* Twine, vi. 178.
Young's caſe, vi. 583.
Young *v.* Clerk, i. 109. 111.
——— *v.* Hockley, i. 425. 458.
——— *v.* Moore, i. 329. iii. 335.
——— *v.* Payne, vi. 91.
——— *v.* Peachy, iii. 303. vii. 143.
——— *v.* Regem, iii. 563.
——— *v.* Rudd, i. 45.
——— *v.* Stowel, v. 186.
——— *v.* Tulſcomb, iii. 510.
——— *v.* Wright, iv. 124.

Z.

Zaker's caſe, iv. 87.
Zenobia *v.* Axtell, vi. 224.
Zinck *v.* Langton, i. 562.
—— *v.* Walker, i. 437. iv. 603.
Zouch *v.* Bamfield, v. 847.
——— *v.* Lloyd, iii. 417.
——— *v.* Parſons, iv. 11. 215.
——— *v.* Stowell, vi. 383, 384. 386.
——— *v.* Thompſon, i. 174. iii. 219. v. 304.
——— *v.* Willingdale, vii. 487.

INDEX.

Abatement. Vol. I. Page 1.

OF *Pleas to the Juriſdiction of the Courts.* Vol. i. Page 2
To the Perſon of the Plaintiff: And therein, i. 3
1. Of Outlawry. i. 3
2. Excommunication. i. 4
3. Alienage. i. 5
4. Premunire. i. 6
5. Popiſh Recuſancy. i. 6
Of Pleas in Abatement, with reſpect to the Perſon of the Defendant: And therein, of privileged Perſons. i. 7
Of Miſnomer and Want of Addition. i. 9
Of Abatement by the Demiſe of the King. i. 10
Of Abatement by the Death of the Parties. i. 11
By reaſon of Marriage or Coverture, i. 16. vii. 385
By a Defect in the Writ. i. 17
By the Writs not agreeing with the Count. i. 17
Where the Writ is abated ex facto, *or is only abateable.* i. 18
Where the Writ ſhall abate in toto, *or in Part.* i. 20
Where it ſhall abate by reaſon of another Action brought for the ſame Thing. i. 22
Where a Perſon may plead in Bar or in Abatement. i. 25
Dilatory Pleas, how reſtrained. i. 26. vii. 385
Of the Manner of pleading in Abatement, and the Proceedings on ſuch Plea. i. 27. vii. 386
Of the Writ by Journies Accompts. i. 30
Foreign Plea. vii. 383

Accompt. Vol. I. Page 31.

Againſt whom, either by the Common Law or by Statute, this Action lies. i. 32
Of the Manner of bringing Account, with reſpect to the Perſon againſt whom it is brought: And therein, of charging one as Receiver when Bailiff, & vice verſa. i. 33
The Nature of the Demands for which it may be brought. i. 36
In what Caſes this is the proper Action, or ſome other may be brought. i. 36
What ſhall be a good Bar to this Action. i. 37
Of the Auditors, and what ſhall be a good Diſcharge before them. i. 38

Accord and Satisfaction. Vol. I. Page 41.

What ſhall be deemed a good Accord and Satisfaction. Vol. i. 41
To what Actions may Accord and Satisfaction be pleaded. i. 44
Of the Form and Manner of pleading Accords. i. 45

Actions in General. Vol. I. Page 46.

Of the different Kinds of Actions. i. 47
In what Caſes an Action will lie, and for whom, and againſt whom. i. 49
In what Caſes diſtinct Things may be laid in the ſame Action. i. 51

Actions Local and Tranſitory. Vol. I. Page 55.

What Actions are Local, what Tranſitory. i. 56
In what Caſes the Court will change the Venue. i. 58

Actions qui tam. Vol. I. Page 61.

In what Caſes they lie. i. 62
What ought to be the Form of them. i. 62
In what Courts they may be brought, and where laid. i. 64
Of the Proceedings and Pleadings in ſuch Actions or Informations. i. 66
Of the Judgment on ſuch Actions or Informations. i. 69
In what Caſes there ſhall be Coſts. i. 69
Whether the Penalty of a Penal Statute may be compounded or granted over. i. 71

Actions on the Caſe. Vol. I. Page 72.

What Perſon, with reſpect to the Injury, may bring an Action on the Caſe. i. 73
Againſt whom ſuch Action lies. i. 74
For what Injuries an Action on the Caſe will lie; and therein, of thoſe Caſes where a Man may be ſaid to ſuffer Damnum abſque Injuria. i. 76
At what Time the Right of Action ſhall be ſaid to have accrued. i. 78
Of Actions on the Caſe for Fraud and Deceit in Contracts, or an Implied Expreſs or Warranty. i. 79
Of Actions on the Caſe for Injuries to a Man's Perſon, Property, Right, Privilege. And, i. 82
1. Where an Action will lie againſt Officers and Miniſters of Juſtice. i. 89
2. Where Caſe will lie for Torts and Injuries committed by Perſons, contrary to the Duty of their Trades and Callings. i. 92
Where an Action on the Caſe will lie for a Nuiſance: and therein, of the Inconvenience of multiplying Actions. i. 93
Where an Action on the Caſe will lie for a Conſpiracy and oppreſſive Proceedings in Proſecutions and Suits at Law. i. 94
Where Caſe will lie though the Party injured has another Remedy. i. 97
Where Caſe will lie, though the Wrong-doer be puniſhable criminally. i. 98
Admiralty. *Vid.* Court of Admiralty. ii. 175
Adminiſtrator. *Vid. Tit.* Executors and Adminiſtrators. iii. 1

Affidavit.

Affidavit. Vol. I. Page 99.

The Taking and Filing Affidavits. Vol. i. 100
Where an Affidavit is neceſſary. i. 101
Where it may be ſaid to be ſhort and defective. i. 103

Agreements. Vol. I. Page 103.

Who are capable of contracting and binding themſelves or others by their Agreements. i. 104
Of Agreements which are good in Law, and will be decreed in Specie in Equity: i. 107. vii. 387
1. Of unreaſonable Agreements, and ſuch as may be ſaid to be obtained by Fraud or Circumvention. i. 107
2. Of Voluntary Agreements. i. 111
3. Of the Manner in which they are to be performed. i. 114
Of Parol Agreements, or ſuch as may be ſaid to be within the Statute of Frauds and Perjuries. i. 115. vii. 388.

Aliens. Vol. I. Page 125.

Who are Aliens, and this either by the Common Law or by Statute. i. 125
Of Naturalization and Denization, the Difference and Effect of them. i. 129
Of the Diſadvantage that Aliens lie under by our Law; and therein, of their Incapacity to purchaſe or inherit, and of the King's Title to ſuch Purchaſes. i. 132
How far the Laws of this Country attach upon Aliens. i. 136
What Actions Aliens may maintain; and therein, of the Difference between an Alien Friend, and one whoſe King is at Enmity with ours. i. 137
Of pleading Alienage. i. 139. vii. 389

Ambaſſadors. Vol. I. Page 141.

Amendment and Jeofail. Vol. I. Page 144.

Of Amendments at Common Law. i. 145. vii. 389
The ſeveral Statutes of Amendment and Jeofail. i. 146
Whether the Statutes of Amendment extend to the King, or to any criminal Proceedings. i. 152
In what Caſes the Proceedings in Civil Cauſes are amendable, and the Manner thereof, as by amending one Part of the Record by another. i. 154
1. Of the original Writ and Proceſs. i. 154
2. Of the Imparlance Roll. i. 156
3. Of the Plea Roll. i. 157
4. Of the Jury, Proceſs and *Niſi Prius* Roll. i. 157
5. Of the Verdict. i. 159
What Defects may be amended or aided after Verdict. i. 160

1. Of the Want of sufficient Certainty in the Plaintiff's Declaration, in not setting forth his Cause. Vol. i. 160. vii. 389
2. Of Repugnancy and Surplusage. i. 161
3. Of Insufficiency in the Defendant's Bar. i. 162
4. Of Immaterial and Informal Issues. i. 162
Of amending the Judgment. i. 164
At what Time the Amendment must be made; and therein, of Records removed out of inferior Courts, and paying of Costs. i. 167
Where Records defaced by Design or Accident will be set right and amended. i. 169
Of Amendments in Equity. i. 170. vii. 390
In what Cases and at what Time Amendments may be made where the Crown is concerned. vii. 390
Amercement. *Vid. Tit.* Fine and Amercement. iii. 169

Antient Demesne. Vol. I. Page 172.

Of the Nature of the Tenure, and how proved. i. 172
Of the Privileges annexed to Antient Demesne. i. 173
How it may become Frank-Fee. i. 174
Where Antient Demesne may be pleaded, and the Form thereof. i. 175

Annuity and Rent-Charge. Vol. I. Page 177.

How an Annuity and Rent-Charge differ from other Rents. i. 178
What shall be a good Grant or Creation thereof. i. 179
Of the Remedies for the Recovery of an Annuity. i. 181
Of the Provisions made by the Legislature respecting Life Annuities. i. 186. vii. 391
Apportionment and Extinguishment of an Annuity or Rent-Charge. *Vid. Tit.* Rents. vi. 1

Appeal. Vol. I. Page 189.

Of the different Kinds of Appeals. i. 190
1. Of an Appeal of Death. i. 190
2. Appeals of Larceny. i. 191
3. Of an Appeal of Rape. i. 191
4. Of an Appeal of Mayhem. i. 191
In what Courts an Appeal may be brought. i. 192
Who may bring an Appeal. i. 193
Within what Time an Appeal must be brought. i. 193
In what County an Appeal must be tried. i. 194
How the Appellant is to appeal and prosecute. i. 194
The Form of the Writ, and for what Faults it may be abated. i. 195
The Form of the Declaration. i. 196
What may be pleaded in Bar to an Appeal. i. 196
How the Appellant is to be punished for a false Appeal. i. 197

Approver. Vol. I. Page 198.

Arbitrament and Award. Vol. I. Page 201.

The Matter in Controverſy. Vol. i. 202
The Submiſſion; and therein, of the different Kinds, and the Revocation thereof. i. 204. vii. 393
The Parties to the Submiſſion, and who are bound by it. i. 207
The Arbitrators or Umpire. i. 209
The Award itſelf, or final Determination of the Arbitrators or Umpire. i. 212 vii. 393
1. That it be made according to the Submiſſion. i. 213
2. It ought to be certain. i. 218
3. That it ought to be equal and mutually ſatisfactory. i. 221
4. It muſt be of a Thing lawful and poſſible. i. 224
5. It muſt be final. i. 225
The Conſtruction and Effect of the Award; and therein, of the Performance thereof. i. 227
Of the Pleadings in Awards. i. 230. vii. 394
In what Caſes the Performance of an Award may be compelled by Attachment, and the Courſe of Proceeding to be taken in order to obtain it. i. 236. vii. 394
Of compelling Performance of an Award by Bill in Equity. i. 238
In what Caſes, when, and in what Manner, Awards may be relieved againſt. i. 239. vii. 394
Aſſets. *Vid. Tit.* Executors and Adminiſtrators. ii. 1
Arreſts. *Vid.* Bail.

Aſſault and Battery. Vol. I. Page 242.

What ſhall be ſaid to be an Aſſault. i. 242
What ſhall be ſaid to be a Battery. i. 243
In what Manner they are to be charged. i. 244
In what Caſes they may be juſtified; and therein, of the Manner of ſetting forth ſuch Juſtification. i. 244
In what Manner they are to be puniſhed. i. 248

Aſſignment. Vol. I. Page 248.

What Things are aſſignable. i. 248

Aſſiſe. Vol. I. Page 250.

Of the Nature of an Aſſiſe, and the Form of the Proceedings on it. i. 251
In what Caſe an Aſſiſe lies. i. 253
What Seiſin is ſufficient to maintain an Aſſiſe. i. 253
How the Demandant muſt ſet forth his Title. i. 254

Aſſumpſit. Vol. I. Page 255.

In what Caſes an Aſſumpſit is the proper Action. i. 256. vii. 395
What Words create ſufficient Certainty in a Promiſe. i. 264

What

What is a sufficient Consideration to create an Assumpsit. i. 266. vii. 395
Where the Consideration shall be said to be executed or continuing. i. 271
Where the Promise shall be void, the Consideration being against Law. i. 272. vii. 395
Where the Consideration and Promise shall be said to be sufficiently set forth and averred. i. 277
What may be pleaded as a good Discharge and Performance of the Promise. i. 281. vii. 396

Attachment. Vol. I. Page 282.

In what Cases an Attachment is to be granted. i. 283. vii. 397
How the Person against whom it is granted is to be proceeded against, and how to be discharged. i. 285

Attorney. Vol. I. Page 287.

Of admitting Persons to act as Attornies, and the Qualifications necessary for such Persons. i. 288
Who may appear by Attorney, and in what Cases. i. 294
Of retaining an Attorney, what shall be an Appearance; and therein, of the Warrant of Attorney. i. 295
Of the Power of an Attorney, when appointed, and the Regularity of his Proceedings. i. 297
Of the Determination of his Power; and therein, of dismissing or changing him. i. 299
Of his Fees and Disbursements, and the Remedy for the Recovery of them. i. 300. vii. 397
Of the Privileges which an Attorney has. i. 305. vii. 399
Of Offences and Misbehaviour, for which he is punishable; and therein, of the Form of the Proceedings against him. i. 306. vii. 399

Audita Querela. Vol. I. Page 307.

Who may be relieved by Audita Querela, *and against whom.* i. 308
In what Cases an Audita Querela *will lie.* i. 309

Authority. Vol. I. Page 314.

Where an Authority shall be said to be given; and therein, of the Construction of the Words that created it. i. 314
Who are capable of executing an Authority. i. 315
Where an Authority is well pursued and executed. i. 315
Where an Authority cannot be transferred. i. 320
When it shall be said to be determined and revoked. i. 320

Bail in Civil Causes. Vol. I. Page 321.

What Persons are authorized to take Bail. i. 322
In what Cases Special or Common Bail are required. i. 324. vii. 400
1. What the Debt must amount to, for which there must be Special Bail. i. 325
2. Where the Demand is uncertain, and sounds only in Damages. i. 328
3. Whether

3. Whether a Defendant can be holden to Bail twice for the ſame Cauſe of Action. Vol. i. 329
4. Whether Bail be required in Actions on Penal Statutes. i. 330
5. Of Perſons who are not required to put in Special Bail. i. 330
6. Where Special Bail is required on removing a Cauſe out of an inferior Juriſdiction before Judgment. i. 332
7. Of putting in Bail on bringing a Writ of Error. i. 333
8. Common Bail, in what Caſes neceſſary. i. 335
Where Bail ſhall be ſaid to be put in regularly. i. 336. vii. 401
1. Of the Manner of putting in, excepting to, and juſtifying Bail. i. 336
2. To what Time it ſhall have Relation. i. 339
3. Where a different Action is proſecuted from that in which Bail was given. i. 340
4. What Defect or Irregularity may be amended. i. 341
Of the Proceedings againſt the Bail, and what they may plead in their Diſcharge. i. 341. vii. 401
Of the Proceedings on the Bail-bond. i. 346. vii. 402
Within what Time the Bail muſt render the Principal. vii. 402

Bail in Criminal Cauſes. Vol. I. Page 348.

In what Caſes it is grantable by a Sheriff. i. 348
Where by a Juſtice of the Peace. i. 350
Where by Juſtices of Gaol-Delivery. i. 352
Where by the Court of King's Bench. i. 353
Where by the other Courts of Weſtminſter. i. 356
Where by the Houſe of Lords. i. 357
What ſhall be ſaid to be ſufficient Bail. i. 357
The Offence of taking inſufficient Bail. i. 358
The Offence of granting it, where it ought to be denied. i. 358
The Offence of denying, delaying or obſtructing it, where it ought to be granted. i. 359
In what Form it is to be taken. i. 360
What ſhall forfeit the Recognizance. i. 360

Bailiff. Vol. I. Page 361.

Sheriff's Bailiffs. i. 362
Bailiffs of Liberties and Franchiſes. i. 365
Bailiffs to Lords of Manors. i. 366

Bailment. Vol. I. Page 367.

Of ſimple Bailment, by which the Bailee has only the naked Poſſeſſion. i. 368
Of pledging Goods as a Security for Money. i. 369
Of Bailment, which veſts a ſpecial Property; and therein, of lending on Special Contracts. i. 373
Where the Thing bailed is deſtroyed or deteriorated, to whom is the Loſs, and to whom is the Remedy. i. 374

Bankrupt. Vol. I. Page 381.

What Kind of Trade, Occupation, or Profession a Man must be of, or of what Nation, before he can be adjudged a Bankrupt, and what Acts he must do, permit, or suffer, which will make him one. Vol. i. 383
Of the Commission of Bankrupt; and therein, of the Creditors who may obtain it, and what they are to do previous thereto. i. 398. vii. 403
Of the Commissioners, their Duty; and therein, of the Power they may exercise over the Bankrupts or others, in discovering the Bankrupt's Estate. i. 403. vii. 404
Of the Assignees; and therein, of the Manner and Time of choosing them, and Nature of their Trust. i. 409. vii. 404
Of the Creditors, who are such; and therein, of proving their Debts. i. 413. vii. 404
Of the Bankrupt's Estate and Effects, to which the Commissioners or Assignees are entitled, when it shall be said to be vested in them; and therein, of fraudulent Dispositions by the Bankrupt, and of Actions the Assignees may bring for the Recovery thereof. i. 428. vii. 404
Of setting off, submitting to Arbitration, and compounding Debts due to the Bankrupt. i. 443. vii. 408
Of the Distribution to be made of the Bankrupt's Estate. i. 445
How the Bankrupt is to demean himself; and therein, of the Crime in not appearing, and discovering his Estate, and the Privilege he is to enjoy during his Attendance. i. 447
Of the Overplus of the Bankrupt's Estate, and the Allowance to be made him; and therein, of his Discharge and Certificate. i. 451. vii. 408
Of Partners. i. 460

Bargain and Sale. Vol. I. Page 463.

Who may bargain and sell, and to whom. i. 466
What may be bargained and sold, and how Bargain and Sale shall be taken. i. 467
In what Manner a Bargain and Sale may be made; and therein, of the Words to be made use of. i. 468
Of the Consideration. i. 469
Of the Enrolment. i. 470
1. The Relation between the Enrolment and the Deed. i. 470
2. What Estates are to be enrolled; and therein, of the Exception as to Lands in Cities, Boroughs, &c. i. 472
3. The Time of Enrolment. i. 472
The Manner of pleading Bargains and Sales. i. 473

Baron and Feme. Vol. I. Page 474.

Who are esteemed Husband and Wife; and therein, of the Legality of the Marriage, and Marriage-Contracts. i. 475. iv. 525
Of the Power given the Husband by Law over the Person of his Wife; and therein, of her Remedy for any Injury done her by him. i. 475
Of his Interest in her Estate and Property. i. 475
And therein,
1. Of the real Estate in her Right. i. 476
2. Of her Chattels Real or Leasehold Interests. i. 476
3. Of

3. Of her Perſonal Eſtate in Poſſeſſion and Choſes in Action. Vol. i. 479
Of the Huſband's Right to Things accruing to the Wife during Coverture. i. 481
Of the Wife's Acts and Agreements before Marriage, in what Caſes revoked and made void by the Marriage. i. 483
Where the Huſband ſhall be liable to the Wife's Debts contracted before Marriage; and therein, of a Wife that is Executrix or Adminiſtratrix. i. 485
Where ſhe alone ſhall be puniſhed for a Criminal Offence, and where the Huſband ſhall be anſwerable for what ſhe does in a Civil Action. i. 486
Of her Contracts for Neceſſaries, and how far the Huſband is bound by ſuch Contracts. i. 488. vii. 410
What Acts done by the Huſband or Wife alone, or jointly with the Wife, will bind the Wife; and therein, of her Agreement or Diſagreement to ſuch Acts after the Death of her Huſband. i. 495
Where the Huſband and Wife muſt join in bringing Actions, i. 499
Where they muſt be jointly ſued. i. 503. vii. 410
Where a Wife ſhall be conſidered as a Feme Sole, *and therein, of her ſeparate Eſtate.* i. 504. vii. 410
What Right accrues to the Repreſentatives of either of them on the Diſſolution of the Marriage. *Vid.* Executors and Adminiſtrators.

Barratry. Vol. I. Page 508.

Who ſhall be ſaid to be a Barrator. i. 508
Of the Form of the Proceedings againſt ſuch an Offender. i. 509
How puniſhed. i. 509

Baſtardy. Vol. I. Page 510.

Who are Baſtards. i. 511
Where Baſtardy is to be tried, and the Rules concerning ſuch Trial; and therein, of general and ſpecial Baſtardy. i. 515
Of Baſtard Eigne *and* Mulier Puiſne. i. 518
How Baſtards are to be provided for; and therein, of the Duty and Power of Juſtices of the Peace. i. 520. vii. 414
Murdering Baſtards. i. 525

Bigamy. Vol. I. Page 525. Vol. VII. Page 413.

Bills of Sale. Vol. I. P. 527. Vol. VII. P. 413.

Bills of Exceptions. Vol. I. Page 527.

Bills of Exchange. *Vid. Tit.* Merchant and Merchandize. i. 4
Bonds. *Vid. Tit.* Obligations. i. 5

Borough-English. Vol. I. Page 531.

Bridges. Vol. I. P. 533. Vol. VII. P. 413.

Burglary. Vol. I. Page 539.

What Breaking is sufficient to constitute this Offence. Vol. i. 539
What Entry. i. 541
Whether both be necessary. i. 541
What shall be accounted Night-time for that Purpose. i. 541
In what Place this Offence may be committed. i. 542
Of the Intention to commit some Felony. i. 543
How this Offence is punished, and the Offender excluded his Clergy. i. 543

By-Laws. Vol. I. P. 544. Vol. VII. P. 413.

Such By-Laws as relate to the appointing and electing of Members of a Corporation. i. 545
Such as are made in Restraint of Trade. i. 547
Such as are made to prevent Nuisances. i. 549
Such as affect Strangers. i. 550
Such as in the Frame and Make of them are void, by ordaining a Method of enforcing Obedience to them contrary to Law. i. 551

Carriers. Vol. I. P. 552. Vol. VII. P. 414.

What Persons come under the Denomination of Carriers. i. 553
In what Cases a Carrier is chargeable for a Failure in his Duty. i. 554
Of his Interest in the Things delivered to his Charge. i. 556
Of the Regulations Carriers are under by Acts of Parliament with respect to their Carriages, and the Prices they are to take. i. 557

Certiorari. Vol. I. P. 558.

Out of what Court it issues; and therein, of the discretionary Power of the Court of King's Bench in granting, denying, and filing it. i. 559 vii. 414
To what Court it lies. i. 561
Where it is necessary, or the Record may be removed without it. i. 563
What the Party who applies for it must do before it is granted. i. 563
Where by Acts of Parliament the Court of King's Bench is restrained from granting it. i. 568. vii. 414
To whom it ought to be directed. i. 570
How far it is a Supersedeas *to the Court below.* i. 570
In what Manner it is to be returned. i. 571
Where the Record shall be said to be removed. i. 572
Of the Proceedings of the superior or inferior Court after the issuing out of the Certiorari. i. 574
Where the Defendant who has applied for it shall be liable to Costs. vii. 414

Champerty. Vol. I. Page 571.

Charitable Uses and Mortmain. Vol. I. P. 576.

Of the several Statutes prohibiting to purchase in Mortmain. i. 577
Of Things exempt from or out of the Statute of Mortmain. i. 578
What is a good Charitable Use within the Statute 43 Eliz. i. 580
What is a Superstitious Use, to which the King is entitled. i. 581

How

How Charitable Diſpoſitions have been conſtrued, and how far favoured in Equity. Vol. i. 582. vii. 415
Of the Commiſſioners of Charitable Uſes, purſuant to the Statute 43 Eliz. i. 590
Of the Statute 9 Geo. 2. c. 36. *for regulating Gifts in Mortmain by Will, &c.* i. 593

Churchwardens. Vol. I. Page 597.

Of the Manner and Right of chooſing Churchwardens. i. 598
Of their Intereſt in and Power over the Things belonging to the Church. i. 601
Of their Power and Duty in making Rates in Matters relating to the Church. i. 602
Of their Power and Duty in making Preſentments, and hindering Irreverence in the Church. i. 603
Of their Accounts; and therein, of Actions brought by or againſt them, and the Remedies they have when their Time is expired. i. 604 vii. 415

Commitments. Vol. I. Page 606.

What Kind of Offenders are to be committed. i. 606
By whom. i. 606
To what Priſon. i. 608
What is to be done previous to their Commitment. i. 610
What ought to be the Form of the Commitment. i. 610. vii. 416
At whoſe Charges they are to be ſent to Priſon. i. 614
To what Court the Commitment is to be certified. i. 615
By what Means the Party may be diſcharged from ſuch Commitment. i. 615

Common. Vol. I. Page 616.

Of the ſeveral Kinds of Common. i. 616
1. Of Common Appendant. i. 617
2. Of Common Appurtenant. i. 618
3. Of Common in Groſs. i. 619
4. Of Common *pur Cauſe de Vicinage.* i. 620
Of the Intereſt of him who is Owner of the Soil. i. 621
Of the Commoner's Intereſt in the Soil; and therein, of the Remedies the Law gives him i. 622. vii. 416
1. Againſt the Lord or Owner of the Soil. i. 623
2. Againſt the other Commoners; and therein, of Admeaſurement. i. 623
3. Againſt Strangers. i. 624
Of Approvement and Incloſure. i. 625. vii. 416
Of Apportionment and Extinguiſhment. i. 628

Conditions. Vol. I. Page 629.

By what Words created in a Deed. i. 630
By what Words created in a Will. i. 632
Of the Manner of creating the Condition, and at what Time it muſt be annexed. i. 633

Where the Nature of the Thing will admit of no Condition, but must be absolute. Vol. i. 634
To whom the Condition may be reserved. i. 635
To whom it shall be said to extend to be bound by it. i. 636
What shall be said a Condition, and not a Covenant. i. 637
What shall be said a Condition, and not a Limitation, and how they differ. i. 638
Of Conditions precedent and subsequent. i. 640
Of void Conditions being against Law. i. 644
Of repugnant Conditions. i. 647
Of impossible Conditions. i. 649
Of the Effect of a void, illegal, or impossible Condition. i. 650
Of the Breach of the Condition. i. 651
1. What shall be a Breach thereof. i. 651
2. What the Party must do to entitle him to the Advantage thereof; and therein, of Notice, Request, Tender, and Refusal. i. 654
3. What shall be a Dispensation therewith. i. 657
4. How far he who enters for a Condition broken is reinstated in his former Estate. i. 658
Of performing the Condition.
1. What Persons may perform it. i. 661
2. To whom the Condition is to be performed. i. 662
3. At what Time it may be performed. i. 665
4. At what Place it may be performed. i. 670
5. What shall be said a sufficient Performance. i. 671
What shall excuse the Non-performance.
1. Of the Act of God. i. 675
2. Of the Act of the Law. i. 677
3. Of the Act of the Parties. i. 678
4. Of the Act of a Stranger. i. 681

Constable. Vol. I. P. 683. Vol. VII. P. 417.

How chosen and appointed. i. 683
Who are obliged to serve. i. 685
Of their Power and Duty in acting without any Warrant from a Justice of the Peace. i. 687
Of their Power and Duty in executing such Warrants. i. 688

Coparceners. Vol. I. Page 690.

The Reason and Nature of such Inheritance. i. 690
The Nature of such Estate in respect of Actions, or against Parceners. i. 691
Of Partition, when Things are dividable or entire, and the Manner thereof. i. 693
Of Partition by Writ de Partitione faciendâ. i. 699
Of Hotchpot, *and the Nature and Incidents of that Kind of Partition.* i. 701
Of the Nature and Incidents of the Estate after Partition made. i. 703

Copyhold. Vol. I. Page 704.

Of the Nature of the Tenure, and what ſhall be deemed Copyhold. Vol. i. 706

In what reſpect Copyholds partake of the Nature of Freehold Lands. i. 708. vii. 417

What Acts of Parliament ſhall be ſaid to extend to Copyholds.

1. Of the Statute *de donis*, the entailing of Copyholds by Cuſtom, and the Manner of docking ſuch Entails. i. 709
2. Of ſuch other Statutes as may be ſaid to relate to them. i. 710. vii. 417

Of ſuch general Cuſtoms as may be ſaid to relate to all Copyhold Eſtates. i. 713. vii. 418

Of particular Cuſtoms that are good and peculiar only to ſome Copyholds. i. 714. vii. 418

Of granting Copyhold Lands. i. 717

1. What Perſons may make good Grants. i. 717
2. What Acts ſhall deſtroy the Power they had of making ſuch Grants. i. 720
3. What Things may be granted to be holden in Copyhold. i. 720
4. Of the Operation of the Grant, and the Eſtate and Intereſt that paſs thereby. i. 721

Of Surrenders, Preſentments, and Admittances.

1. Of the Neceſſity of a Surrender, and where the Copyholder ſhall be ſaid to be in before Admittance. i. 722. vii. 418
2. Where the Want of a Surrender will be ſupplied in Equity. i. 724
3. What Perſons may ſurrender. i. 726. vii. 419
4. What Perſons may accept ſuch Surrenders, and make Admittances. i. 727. vii. 419
5. What Words or Acts amount to a Surrender. i. 727
6. What Acts amount to an Admittance. i. 728
7. Of the Conſtruction to be made when the Surrender, Preſentment, and Admittance differ. i. 729
8. Of the Time of making the Surrender, Preſentment, and Admittance; and where they ſhall be effectual, though any of the Parties die before they are completed. i. 730

Of the Operation of the Surrender in paſſing the Eſtate.

1. Of the Perſons to take, and what ſhall be a ſufficient Certainty in the Deſcription of them. i. 731
2. What ſhall be ſaid to paſs by the Surrender. i. 731
3. What Eſtate or Intereſt paſſes by the Surrender. i. 732
4. Of the Power and Authority of the Lord and Steward; and therein, of the Difference of their Acts. i. 733

Of Fines payable by Copyhold.

1. Where a Fine ſhall be ſaid to be due, and by whom, and to whom payable. i. 734. vii. 419
2. At what Time payable. i. 735
3. Of the Certainty and Reaſonableneſs of the Fine. i. 735. vii. 419
4. Remedy for the Fine. i. 736

Of the Extinguiſhment of the Copyhold.
1. Where the whole Copyhold ſhall be extinguiſhed or ſuſpended. Vol. i. 737. vii. 419
2. Where Part only, or what is incident to it, ſhall be extinguiſhed. i. 738
Of Forfeiture.
1. Of Forfeiture for Non-Attendance at Court, and not doing Service. i. 739
2. Forfeiture for Non-Payment of Rent. i. 740
3. Forfeiture in the Copyholder's taking upon him to diſpoſe of the Copyhold, and make Leaſes. i. 740. vii. 420
4. Of Forfeiture in committing Waſte; and therein, of the Lords or Tenants Intereſt in the Trees. i. 741
5. Of Forfeiture by Incloſure. i. 742
6. Forfeiture for Treaſon and Felony. i. 743
7. In what Caſes a Forfeiture of Part ſhall be a Forfeiture of the Whole. i. 743
8. Who ſhall be affected by a Forfeiture, or take Advantage thereof. i. 744
9. What Perſons ſhall be excuſed from a Forfeiture. i. 745 vii. 420
10. Where the Forfeiture ſhall be ſaid to be diſpenſed with. i. 746
Copyhold where and how to be ſued for and recovered. i. 747

Coroners. Vol. I. Page 748.

Of the Qualifications and Manner of chooſing and appointing a Coroner. i. 750
In what Places he hath Juriſdiction. i. 751
Of his Authority and Duty in taking Inquiſitions. i. 752
Of traverſing and quaſhing ſuch Inquiſitions. i. 755
Of his Power as to Bills of Appeal, Appeals of Approvers, and the Abjuration of a Felon. i. 756
Where the Act of one Coroner ſhall be as effectual as if done by them all. i. 757
Of the Fees that he may lawfully take. i. 757
Of diſcharging him, and for what Miſdemeanors puniſhed. i. 758

Corporations. Vol. II. P. 1. Vol. VII. P. 420.

Of the Nature and different Kinds of Corporations. ii. 2
By whom and in what Manner created. ii. 3
Of the Names of Corporations.
1. Of the Name in its Creation. ii. 4
2. How far the Name may be varied from in Grants by or to a Corporation. ii. 5
3. How far it may be varied from in Pleading and judicial Proceedings. ii. 7
What Things are incident to a Corporation. ii. 8
How Corporations differ from natural Perſons.
1. Of Grants made by and to them. ii. 10
2. How they are to ſue and be ſued. ii. 11
3. What they may do without Deed. ii. 13

4. What

4. What Things they may take in Succeſſion: Vol. ii. 14
5. Where they ſhall be liable in their natural Capacities. ii. 15
6. Of the Qualifications requiſite for Members or Officers of Corporations. ii. 15
7. Of the Concurrence required in corporate Acts. ii. 16
8. Of the Regularity of their Proceedings. ii. 18
9. Of the Election and Amotion of their Members. ii. 20
How they are viſited. ii. 27
Of the Diſſolution of Corporations. ii. 30

Coſts. Vol. II. Page 32.

Of the firſt Introduction of, and giving the Plaintiff Coſts de incremento ii. 33
In what Caſes the Plaintiff ſhall have no more Coſts than Damages.
1. Of Actions of Treſpaſs, where the Right of Freehold or Inheritance may come in queſtion, or where the Treſpaſs is wilful and malicious. ii. 35. i. 420
2. Of Coſts in Actions of Slander. ii. 40
3. Of Coſts in Actions of Aſſault and Battery. ii. 41. vii. 421
Where the Coſts ſhall be doubled or trebled. ii. 42. vii. 421
Of awarding the Defendant his Coſts. ii. 43. vii. 421
What Perſons are entitled to or exempted from paying Coſts. ii. 46 vii. 421
1. Of Executors and Adminiſtrators. ii. 46
2. Of Officers and Miniſters of Juſtice. ii. 48
3. Of Coſts for and againſt Informers, and where the Proſecution may be ſaid to be carried on at the Suit of the King. ii. 49
4. Of Paupers. ii. 51
Of Coſts in Replevin. ii. 52
Of Coſts in a Writ of Error. ii. 53
Of Coſts in a feigned Iſſue. ii. 55
Of Coſts in the ſeveral Steps and Proceedings of a Cauſe. ii. 56. vii. 422
Coſts how aſſeſſed or taxed. ii. 58. vii. 423

Covenant. Vol. II. Page 60.

Of the Manner, and by what Words an expreſs Covenant is created. ii. 62. vii. 423
Of Covenants created by Implication of Law. ii. 65. vii. 424
Where an Action of Covenant is a proper Remedy. ii. 67
Where there are ſeveral Parties; and therein of joint Covenants. ii. 68
Of Covenants real and perſonal; and therein, of the Perſons to whom they ſhall extend.
1. Of Covenants which ſhall extend to the Heir or Executor, ſo as to be bound by them, though not expreſsly named. ii. 69
2. Of Covenants which the Heir or Executor may take Advantage of. ii. 69
3. Where an Aſſignee ſhall be bound by the Covenant of the Aſſignor. ii. 70. vii. 424
4. Where the Aſſignor continues ſtill liable. ii. 72
5. Where an Aſſignee ſhall take Advantage of a Covenant. ii. 73
6. Of Covenants which bind by Force of the Statute 32 *H* 8. *cap.* 34. ii. 75

How Covenants are to be construed. Vol. ii. 76
Where the principal and all auxiliary Covenants shall be said to be void and extinguished. ii. 80. vii. 424
What shall be deemed a Breach, or construed a good Performance. ii. 81
Where the Breach shall be said to be well assigned. ii. 83
Where the Performance shall be said to be well set forth and pleaded. ii. 88
What may be pleaded in Bar to the Action. ii. 91. vii. 427

Courts and their Jurisdictions in general. Vol. II. Page 93.

The Nature and Original of our Courts, and by what Authority constituted. ii. 94
Of the Judges and Persons exercising a Jurisdiction. ii. 96
What determines their Jurisdiction and Authority. ii. 98
Of their Division, and the Subordination of one Court to another.
1. In general of the several Kinds of Courts which exercise a Jurisdiction. ii. 100
2. Of such as are of Record, or not. ii. 101
3. How inferior Courts must claim their Jurisdiction; and therein, of pleading to the Jurisdiction and demanding Conusance. ii. 102
4. Where it must appear, that inferior Courts have a Jurisdiction. ii. 105
What is incidental to all Courts in general. ii. 108

Court of Parliament. Vol. II. Page 108.

Of the Original and Antiquity of Parliaments. ii. 109. vii. 426
Of the Persons of whom it consists. ii. 113. vii. 426
Of the Manner of their Summons and assembling. ii. 118. vii. 427
Of Elections.
1. Of the Electors and their Qualifications. ii. 120. vii. 429
2. Of the Elected and their Qualifications. ii. 122. vii. 430
3. Of the Duty of Returning Officers, and the Remedies against them; and of the Mode of proceeding upon Complaint of undue Elections. ii. 125
Of the Method of passing Bills. ii. 129. vii. 432
Of the Continuance, adjournment, Prorogation, and Dissolution of Parliament ii. 131. vii. 435
Of the Jurisdiction of the House of Lords. ii. 132
Of the Privileges of Members. *Vid. Tit.* Privilege. v. 626

Court of Chancery. Vol. II. Page 133.

As an Officina Brevium, *out of which all original Writs flow.* ii. 134
Of the ordinary and limited Court, proceeding according to Law, commonly called the Petty Bag. ii. 136
Of the extraordinary Court, proceeding according to Equity.
1. Of its original Jurisdiction, and how at first it has been expunged by the Common Law Courts. ii. 137
2. What Jurisdiction it exercises at this Day. ii. 136

Court

Court of King's Bench. Vol. II. Page 140.

Of the Juriſdiction of the Court of King's Bench.
1. Of its Juriſdiction in Criminal Matters. Vol. ii. 141
2. Of its Juriſdiction in Civil Cauſes. ii. 142
3. Of its Juriſdiction in reforming and keeping inferior Juriſdictions within their proper Bounds. ii. 143

How far its Preſence ſuſpends the Power of all other Courts. ii. 144
Of the Form of its Proceedings. ii. 144

Court of Common Pleas. Vol. II. Page 145.

Court of Exchequer. Vol. II. Page 147. Vol. VII. Page 437.

Of the Nature and Antiquity of this Court. ii. 147
In what Caſes it has a Juriſdiction. ii. 148
Of the Manner of its Proceedings. ii. 150

Court of the Conſtable and Earl Marſhal. Vol. II. Page 151.

Of the Manner of holding this Court; and therein, whether it can be held by Commiſſion by the Earl Marſhal only, and whether it may be prohibited if it exceeds its Juriſdiction. ii. 152
In what Caſes it has a Juriſdiction. ii. 153
Of the Form and Manner of its Proceedings. ii. 154

Court of Oyer and Terminer and Gaol-Delivery. Vol. II. Page 154.

Of the Manner of authoriſing Commiſſioners of Oyer *and* Terminer *and Gaol-Delivery; and therein, of the Determination of their Power.* ii. 155
Of their Juriſdiction when appointed. ii. 156
Of the Form of their Proceedings and holding their Courts. ii. 157

Court of the Juſtices of Aſſize and Niſi Prius. Vol. II. 158.

Court of Seſſions of Juſtices of the Peace. Vol. II. Page 159.

Of the Eccleſiaſtical Courts. Vol. II. Page 161.

The ſeveral Eccleſiaſtical Courts, which exerciſe a Juriſdiction.
1. Of the Court of Convocation. ii. 162
2. Of the Court of Arches. ii. 163

3. Of the Prerogative Court. Vol. ii. 163
4. Of the Court of Audience. ii. 164
5. Of the Court of Faculties. ii. 164
6. Of the Court of Peculiars. ii. 164
7. Of the Conſiſtory Courts. ii. 165
8. Of the Court of the Archdeacon. ii. 165
9. Of the Court of Delegates. ii. 165
10. Of the Court of Commiſſioners of Review. ii. 166
Of appealing from an inferior to a ſuperior Court. ii. 166
Of citing one out of his own Dioceſe; and therein, of the Boundaries of their Juriſdiction. ii. 167
In what Caſes the Eccleſiaſtical Courts are allowed to have a Juriſdiction. ii. 170
How they are to proceed as to thoſe Matters in which they have a Juriſdiction, otherwiſe will be controlled by the Temporal Courts. ii. 174

Of the Court of Admiralty. Vol. II. Page 175.

To what Places the Juriſdiction of the Admiralty is confined. ii. 176
To what Things its Juriſdiction extends; and therein, of ſuch Matters as ariſe partly on Sea and partly on Land. ii. 178
To what Contracts its Juriſdiction extends; and therein, of Contracts made on Sea. ii. 180
To what Crimes and Offences its Juriſdiction extends. ii. 182
By what Law it proceeds, and the Form of ſuch Proceedings. ii. 184

Of the Marſhalſea and Palace-Court. Vol. II. Page 187.

Court Palatinate. Vol. II. Page 188.

1. Of the County Palatine of *Cheſter.* ii. 189
2. Of the County Palatine of *Durham.* ii. 190
3. Of the County Palatine of *Lancaſter,* and the Duchy Court. ii. 191

Of the Royal Franchiſe of Ely. Vol. II. P. 192.

Courts of the Foreſt. Vol. II. Page 192.

1. Of the Juſtice Seat. ii. 193
2. The Swainmote Court. ii. 195
3. The Court of Attachments. ii. 196

Of the Sheriff's Torn. Vol. II. Page 196.

The Manner of holding this Court. ii. 197
What Perſons owe Suit to it. ii. 198
In what Caſes it has a Juriſdiction. ii. 198
Of the Form of its Proceedings. ii. 201

Of the Court-Leet. Vol. II. Page 202.

Of

Of the County Court. Vol. II. P. 203. Vol. VII. Page 438.

Of the Hundred Court. Vol. II. P. 204.

Of the Court-Baron. Vol. II. P. 205. Vol. VII. Page 438.

Courts of the Cinque Ports. Vol. II. Page 207.

Courts of the Stanneries. Vol. II. Page 209.

Of the Court of Commissioners of Sewers. Vol. II. Page 211.

Court of Piepowders. Vol. II. Page 214.

Of the Courts in London. Vol. II. Page 215.

1. Of the Court of Hustings. Vol. ii. 216
2. Of the Sheriffs Courts. ii. 216
3. The Court of Equity before the Lord Mayor, commonly called the Court of Conscience. ii. 217

Court of Requests. Vol. VII. Page 439.

Curtesy of England. Vol. II. Page 218. Vol. VII. Page 440.

What Persons may be Tenants by the Curtesy, what not. ii. 219
Of what Sort of Inheritances this Estate is allowable, of what not. ii. 220 vii. 440
What Estate the Wife must have to let in the Husband to be Tenant by the Curtesy. ii. 222. vii. 441
1. The descendible Quality of such Estate. ii. 223
2. The Seisin of the Wife thereof. ii. 223
3. When the Estate and Seisin is to begin, and how long it must continue. ii. 225
Of the Husband's Title being initiate by having Issue, and to what Purposes.
1. What Sort of Issue this must be. ii. 228
2. When it must be born. ii. 228
3. What it must do to entitle the Husband to be Tenant by the Curtesy. ii. 228
The Nature and Quality of such Tenancy by the Curtesy.
1. With respect to the Estate itself. ii. 229
2. With respect to the Privity between him and the Heir. ii. 229
By what Means this Title may be prevented and destroyed. ii. 230

Customs.

Customs. Vol. II. Page 231. Vol. VII. Page 441.

Of the Commencement and Length of Time necessary to establish a Custom. Vol. ii. 232
What Persons are affected with or bound by a Custom. ii. 233
Of such Customs as are against the Rules of the Common Law, and yet not being unreasonable in themselves are good, and from the Conveniency of them bind in particular Places. ii. 234
Where from the Benefits accruing from them they shall bind. ii. 238
Where from the Certainty or Incertainty of them, they shall be deemed good or void. ii. 241
How to be construed, and to what Things a Custom shall be said to extend. ii. 242
Custom how destroyed. ii. 243
Of the Manner of alleging and pleading a Custom. ii. 243

Customs of London. Vol. II. Page 244.

Of the Customs of London *in general.* ii. 246
Of the Customs of London *with respect to Orphans.* ii. 248
Of the Customs of London *in respect to a Freeman's Estate.*
1. What shall be esteemed such an Estate, as will be subject to the Custom, and what Disposition a Freeman may make thereof. ii. 249
2. Of the Children's Part; and therein, of Survivorship, Advancement and bringing into Hotchpot. ii. 251
3. Of the Wife's Part, and what shall bar her thereof. ii. 255
4. Of the Legatory or dead Man's Share. ii. 255
Of the Custom of London *as it relates to Feme Coverts.* ii. 257
As it relates to Masters and Apprentices. ii. 257
As it relates to Landlords and Tenants. ii. 258
Of the Customs of London, *which are in Furtherance of Justice, and for the more speedy Recovery of Debts.* ii. 258
Of the Customs of Foreign Attachment.
1. Of the Nature of the Debt or Duty, which may be attached. ii. 258
2. In whose Hands and at what Time the Attachment may be made. ii. 261
3. Of the Form of the Proceedings in a Foreign Attachment. ii. 261

Damages. Vol. II. Page 263.

In what Actions a Party shall recover Damages. ii. 263
What Persons are entitled to, or shall recover Damages. ii. 264
Against whom Damages shall be recovered. ii. 265
Of assessing the Damages.
1. Of the *Quantum* of the Damages the Jury may give. ii. 266
2. Whether they may give more than the Plaintiff has declared for. ii. 267
3. Must be assessed pursuant to the Plaintiff's Right, or the Injury he has received; and therein, of assessing entire Damages. ii. 268

4. Where to be assessed jointly or severally, where there are several Defendants. Vol. ii. 272
Where the Court may increase or mitigate the Damages. ii. 274
Of the Manner of assessing and recovering Damages. ii. 276

Debt. Vol. II. Page 278. Vol. VII. Page 442.

In what Cases an Action of Debt will lie. ii. 279
At what Time it shall be said to have accrued. ii. 281
Who may bring Debt; and therein, of the Privity of Contract and Estate, ii. 282
Against whom it may be brought. ii. 284
Where Debt is the proper Action, and not, Covenant, Case, &c. ii. 286
Of the Manner of bringing the Action, and where it must be brought in the Debet *and* Detinet, *or* Detinet *only* ii. 287
Of the Extinguishment of the Debt, and pleading in Bar thereof. ii. 290
Deceit. *Vid. Tit.* Fraud. iii. 294
Declaration and Demurrer. *Vid. Tit.* Pleadings. v. 1

Deodand. Vol. II. Page 292.

Descent. Vol. II. Page 294.

Of Lineal Descent; and therein, of the Exclusion of the ascending Line. ii. 295
Of Collateral Descent. ii. 296
Of the Half Blood, and the Possessio Fratris. ii. 297
Of Descents according to Custom. ii. 300
Where a Person shall be said to take by Purchase, and not by Descent. ii. 302. vii. 442
Of a Descent, its Operation to take away an Entry. ii. 304
In what Cases the Entry of the Disseisee may be lawful notwithstanding a Descent. ii. 307
Whose Entry is preserved notwithstanding a Descent. ii. 311
How the Entry may be preserved by continual Claim.
1. Of the Nature of continual Claim, and the Effects of it. ii. 312
2. What is necessary to a continual Claim to make it effectual. ii. 313
3. The Time in which it is to be made. ii. 314

Detinue. Vol. II. Page 316.

By and against whom Detinue lies. ii. 316
For what Things it may be brought. ii. 317
Devastavit. *Vid. Tit.* Executors and Administrators.

Devises. Vol. IV. Page 242.

Who may devise Lands, and to whom. iv. 244
Of what Estate or Interest in the Devisor he may dispose. iv. 247
What Words pass a Fee in a Will. iv. 250
What Words create an Estate Tail or for Life iv. 256
Of Terms for Years, and uncertain Interests by Devise. iv. 281

Of

Of Deviſes for Payment of Debts. Vol. iv. 283
Of Deviſes by Implication. iv. 288
Of the Diſpoſition of Goods and Chattels by Will, by what Deſcription, and to whom good. iv. 291. 339
Of Executory Deviſes of Lands of Inheritance; and therein, of Contingent Remainders and Croſs Remainders, as far as they relate to this Place. iv. 292
Of Executory Deviſes of Leaſes for Years; and therein, of the Limitation of the Truſt of a Term, as far as it relates to and agrees with a Deviſe thereof. iv. 304
Of void Deviſes.
1. By deviſing what the Law already gives, or what the Policy of the Law will not admit. iv. 315
2. By Incertainty in the Deſcription of the Thing deviſed. iv. 322
3. By Incertainty in the Deſcription of the Perſon to take. iv. 328
4. By the Deviſee's dying in the Lifetime of the Deviſor. iv. 334

What Circumſtances are neceſſary by the 32 *H.* 8. *c.* 1. and the 34 & 35 *H.* 8. *c.* 5. and 29 *Car.* 2. *c.* 3. and what ſhall be a Revocation, and a new Publication. *Vid. Tit.* Will.

Diſclaimer. *Vid. Tit.* Pleadings.

Diſcontinuance. Vol. II. Page 318.

Of Diſcontinuances made by Eccleſiaſtical Perſons. ii. 319
Made by Tenants in Tail. ii. 320
By Huſbands ſeiſed in Right of their Wives. ii. 323
Of Diſcontinuances by Women of Lands of the Gift of their Huſband or his Anceſtor. ii. 324
What Eſtate or Intereſt may be diſcontinued. ii. 326
By what Act or Conveyance a Diſcontinuance may be made, and the Effect thereof. ii. 328

Diſſeiſin. Vol. II. Page 329.

What Acts amount to a Diſſeiſin. ii. 329
What Perſons are capable of committing ſuch Diſſeiſins. ii. 339

Diſtribution. *Vid. Tit.* Executors and Adminiſtrators.

Diſtreſs. Vol. II. Page 340.

Who in reſpect of his Eſtate or Intereſt may diſtrain for Rent. ii. 341
What Things may be diſtrained. ii. 343
Of the Manner of diſtraining as to Time and Place. ii. 346
Of the Diſtreſs when ſeized; and of the Diſtrainer's Intereſt therein, and what he is to do therewith. ii. 347
Where a Diſtreſs ſhall be ſaid to be wrongful and exceſſive; and therein, of the Remedy which the Party injured hath. ii. 352
Of diſtraining Things Damage Feaſant. ii. 353
Of Diſtreſſes for Amercements. ii. 354

Divorces. *Vid. Tit.* Marriage. iv. 549

Dower. Vol. II. Page 356. Vol. VII. Page 442.

Who may have Dower, and who not; and therein, of the Age and other Disability of the Husband or Wife. Vol. ii. 358

Of what Estate a Woman may have Dower.

1. Of Quarentine. ii. 360
2. Of the different Kinds of Inheritances. ii. 361
3. Of the Nature and Quality of such Estate, whether Sole, Joint, or in Common. ii. 363
4. Of its Continuance; wherein, of Estates conditional, suspended, determined, or extinguished; and therein, of Remitters to the Heir, and Recoveries by Title Paramount. ii. 366
5. Of the Value of the Improvement of the Husband's Estate, either in his Lifetime or after his Death. ii. 368

Of the Things requisite to the Consummation of Dower, viz. *Marriage, Seisin, and Death of the Husband.*

1. Of the Marriage, how long it must continue; and therein, of the several Sorts of Divorces. ii. 369
2. Of the Seisin, either in Fact or in Law; and therein, of the Seisin in Fact, as it is continuing, or not continuing, as instantaneous. ii. 370
3. Of the Death of the Husband. ii. 372

Of the Assignment of Dower.

1. By what Persons. ii. 373
2. Of the Manner; and therein, of assigning it by Metes and Bounds, &c. ii. 374
3. By what Court. ii. 376

Where the Wife shall have her Election to be endowed of one Thing or another, and where of both; and therein, of Endowment de novo, *and the* dos de dote. ii. 378

What shall be a Bar of Dower, and what not; and therein, of Acts done or suffered by the Husband solely, or by the Husband and Wife jointly, or by the Wife solely, either during the Coverture or after; and therein, of Elopement of Detinue of Charters or Heir. ii. 380

Where the Wife shall hold her Dower subject to the Charges of her Husband, and where not; and therein, of the Privileges of Tenant in Dower, and the Nature of her Estate, as to Alienations made, or Actions brought by or against her. ii. 387

To whom the Tenant in Dower shall be attendant, and by what Services. ii. 388

Of the Proceedings and Damages in Dower, unde nihil habet. ii. 389

Of the Admeasurement of Dower. ii. 396

Dower by the Custom. ii. 397

Dower ad Ostium Ecclesiæ. ii. 400

Dower ex Assensu Patris. ii. 400

Dower de la plus Beale. ii. 401

Duress. Vol. II. Page 402.

For what Duress or Degree of Restraint or Terror a Man shall avoid his Deed or Contract. ii. 402

On whom, and by whom the Duress must be committed. ii. 404

What Contracts or Securities may be thus avoided. ii. 405

The Manner of avoiding them. ii. 405

Ejectment. Vol. II. Page 406.

Of the Nature of the Action, and ancient Manner of proceeding in Ejectment. Vol. ii. 407
Of the modern Manner of commencing and proceeding in Ejectment.
1. Of ſerving the Declaration, Notice to the Tenant in Poſſeſſion, and entering into the common Rule. ii. 408. vii. 443
2. Of adding proper Parties. ii. 412. vii. 443
3. Of the Coſts. ii. 413
In what Caſes the ancient Form is ſtill to be adhered to. ii. 415
Of the Declaration in Ejectment.
1. Of what Things an Ejectment will lie. ii. 417
2. What ſhall be a ſufficient Deſcription of the Things for which it will lie. ii. 419
3. Of the Demiſe and Right of Entry in the Leſſor of the Plaintiff, and of the Ouſter. ii. 423. vii. 444
Of the Plea and General Iſſue in Ejectment. ii. 430
Of the Verdict and Judgment in Ejectment. ii. 431
Of the Writ of Execution.
1. Of the Time when the Writ is to be ſued. ii. 432
2. How the Writ is to be executed. ii. 434
3. How the Plaintiff is to be quieted, and what Relief he has when his Poſſeſſion is diſturbed. ii. 435
Of the Meſne Profits, and how to be recovered. ii. 437
Of bringing a new or ſecond Ejectment. ii. 439. vii. 444
Where a Court of Equity will interpoſe by Injunction. vii. 444

Election. Vol. II. Page 441.

In what Caſes an Election is given. ii. 441
To what Perſon; and therein, of him who is to do the firſt Act. ii. 443
Where it ſhall be ſaid to continue or be determined. ii. 444
What ſhall be a ſufficient Election. ii. 447
Where a Party ſhall be put to his Election, or not. vii. 444
Elegit. *Vid. Tit.* Execution. ii. 740
Embracery. *Vid. Tit.* Juries.

Error. Vol. II. Page 448. Vol. VII. Page 451.

In what Caſes a Writ of Error will lie.
1. In what Caſes a Writ of Error is the proper Remedy to be relieved againſt an erroneous Judgment. ii. 450
2. On what Judgments a Writ of Error will lie. ii. 452
3. In what Court the Judgment muſt be given, on which a Writ of Error will lie. ii. 455
Who may bring a Writ of Error, and againſt whom; and therein, of the Perſons neceſſary to be made Parties thereto. ii. 456
Of the Time of bringing a Writ of Error. ii. 462
Of the Manner of bringing it.
1. Of the Form of the Writ, and where the Record ſhall be ſaid to be removed. ii. 463
2. What is neceſſary to be removed; and therein, of removing the Record or a Tranſcript. ii. 466
Of alleging a Diminution, and granting a Certiorari. ii. 468
Of the Scire Facias. ii. 473

Of

Of the Proceedings after the Record is removed; and therein, of the Abatement of the Writ of Error. Vol. ii. 476
How far the Writ of Error is a Superſedeas. ii. 477
To what Court a Writ of Error lies.
1. Of Writs of Error into Parliament. ii. 479. vii. 452
2. Of Writs of Error into the Exchequer Chamber. ii. 480
3. Of reverſing Judgments in the Court of Exchequer. ii. 481
4. Of the Writs of Error into the King's Bench. ii. 482
5. Of Writs of Error into the Common Pleas, and inferior Courts. ii. 483
6. Where a Writ of Error lies in the ſame Court in which the Record is. ii. 484
Of aſſigning Errors. ii. 485. vii. 454
1. Of the Manner of aſſigning Errors. ii. 485
2. Of aſſigning Errors in Fact and in Law. ii. 487
3. Of aſſigning that for Error which appears contrary to the Record. ii. 488
4. Of aſſigning that for Error which is for the Party's Advantage. ii. 490
5. Where the Matter aſſigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time. ii. 492
6. Where Matters which might be aſſigned for Error are aided by a Releaſe and Conſent of Parties. ii. 494
What Defence the Defendant in Error may make; and therein, of pleading a Releaſe. ii. 497
Of the Judgment to be given on the Writ of Error. ii. 500. vii. 454
1. Where on a Writ of Error Part only or the whole Judgment ſhall be reverſed. ii. 500
2. What Judgment ſhall be given on the Reverſal of the firſt. ii. 503
3. To what the Parties ſhall be reſtored on the Reverſal of the firſt Judgment. ii. 505

Eſcape in Civil Caſes. Vol. II. P. 507. Vol. VII. Page 454.

Where the Party ſhall be ſaid to be legally committed, ſo that the ſuffering him to go at large will be adjudged an Eſcape.
1. Where the Authority by which he is committed ſhall be ſaid to be ſufficient for that Purpoſe. ii. 508
2. Where the Form of the Commitment, or being in Cuſtody ſhall be ſaid to be regular. ii. 510
What Degree of Liberty or going at large ſhall be deemed an Eſcape.
1. With what Strictneſs Priſoners are to be kept. ii. 512
2. What on this Account ſhall excuſe the Sheriff, Gaoler, &c. when acting in Obedience to ſome Authority, as removing a Priſoner on a *Habeas Corpus*, &c. ii. 513
3. What by Conſtruction of Law ſhall be deemed an Eſcape, though the Party be ſtill in Confinement. ii. 515
Of the Difference between voluntary and negligent Eſcapes. ii. 515
Of the Difference between an Eſcape on Meſne Proceſs and Execution. ii. 516
What Perſons are anſwerable for, and to be charged with an Eſcape.
1. Of the preceding or ſucceeding Sheriff, Warden, &c. ii. 517

2. Where Sheriffs, Wardens, their Superiors or Deputies, are liable at the Election of him who is injured by the Escape. Vol. ii. 518
3. Where the Party injured may have his Remedy against the Person escaping; and therein, of Escape Warrants. ii. 521
Of the proper Remedy and Nature of the Action to be brought for an Escape. ii. 525
Of the Manner of laying the Action. ii. 527
Of the Party's Defence, who suffered the Escape; and therein, of pleading fresh Suit. ii. 528

Estate in Fee-Simple. Vol. II. Page 530.

Who may purchase or inherit such Estate. ii. 531
The Import of the Word Heir that creates the Estate.
1. When it is a Word of Limitation. ii. 534
2. When it is a Word of Purchase. ii. 536

Estate-Tail. Vol. II. Page 538.

What Things may be entailed within the Statute de donis conditionalibus. ii. 541
What Words are requisite to create an Estate-Tail in a Deed or Gift. ii. 543
Of the several Sorts of Estates-Tail. ii. 547
How far Tenant in Tail may charge his Estate, and what Acts of his relating to the Inheritance shall bind the Issue though the Entail continues. ii. 552
Of Entailing Copyhold Estates, *Vid. Tit.* Copyhold. i. 709
By what Words an Entail is created in a Will, *Vid. Tit.* Devises.

Estate-Tail after Possibility of Issue extinct. Vol. II. Page 554.

Who may be Tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created. ii. 554
The Power this Tenant has over the Inheritance, and in what Respects he is considered as a bare Tenant for Life. ii. 556

Estate for Life and Occupancy. Vol. II. P. 557.

What Interest or Property in the Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication. ii. 558
Who upon the Death of Tenant for Life is to enjoy the Land; and therein, of Occupancy. ii. 561
1. Of what Things a Man may make himself a Title to by Occupation. ii. 562
2. What makes an Occupant. ii. 564
3. The Way to prevent the general Occupant; and therein, of the special Occupant, and the Alteration made in the Common Law, by the Statute 29 *Car. 2. cap. 3.* ii. 566

How far Tenant for Life may diſpoſe of his Eſtate either ſingly by himſelf, or by joining with him in Reverſion; and therein, of his Forfeiture, either by Common Law or Statute. Vol. ii. 568

Eſtate by Curteſy of *England*. *Vid. Tit.* Curteſy of *England*.

Eſtate in Dower. *Vid. Tit.* Dower.

Eſtate in Joint-tenancy and Tenancy in Common. *Vid. Tit.* Joint-tenants and Tenants in Common.

Eſtate in Coparcenary. *Vid. Tit.* Coparceners.

Eſtate for Years. *Vid. Tit.* Leaſes for Years.

Eſtate at Will. *Vid. Tit.* Tenant at Will.

Evidence. Vol. II. Page 575.

Who may be a Witneſs. ii. 576. vii. 455

1. Whether a Huſband or Wife may be a Witneſs for or againſt each other. ii. 577
2. Whether a Judge or Juror may be a Witneſs. ii. 579
3. Whether a Counſel, Attorney, or Solicitor may be Witneſs againſt his Client. ii. 579
4. Whether Plaintiffs or Defendants in the Cauſe may be Witneſſes. ii. 581
5. Whether an Accomplice in a Crime may be a Witneſs for or againſt his Companion. ii. 582
6. How far a Perſon is diſabled from being a Witneſs in reſpect of his having been attainted or convicted of a Crime. ii. 583

How far a Perſon is diſabled from being a Witneſs in reſpect of his being intereſted in the Succeſs of the Cauſe. ii. 584

Of the Number of Witneſſes required in our Law. ii. 593

Of compelling a Witneſs to appear and give Evidence. ii. 594

Of the Manner of giving Evidence.

1. Where the Examination is in open Court; and therein, of ſuch Queſtions as may be aſked a Witneſs. ii. 596
2. Of Examinations and Proofs in Chancery. ii. 598

Of written Evidence; and therein, of admitting Exemplifications or Copies of Records, &c. as Evidence. ii. 608. vii. 455

Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will. ii. 652. vii. 456

Of preſumptive Proof. ii. 660

Where the Law requires the higheſt Proof the Nature of the Thing is capable of. ii. 662

Of Hearſay Evidence. ii. 662

Of the Party's Confeſſion. ii. 663

Of Similitude of Hands. ii. 664

Whether the Depoſitions of Witneſſes in another Cauſe may be given in Evidence. ii. 664

Excommunication. Vol. II. Page 665. Vol. VII. Page 457.

In what Caſes the Spiritual Court may properly excommunicate. ii. 666

In what Caſes a Perſon ſhall be ſaid to be ipſo facto *excommunicated.* ii. 668

By whom Excommunication is to be pronounced and certified. Vol. ii. 671
What Inconveniencies and Disabilities it lays the Party excommunicated under; and therein, of his Disability to bring an Action. ii. 674
Of the Proceedings on the Writ of Excommunicato capiendo, *both at Common Law, and by virtue of the Statute* 5 Eliz. cap. 23. ii. 675
Of absolving and assoiling a Person excommunicate. ii. 682

Execution. Vol. II. Page 683.

Of the Nature of Execution, and what Things were liable thereto by the Common Law. ii. 685
Of the Judgment on which Execution is to be taken out; and therein, of Recognizances and Statutes, which are in the Nature of Judgments.
1. Of the Nature of Recognizances at Common Law, and on the 23 *H. cap.* 6. *&c.* and of the Statute Merchant and Staple. ii. 687
2. Of the several Processes on those Securities, when forfeited, in order to a full Execution. ii. 691
1. Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, *&c.* and they from each other. ii. 691
2. At what Time Execution may be granted on each of them. ii. 693
3. Who shall have Execution on them as the Person alters. ii. 693
4. Against whom Execution may be granted. ii. 696
3. What Things are bound by them, and are liable to be extended for the Satisfaction of them. ii. 698
4. What Provision the Law has made for Tenant by Statute Merchant, *&c.* in Case of Eviction. ii. 701
5. The several Ways of vacating and discharging these Statutes, and this either before or after Execution. ii. 702
Of the several Kinds of Judicial Writs which lie after Judgment.
1. Of the Form, Teste, and Return of such Writs. ii. 709
2. Of the *Eliget.* ii. 710
3. Of the *Capias ad Satisfaciendum.* ii. 713. vii. 458
4. Of the *Fieri facias* and *Levari facias.* ii. 714. vii. 458
5. Of the *Habere facias seisinam* and *possessionem.* ii. 716
Where the Party shall be concluded by the Election of one of them, and what further Remedy he has, when he hath not received entire Satisfaction on his first Writ, and this either against the Party or Sheriff. ii. 717
Of the Authority and Jurisdiction of the Court out of which the Execution issues; and therein, of the Manner of executing a Judgment, when the Record has been removed from an inferior to a superior Court. ii. 721
Who are entitled to, and may sue out Execution. ii. 723
Of the Persons against whom Execution may be sued out.
1. Of suing out Execution, where there are several Parties concerned. ii. 725. vii. 458
2. Of suing out Execution against the Heir and Executor. ii. 725
3. Of suing out Execution against Infants. ii. 726
4. Of suing out Execution against a Feme Covert. ii. 726
5. Of suing out Execution against privileged Persons. ii. 727
6. Of suing out Execution against a Clerk or one in Holy Orders. ii. 727. vii. 458

At what Time Execution may be ſued out; and therein, of the Neceſſity of a Scire facias. Vol. ii. 728
To what Time the Execution ſhall have Relation, ſo as to avoid any Alienation by the Party; and therein, of the Statute of Frauds. ii. 731
Of the King's Precedency in Executions. ii. 734. vii. 459
Of the proper Officers to do Execution; and therein, of the preceding and ſucceeding Sheriff. ii. 735
Of the Manner of compelling him to do Execution; and therein, of the Party's Remedy againſt him for Neglect of his Duty ii. 736
Of the Sheriff's Authority in doing Execution; and therein, of breaking Doors, &c. ii. 736
Of the Offence of hindering or obſtructing an Execution. ii. 738
Of the Party's Remedy, when there hath been an irregular Execution, and how the ſame is to be ſet aſide. ii. 739
To what he ſhall be reſtored, when ſuch erroneous Execution is ſet aſide. ii. 740
Whether a Court of Equity will aid an Execution at Law. vii. 461

Executors and Adminiſtrators. Vol. III. Page 1.

What Perſons may be Executors.
1. Of appointing the King Executor. iii. 5
2. Whether Corporations may be Executors. iii. 5
3. Who in reſpect of their Crimes are diſabled from being Executors. iii. 5
4. Who in reſpect of their Country. iii. 6
5. Who in reſpect of their Want of Underſtanding. iii. 7
6. Who in reſpect of their Fortune and Circumſtances; and therein, of obliging an Executor to give Security. iii. 7
7. Of making Infants Executors. iii. 8
8. Of a Feme Covert Executrix. iii. 9
9. Of making Creditors Executors. iii. 10
10. Of making Debtors Executors. iii. 11

Of the Different Kinds of Executors and Adminiſtrators.
1. Of an Adminiſtrator *durante minori ætate* of an Infant Executor or Adminiſtrator.
1. Who may be ſuch an Adminiſtrator. iii. 13
2. What Acts he may do. iii. 13
3. When his Authority determines. iii. 14
2. Of an Adminiſtrator *de bonis non*, where the firſt Adminiſtrator dies, or the Executor dies inteſtate, or without Probate of the Will.
1. In what Caſes Adminiſtration *de bonis non* ſhould be granted, and to whom. iii. 19
2. What Things unadminiſtered ſuch a one is entitled to. iii. 19
3. In what Actions commenced before his Time may an Adminiſtrator *de bonis non* proceed. iii. 20
3. Of an Executor *de ſon Tort.*
1. What Acts or Degree of intermeddling will make an Executor *de ſon Tort.* iii. 20
2. What Acts of his are valid, as if done by a lawful one. iii. 25
3. How he is to be charged, and how far a ſubſequent Adminiſtration purges the firſt Wrong. iii. 25

Of the Manner of appointing an Executor.
1. By what Words an Executor is conſtituted. Vol. iii. 27
2. Of appointing an Executor abſolutely, or on Condition. iii. 28
3. Of appointing a temporary Executor. iii. 29
4. Of appointing an Executor with a limited Power, as to adminiſter ſuch a Part of the Eſtate, &c. iii. 30

Of appointing Co-Executors.
1. What Acts done by one of them ſhall be as valid as if done by them all. iii. 30
2. Where they muſt anſwer for each other's Acts, and what Remedy the one has againſt the other. iii. 31
3. Where they muſt jointly ſue and be ſued; and therein, of Summons and Severance. iii. 32

Of the Probate of Wills, and granting Adminiſtration.
1. To whom the Probate of Wills, and the granting of Adminiſtration did originally belong. iii. 34
2. Of the King's Juriſdiction herein. iii. 35
3. Of the Archbiſhop's Juriſdiction; and therein, of *bona Notabilia*. iii. 36
   1. Of what Value the Goods and Effects muſt be that will make *bona Notabilia*. iii. 37
   2. Of the Nature of ſuch Effects as will make *bona Notabilia*, and how far it was neceſſary that they ſhould be in ſeveral Dioceſes. iii. 37
4. Of the Probate of Wills, and Granting Adminiſtration by the Biſhop of the Dioceſe. iii. 39
5. Of the Probate of Wills, and Granting Adminiſtration where the Party died within ſome peculiar Juriſdiction. iii. 39
6. Of the Juriſdiction of ſome Lords of Manors in the Probate of Wills. iii. 39
7. Of the Juriſdiction of ſome Mayors, in reſpect of the Burgeſſes within ſuch a Place. iii. 40
8. The Form of proving a Will, and taking out Adminiſtration; and therein, of entering a Caveat. iii. 40
9. Of the Executor's Refuſal. iii. 42
10. What Acts amount to an Adminiſtration, ſo that the Party cannot afterwards refuſe. iii. 44
11. Of bringing in an Inventory. iii. 44
12. Where Adminiſtration unduly obtained may be revoked or repealed. iii. 49
13. How far a Repeal makes all meſne Acts void. iii. 50
14. What Things an Executor may do before Probate of the Will. iii. 52

What Perſons are entitled to Adminiſtration. iii. 53

In what Manner the Ordinary may grant it; and therein, of granting it to one or more, or for a particular Thing. iii. 56

What ſhall be deemed a Teſtator's perſonal Eſtate or Aſſets in the Hands of the Executor
1. What ſhall be ſuch an Intereſt veſted in the Teſtator as ſhall go to his Executors. iii. 57
2. How far Debts due to the Teſtator are Aſſets. iii. 59
3. What ſhall be deemed his perſonal Eſtate; and therein, what Things ſhould go to the Heir, and not to the Executor. iii. 60
4. What Things ſhall go to the Wife of the Deceaſed, and not to the Executor. iii. 65
5. Where

5. Where after Debts and Legacies paid, the Executors ſhall have the Surplus to themſelves, or are to be Truſtees for the next of Kin. Vol. iii. 67

How the perſonal Eſtate, after Debts paid, is to be diſtributed, when the Party dies inteſtate; and therein, of the Share the Huſband or Wife are entitled to, of the aſcending, deſcending, and collateral Line, and Admiſſion of the half Blood, and where the Diſtribution ſhall be per Stirpes, *and not* per Capita. iii. 72. vii. 462

Of Advancement and bringing into Hotchpot. iii. 76

What ſhall be a Devaſtavit *either in Executors or Adminiſtrators; and therein, of the Order of paying Debts or Legacies.*

1. What Manner of W ſting will amount to a *Devaſtavit*. iii. 77
2. Where it will be a *Devaſtavit* to pay Debts of an inferior Nature before thoſe of a ſuperior, and the Order in which Debts are to be paid. iii. 79
3. Of paying Legacies before Debts; and therein, of the Executor's Aſſent to a Legacy. iii. 84
4. What ſhall be allowed on Account of Funeral Expences. iii. 85

Where the perſonal Eſtate ſhall be firſt applied in Diſcharge of Debts, &c. and therein, of marſhalling Aſſets. iii. 85. vii. 462

In what Caſes an Executor may make himſelf liable de bonis propriis.

1. Where he ſhall be liable *de bonis propriis* by his falſe Pleading, iii. 87
2. Where by his Promiſe to pay or diſcharge the Teſtator's Debts or Legacies he makes himſelf liable. iii. 90

What Actions Executors or Adminiſtrators may bring in Right of thoſe they repreſent. iii. 91

How ſuch Actions muſt be laid; and therein, of joining a Matter in Right of the Teſtator, and in their own Right in the ſame Action. iii. 92

Of Actions and Remedies againſt Executors and Adminiſtrators.

1. Upon what Contracts or Engagements of their Teſtators or Inteſtates, Executors or Adminiſtrators are liable. iii. 95
2. Of perſonal Torts, which are ſaid to die with the Party. iii. 97
3. Of Remedies againſt Executors or Adminiſtrators of Executors. iii. 99
4. Where they ſhall be excuſed from Coſts. iii. 100. vii. 463
5. Where excuſed from putting in Special Bail. iii. 101

Extinguiſhment. Vol. III. Page 101.

Of the Extinguiſhment of Rents. iii. 102
Of the Extinguiſhment of Copyholds. iii. 105
Of the Extinguiſhment of Common. iii. 106
Of the Extinguiſhment of Debts. iii. 106

Extortion. Vol. III. Page 108.

Fairs and Markets. Vol. III. Page 109.

Of the Right to a Fair or Market.

1. How a Right to a Fair or Market muſt firſt commence. iii. 110
2. Of the Owner's Remedy for a Diſturbance in the Enjoyment of them. iii. 111

Of the Manner of holding Fairs and Markets.

1. In what Place they are to be held. iii. 111

2. At what Time they are to be held. Vol. iii. 112
3. How long to continue. iii. 112
Of the Duty and Power of Owners of Fairs and Markets in Things incident to them. iii. 113
Of the Toll and other Duties which Owners of Fairs and Markets are entitled to.
1. Where such Tolls, &c. shall be said to be reasonable, and legally due. iii. 113
2. What Persons are exempt from Payment thereof. iii. 115
How far a Sale in a Fair or Market overt changes the Property of a Thing sold therein. iii. 115

Fees. Vol. III. Page 119.

In what Cases a Fee shall be said to be due. iii. 120
How much shall be said to be due. iii. 121
At what Time it shall be said to be due. iii. 124
In what Court Fees are to be recovered. iii. 126

Felony. Vol. III. Page 127.

Of what Nature the Things taken must be to constitute the Offence of Felony. iii. 128
How far the Goods ought to belong to another. iii. 130
What shall be said to be a felonious and fraudulent Taking. iii. 132
What shall be said to be a Carrying away. iii. 134
By whom the Offence may be committed. iii. 135
Of what Value the Goods must be; and therein, of the Difference between Grand and Petit Larceny. iii. 135
Where the Offender is or is not excluded his Clergy. iii. 136
Where the Offender is to be transported. iii. 139

Felo de se. Vol. III. Page 141.

Where a Person shall be said to be Felo de se. iii. 142
Of the Manner of finding him such. iii. 142
What he shall forfeit for this Offence. iii. 143

Feoffment. Vol. III. Page 144.

The several Sorts of Livery in our Law.
1. Of Livery in Deed. iii. 145
2. Of Livery within View or in Law. iii. 146
The Effect and Operation of Livery.
1. The Effect thereof to pass a future Interest. iii. 148
2. The Operation thereof, where the Feoffor is out of Possession. iii. 151
3. In what Cases several Parcels will pass by one Livery, or where several Parties may take by Livery to one. iii. 156
Of the Charter of Feoffment; and therein, what Things are necessary to the making a perfect Charter, and how far the Charter governs the Livery which is relative to it. iii. 157
Who may make a Feoffment. iii. 164
Of making it by Letter of Attorney. iii. 166
Fieri Facias. *Vid. Tit.* Execution. ii. 714.

Fines

Fines and Amercements. Vol. III. Page 169.

Who have ſufficient Authority to fine and amerce. Vol. iii. 170
For what Offences the Party is to be fined or amerced. iii. 171
In what Actions or Proceedings there ought to be a Fine or Amercement.
1. Of the Nature of the Action in which there ought to be a Fine or Amercement. iii. 173
2. At what Time to be awarded. iii. 175
3. Whether to be awarded when the Party is acquitted as to Part. iii. 177
4. Whether to be awarded where there are ſeveral Parties, and ſome of them only acquitted. iii. 178
5. Of awarding Fines and Amercements jointly or ſeverally. iii. 178
6. Whether the Party can be twice amerced in the ſame Action. iii. 179
Where a Fine ought to be awarded, and not an Amercement, & vice verſa. iii. 180
Who in reſpect of their Perſons are not to be fined or amerced. iii. 183
Of the Reaſonableneſs of the Fine; and of mitigating or aggravating it. iii. 185
Of the Reaſonableneſs of an Amercement, and the Affeerment thereof.
1. Of the Neceſſity of an Affeerment. iii. 186
2. By whom the Affeerment is to be. iii. 187
Of the Manner of recovering Fines and Amercements. iii. 188

Fines and Recoveries. Vol. III. Page 189.

Of the ſeveral Parts of a Fine, and when they begin to operate. iii. 190
Of the ſeveral Sorts of Fines. iii. 194
Who may levy Fines. iii. 196
Of the Dedimus Poteſtatem. iii. 199
Of the Operation of a Fine in barring the Iſſue in Tail. iii. 201
Of the Operation of a Fine in barring Strangers, or thoſe who have but an uncertain Intereſt, as a Term for Years, or barely an equitable Intereſt. iii. 205. vii. 464
Of the Remedies given to Strangers by Claim and Entry for the Preſervation of their Right. iii. 214
Of erroneous Fines, and the Manner of reverſing them. iii. 216

Common Recoveries. Vol. III. Page 222.

Who may ſuffer a Recovery. iii. 225
Of what Things a Recovery may be ſuffered, and by what Names. iii. 226
What Eſtates or Intereſt may be barred by a Common Recovery; and therein, of the ſingle and double Voucher iii. 228. vii. 464
Of erroneous and void Recoveries, who may avoid them, and by what Method. iii. 243
Of other Effects of a Recovery. vii. 465
Fines payable by Copyhold Tenants. *Vid. Tit.* Copyhold. i. 709.

Forcible Entry and Detainer. Vol. III. P. 248.

The ſeveral Statutes made relating to this Subject. Vol. iii. 249
What ſhall be a forcible Entry and Detainer within theſe Statutes. iii. 252
Of the Nature of the Poſſeſſions, with reſpect to which one may be guilty of a forcible Entry or Detainer. iii. 254
What Perſons may be guilty thereof. iii. 254
What ought to be the Form of a Record, grounded upon theſe Statutes. iii. 255
Of the awarding of Reſtitution, by whom, and in what Manner; and therein, of the Nature of the Poſſeſſions, and to whom ſuch Reſtitution is to be made. iii. 258
What ſhall be a Bar or Stay to ſuch Award of Reſtitution; and therein, of ſuperſeding and ſetting it aſide after it is executed. iii. 259

Foreſtalling. Vol. III. Page 261.

What it is at Common Law, and how puniſhed. iii. 261
What it is by Statute, and how reſtrained and puniſhed. iii. 262

Forfeiture. Vol. III. Page 263.

For what Crimes an Offender ſhall forfeit his Lands at Common Law. iii. 264
For what Crimes his Goods and Chattels. iii. 266
For what Crimes by Statute. iii. 268
To what Time the Forfeiture ſhall have Relation. iii. 271
What is to be done with the Offender's Goods before Conviction. iii. 272
Where the Wife ſhall loſe her Dower. iii. 273
How far the Blood of the Offender is corrupted. iii. 274

Forgery. Vol. III. Page 277.

In what Caſes the making and altering of a Writing ſhall be ſaid to be ſo far falſe and fraudulent as to amount to Forgery. iii. 277
Of what Nature or Kind the Writing muſt be to conſtitute the Offence Forgery at Common Law. iii. 279
What Offences of this Kind are made Forgery by Statute, and of the Puniſhment to be inflicted on Perſons guilty of Forgery. iii. 280
Foreſts. *Vid.* Of the Court of Foreſts, *Title* Courts and their Juriſdiction. ii. 192.

Formedon. Vol. III. 286.

Of the ſeveral Writs of Formedon.
1. Of the Formedon in Deſcender. iii. 287
2. Of the Formedon in Remainder. iii. 288
3. Of the Formedon in Reverter. iii. 289
Of what Things a Formedon will lie. iii. 290
How the Demandant muſt ſet forth his Title. iii. 290
Of the Tenant's Plea in Abatement or Bar. iii. 291

Fraud. Vol. III. Page 294.

What Acts are condemned in the Common Law Courts as fraudulent, though not within the expreſs Proviſion of any Act of Parliament. Vol. iii. 294
What Acts are deemed fraudulent in the Courts of Equity. iii. 298
Of fraudulent Conveyances and Deviſes, &c. to defeat Creditors and Purchaſers within 13 Eliz. cap. 5. 27 Eliz. cap. 4. *and* 3 W. & M. cap. 14, &c. iii. 307
In what Court Fraud is cognizable. iii. 321
Where a Wrong-doer is further puniſhable than by making void the fraudulent Act. iii. 322

Game. Vol. III. P. 324. Vol. VII. P. 466.

Gaming. Vol. III. P. 335. Vol. VII. P. 466.

How far reſtrained by the Common Law. iii. 335
How far reſtrained by Statute. iii. 336

Gaol and Gaoler. Vol. III. Page 344. Vol. VII. Page 467.

Gaols by what Authority erected, and to whom they belong. iii. 345
Who are to be at the Charge of repairing them. iii. 346
To what Place Offenders are to be committed; and therein, what ſhall be ſaid a Gaol, and where to be kept. iii. 348
Of the Duty and Power of Gaolers and Keepers of Priſons.
1. What Acts they may lawfully do, and for what Abuſes puniſhable. iii. 349
2. For what Offences they ſhall forfeit their Offices. iii. 352
At whoſe Charge Priſoners are to be carried to Gaol. iii. 354
How maintained there. iii. 355
Of the Offence of breaking Gaol. iii. 357

Gavelkind. Vol. III. Page 360.

Of the Original, Continuance, and ſeveral Properties of this Cuſtom. iii. 360
The particular Caſes which have been adjudged relating to this Cuſtom. iii. 368

General Iſſue. *Vid. Tit.* Pleadings.

Grants. Vol. III. Page 371.

What Perſons may make good Grants.
1. Of Grants by Corporations. iii. 373
2. Of Grants by Eccleſiaſtical Perſons. iii. 373
3. Of Grants by Infants. iii. 375
4. Of Grants by Feme Coverts. iii. 375
5. Of Grants by Idiots and Perſons of Inſane Memory. iii. 376
6. Of Grants by Perſons under Dureſs. iii. 376

What Perſons may take by Grant. Vol. iii. 377
What Name or Deſcription of the Grantor or the Grantee will make the Grant certain enough. iii. 378
Of what Intereſt in the Grantor he may diſpoſe.
1. Where by Reaſon of Maintenance a Thing cannot be granted or aſſigned over. iii. 381
2. Where the Grantor muſt have an abſolute Property, ſo that the Grant be not to the Prejudice of a third Perſon. iii. 382
3. Whether a bare Right or Poſſibility may be granted or aſſigned over. iii. 383
4. What Seiſin or Poſſeſſion in the Grantor will enable him to grant it over. iii. 384
5. Where the Grantor's Right being joined with a Truſt or Confidence, is incapable of being granted or aſſigned over. iii. 385
What Ceremony is requiſite to the Perfection of a Grant; and therein, of the Neceſſity of a Deed. iii. 385
What Words are ſufficient to create a good Grant. iii. 386
Where a Thing ſhall be ſaid to paſs by Grant or ſome other Conveyance. iii. 387
Where Grants ſhall be ſaid to be good or void for Incertainty.
1. What ſhall be a ſufficient Deſcription of the Thing granted notwithſtanding any Miſrecital thereof. iii. 388
2. Where a Defect in the Deſcription may be aided by Relation to a Thing certain. iii. 391
3. Where by an Election given to the Grantee he may reduce an uncertain Grant to a Certainty. iii. 391
How Grants are to be expounded.
1. How to be conſtrued where there appears a Repugnancy in the Words. iii. 393
2. Where the Premiſes differ from the *Habendum*; and therein, how far the *Habendum* may enlarge or abridge the Grant in the Premiſes. iii. 395
3. How the Words of a Grant are to be conſtrued as to the Things intended to be granted. iii. 395
4. Where a Thing ſhall be ſaid to paſs as appendant, appurtenant, or incident. iii. 397
5. What Eſtate or Intereſt ſhall be ſaid to be granted. iii. 398
6. At what Time the Thing granted becomes veſted, and when the Grantee muſt take the ſame. iii. 400

Guardian. Vol. III. Page 401.

The ſeveral Kinds of Guardians.
1. Of the ſeveral Kinds of Guardians by the Common Law. iii. 402
2. Of Guardians by Cuſtom. iii. 404
3. Of Guardians by Statute. iii. 405
What Perſons may be Guardians. iii. 408
By what Authority Guardians are appointed; and therein, of the proper Juriſdiction in reſtraining and puniſhing Abuſes by Guardians and others in relation to Infants. iii. 410
Of the Manner of appointing and admitting a Guardian. iii. 411
At what Time the Authority of a Guardian ceaſes, and what Acts will determine it. iii. 412

Of the Guardian's Intereſt in the Body and Lands of the Ward, and his Remedy for the ſame. Vol. iii. 413
What Things a Guardian may lawfully do, and will bind the Infant. iii 414
Of the Infant's Remedy againſt his Guardian for Abuſes by him. iii. 417
Of obliging a Guardian to account, and what Allowances he ſhall have. iii. 419

Habeas Corpus. Vol. III. Page 420. Vol. VII. Page 467.

Of the Nature and ſeveral Kinds of Writs of Habeas Corpus. iii. 421
Of the Habeas Corpus ad ſubjiciendum.
1. What Courts have a Juriſdiction of granting it. iii. 423
2. To what Places it may be granted. iii. 424
3. In what Caſes it is to be granted, and where it is the proper Remedy. iii. 425
4. How far the Courts have a diſcretionary Power in granting or denying it; and therein, of the *Habeas Corpus* Act. iii. 427
5. Of the Manner of ſuing it out, and the Form of the Writ. iii. 431
6. To whom it is to be directed. iii. 431
7. By whom to be returned. iii. 432
8. Of the Manner of compelling a Return, and the Offence of a falſe Return. iii. 432
9. What Matters muſt be returned together with the Body of the Party. iii. 433
10. Where the Return ſhall be ſaid to be ſufficient, and to warrant the Commitment. iii. 434
11. Whether the Party can ſuggeſt any Thing contrary to the Return. iii. 436
12. Whether any Defect in the Return may be amended. iii. 437
13. What is to be done with the Priſoner at the Return; and therein, of bailing, diſcharging, or remanding him. iii. 437
Of the Habeas Corpus ad faciendum & recipiendum. iii. 439

Heir and Anceſtor. Vol. III. Page 448. Vol. VII. Page 467.

Of the Nature of the Relationſhip between Heir and Anceſtor. iii. 449
Of the ſeveral Kinds of Heirs.
1. Of the Heir apparent. iii. 449
2. Of the Heir General, or Heir at Common Law. iii. 450
3. Of the ſpecial Heir, or Iſſue in Tail. iii. 452
4. Of the Cuſtomary Heir. iii. 452
5. Of the *Hæres factus.* iii. 452
Of what Conditions, Covenants, &c. of the Anceſtor's the Heir ſhall take Advantage. iii. 453
What Conditions, Covenants, &c. ſhall extend to him, ſo as to bind him. iii. 455
What Actions he may commence and proſecute in Right of his Anceſtor. iii. 457
Where the Heir ſhall be ſaid to be bound to anſwer his Anceſtor's Debts and Contracts. iii. 458

How

How to be proceeded againſt where he is bound. Vol. iii. 464
Where he ſhall be liable himſelf, and the Judgment general or ſpecial.
1. Where he ſhall be liable for his falſe Pleading. iii. 465
2. Where by his Promiſe to pay or diſcharge the Debt of his Anceſtor. iii. 467
What ſhall be Aſſets in his Hands. iii. 467
What Things ſhall go to the Heir, and not to the Executor, *vide Tit.* Executors and Adminiſtrators.

Hereſy, and Offences againſt Religion. Vol. III. Page 470.

Of Hereſy.
1. What it is. iii. 471
2. By whom it is cognizable. iii. 471
3. How puniſhed. iii. 472
Of Witchcraft, and how puniſhed. iii. 473
Of Offences againſt Religion as puniſhable by the Common Law. iii. 474
Of Offences by Statute againſt Religion.
1. Of the Offence of prophaning the Lord's Day. iii. 474
2. Of the Offence of Swearing. iii. 477
3. Of the Offence of Drunkenneſs. iii. 477
4. Of the Offence of Reviling the Sacrament. iii. 477
5. Of Offences againſt the Common Prayer. iii. 478
6. Of the Offence of teaching Schools without conforming to the Church. iii. 479
7. Of the Offence in not coming to Church.
1. What Forfeitures of Money, Lands or Goods, ſuch Offenders incur. iii. 479
2. In what Manner they are to be proceeded againſt for thoſe Forfeitures. iii. 481
3. What other Inconveniencies they are ſubject to. iii. 482
4. By what Means they may be diſcharged. iii. 482
5. How far a Perſon is puniſhable for ſuffering ſuch Abſence in others. iii. 483
8. Of Offences againſt the eſtabliſhed Church by Proteſtant Diſſenters. iii. 483
Of the Offence of profeſſing or encouraging the Popiſh Religion, *vid. Tit.* Popiſh Recuſants.
Of the Offence of holding an Office without conforming to the eſtabliſhed Religion, *vid. Tit.* Offices, *&c.*

Heriot. Vol. III. Page 485.

Of the Original and Nature of Heriots. iii. 485
Of the ſeveral Kinds, and where an Heriot ſhall be ſaid to be due.
1. Where an Heriot ſhall be ſaid to be due by Cuſtom. iii. 486
2. Where an Heriot ſhall be ſaid to be due by Tenure or Reſervation. iii. 489
Of the Remedies to be purſued for the Recovery of an Heriot where it is due. iii. 490

Highways.

Highways. Vol. III. Page 492.

Of the ſeveral Kinds, and what ſhall be ſaid a Highway. Vol. iii. 493
To whom the Highway and Soil belong. iii. 494
Who hath a Right to a Way, and how he muſt claim it. iii. 494
Whether a Highway may be changed. iii. 497
Of Stopping a Highway and other Nuiſances therein. iii. 497
Who are obliged to repair a Way by the Common Law; and therein, where a Perſon ſhall be liable by reaſon of Incloſure, Tenure, or Preſcription. iii. 498
Of the Proviſion for repairing the Highways [and Turnpike Roads] by Act of Parliament. iii. 500
How the Parties obliged to repair are to be proceeded againſt, and what Defence they may make. iii. 501

Hue and Cry. Vol. III. Page 503.

Hue and Cry at the Common Law, or Suit of the King.
1. By whom Hue and Cry is to be levied. iii. 504
2. In what Manner it is to be levied. iii. 505
3. In what Manner to be purſued. iii. 505
4. What the Perſons may juſtify doing who purſue it. iii. 505
5. How the Omiſſion or Neglect of not doing it is puniſhed. iii. 507
Of raiſing Hue and Cry purſuant to the ſeveral Statutes which declare in what Manner the Hundred ſhall be chargeable. iii. 508
1. What Kind of Robbery it muſt be, ſo as to make the Hundred liable, and how far it is neceſſary that it be done on the Highway. iii. 509
2. On what Day, or Time of the Day, it muſt be committed. iii. 510
3. What Hundred ſhall be ſaid to be liable. iii. 511
4. What Perſon is to bring the Action, and make Oath of the Robbery. iii. 512
5. Of the Notice to be given of the Robbery. iii. 513
6. Where the Party muſt give Bond for Payment of Coſts, in caſe he does not prevail. iii. 515
7. Of the Oath to be taken of the Robbery, and before whom the ſame muſt be. iii. 516
8. At what Time the Action is to be brought. iii. 517
9. What Evidence will maintain it; and therein, of the Witneſſes for and againſt it. iii. 518
10. What ſhall excuſe the Hundred; and therein, of apprehending the Robbers. iii. 518
11. How the Money is to be levied, and each Hundred to contribute to the Charges. iii. 520

Idiots and Lunaticks. Vol. III. Page 525. Vol. VII. Page 468.

What Perſons are eſteemed ſuch, ſo as to come within the Protection of the Law. iii. 525

How

How they are to be found such. Vol. iii. 527
Who hath an Intereſt in and Juriſdiction over them; and therein, of appointing them proper Curators and Committees, and the Power and Duty of ſuch Committees. iii. 529
How far their Want of Underſtanding ſhall be ſaid to be prejudicial to them in Civil Reſpects. iii. 533
How far the Want of Underſtanding will excuſe in Criminal Caſes. iii. 534
How far their Acts are good, void or voidable, and of the late Proviſions by Statute-Law. iii. 536
How they are to ſue and defend. iii. 541

Indictment. Vol. III. Page 542.

Of the Nature of an Indictment, and how far it is conſidered as a Proſecution at the Suit of the King. iii. 544
Where it is neceſſary, or the Party may be tried for a Capital Offence without it. iii. 545
By whom it is to be found; and therein, who may and ought to be Indictors. iii. 547
Whether the Indictors or Grand Jury may find Part of a Bill brought before them true, and Part falſe. iii. 547
What Matters are indictable. iii. 549. vii. 465
Within what Place the Offence inquired of muſt ariſe. iii. 550
What ought to be the Form of the Body of an Indictment at Common Law.
1. How the Body of an Indictment at Common Law ought to ſet forth the Subſtance and Manner of the Fact. iii. 553
2. How the Perſons mentioned or referred to in it. iii. 557
3. How the Thing within the Offence was committed. iii. 560
4. How the Circumſtance of Time and Place. iii. 561
5. Where the Offence indictable may be laid jointly and where ſeverally, and where both jointly and ſeverally, and where the Offences of ſeveral Perſons may be laid in one Indictment. iii. 563
6. Whether the Words *Vi & Armis* be in any Caſe neceſſary. iii. 564
7. Whether it be neceſſary to lay the Words *contra Pacem*. iii. 565
8. Whether it be neceſſary to lay it *contra Coronam & Dignitatem Regis*. iii. 566
9. Whether it be neceſſary to lay it *in contemptum Regis*. iii. 566
10. Whether neceſſary to lay it *illicitè*. iii. 566
11. Whether a Defect in any of theſe Particulars be amendable. iii. 566

What ought to be the Form of an Indictment upon a Statute.
1. Whether it be neceſſary that ſuch Indictment recite the Statute whereon it is grounded. iii. 567
2. What Miſrecitals of ſuch Statutes are fatal. iii. 567
3. How far it is neceſſary to bring the Offence indictable within the very Words of the Statute. iii. 567. vii. 469
4. Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law. iii. 571
5. How far it is neceſſary to conclude *contra formam Statuti*. iii. 571

What

What ought to be the Form of the Caption of an Indictment. Vol. iii. 571
Where an Indictment may be quashed. iii. 573

Infancy and Age. Vol. III. Page 575.

Who are Infants; and therein, of the several Ages and Periods between which the Law distinguishes as to several Purposes. iii. 576
To whom the Privilege of Infancy extends, or who are to be considered as Minors. iii. 582
How far the Law regards and takes notice of Infants in Ventre sa mere. iii. 582. vii. 469
How Infancy is to be tried. iii. 584
Of what Things an Infant is capable in relation to the Public, and in which he shall answer for his Neglect. iii. 585
Of what Things capable, being for his own Advantage. iii. 586
How far the Law takes care of his Interest, so as not to let him suffer by his Laches; and therein, where he must take notice and perform Conditions, &c. iii. 587
Where punishable for Crimes and Injuries committed by him. iii. 590
Of the Acts of Infants, as they are good, void or voidable.
1. Of their Contracts for Necessaries. iii. 593
2. Of Judicial Acts, or Acts done by him in a Court of Record. iii. 596
3. Of his Acts *in pais*, where void or only voidable. iii. 597
4. Where void or voidable as to the Infant, shall yet bind others. iii. 605
5. At what Time voidable Acts are to be avoided. iii. 606
6. By whom to be avoided. iii. 607
7. In what Manner they are to be avoided. iii. 608
8. Of the Confirmation of voidable Acts. iii. 611

Of the Privilege of Infants in Suits and Actions by and against them.
1. How far the Courts take care of the Interest of Infants. iii. 613
2. How they are to appear when they sue or are sued. iii. 616

Of the Privilege of Infancy as to the Parol's demurring.
1. In what Actions the Parol demur. iii. 621
2. Where the Parol shall demur without any Plea pleaded. iii. 626
3. Upon what Plea pleaded the Parol shall demur. iii. 627
4. For the Nonage of what Person the Parol shall demur. iii. 628
5. In respect to what Estate and Interest the Parol shall demur. iii. 628
6. Where for the Nonage of the Vouchee. iii. 630
7. Where for the Nonage of the Prayee in Aid. iii. 631
8. In what Cases if the Parol demur against one it shall be against another. iii. 631
9. In what Cases the Demurrer of the Parol for Part shall be for all. iii. 632
10. Of the Prayer of Age and Counter-plea. iii. 633

Informations. Vol. III. Page 634.

Of the Nature and several Kinds of Informations. iii. 634
In what Cases they lie. iii. 636
In what Manner they are to be laid. iii. 640

Of

Of filing an Information, the Proceedings thereon, and the Provisions made therein by Statute. Vol. iii. 641. vii. 470

Injunction. Vol. III. Page 648.

The several Kinds of Injunctions, and when to be granted. iii. 648
vii. 470
What shall be a Breach thereof, and how punished. iii. 656
How dissolved. iii. 657. vii. 471

Inns and Innkeepers. Vol. III. Page 659.

Inns, by what Authority erected, and how far within the Statutes concerning Alehouses. iii. 660
Who shall be said a common Innkeeper; and therein, of the Privileges allowed him by Law. iii. 660
Of the Duties enjoined Innkeepers by Law.
1. To what Things the Duty of an Innkeeper extends. iii. 662
2. Of the Offence of selling corrupt Commodities, or at exorbitant Prices. iii. 663
3. Of the Offence of refusing to harbour or entertain a Guest. iii. 664
4. In what Cases chargeable for Things stolen or lost. iii. 664
5. Who is such a Guest as may charge an Innkeeper. iii. 665
6. Of the Manner in which he is to be charged. iii. 666
Of the Innkeeper's Remedies against his Guests. iii. 667

Joint-tenants and Tenants in Common. Vol. III. Page 669.

Of the Nature of their Estates; and therein, of the Difference between Joint-tenants and Tenants in Common. iii. 670
What Persons may be Joint-tenants or Tenants in Common. iii. 672
Of what Things there may be a Joint-tenancy or Tenancy in Common. iii. 675
How a Joint-tenancy is created. iii. 676
How a Tenancy in Common is created. iii. 678
What Words create a Joint-tenancy, and not a Tenancy in Common, &c. converso. iii. 678. vii. 471
Of the Duration and Continuance of the Estate, whether given jointly, or in common; and therein, where the Inheritance shall be said to be joint or several. iii. 685
Of the joint and distinct Interest of Joint-tenants and Tenants in Common, as to Acts done by or to them. iii. 687. vii. 475
1. In what Acts they must all join. iii. 687
2. When the Acts of one will be equally advantageous as if done by both. iii. 688
3. When the Acts of one will bind the other, whether to his Advantage or Prejudice. iii. 690
Of Severance and Survivorship. iii. 691. vii. 428
1. Of the Right of Survivorship, and what Things will survive. iii. 691

2. At what Time the Right of Survivorſhip is to take place. Vol. iii. 692
3. What Diſpoſition will work a Severance and defeat the Right of Survivorſhip. iii. 693
1. What Diſpoſition with a Stranger will work a Severance. iii. 693
2. What Diſpoſition or Conveyance by one Joint-tenant or Tenant in Common with his Companion, will work a Severance. iii. 694
3. At what Time ſuch Diſpoſition muſt be made to take Effect. iii. 695
4. What ſhall be a total Severance, or but for a limited Time. iii. 697
5. How far the Charges or Incumbrances of one Joint-tenant ſhall affect the Survivor. iii. 697
6. Of Severance by Operation of Law. iii. 698
7. Of Severance by Compulſion of Law; and therein, of the Writ *de Partitione facienda*. iii. 699
Joint-tenants and Tenants in Common how to ſue and be ſued; and therein, of Summons and Severance. iii. 704
Of the Remedies which Joint-tenants and Tenants in Common have againſt each other. iii. 708

Jointure. Vol. III. Page 710.

The Original and firſt Introduction of this Proviſion. iii. 711
Of its being a Bar of Dower; and therein, of the 27 H. 8. cap. 10. *and the Rules to be obſerved in making a good Jointure, and ſuch a one as will be an effectual Bar of Dower.* iii. 712
1. That the Eſtate muſt take Effect immediately after the Death of the Huſband. iii. 713
2. That it muſt be for Term of the Wife's Life, or greater Eſtate. iii. 714
3. That it muſt be made to herſelf, and not to others in Truſt for her. iii. 714
4. That it muſt be in Satisfaction of her whole Dower. iii. 715
5. That it muſt be expreſſed to be in Satisfaction of her Dower; and therein, how far a collateral Recompence ſhall be a Bar of Dower of Jointure. iii. 715
6. That it muſt not be made during Coverture. iii. 718
How far her own or her Huſband's Act may defeat her of this Proviſion. iii. 720
How far a Jointreſs is entitled to the Aid and Aſſiſtance of a Court of Equity. iii. 721
Of Diſcontinuances by Women of their Huſbands Eſtates, *vide Tit.* Diſcontinuance.

Juries. Vol. III. Page 722.

Of the ſeveral Kinds of Juries and particular Inqueſts; and therein, of the Number ſuch Juries muſt conſiſt. iii. 725
Of the Jury Proceſs, and Manner of convening the Jury.
1. Of the Neceſſity of ſuch Proceſs, and where a Pannel may be returned by a bare Award without any Precept. iii. 728
2. Of the ſeveral Kinds of Jury Proceſs, and Manner of compelling a Jury to appear. iii. 729

3. By whom such Processes are to be executed, and the Jury convened. Vol. iii. 731
4. In what Time such Processes are returnable. iii. 736
5. Where the Jury must appear. iii. 738
6. What Number are to be returned. iii. 739
7. Of awarding Process by Proviso. iii. 741
8. Necessity of returning a Penal into Court, and where a Prisoner may demand a Copy of it. iii. 742
9. Of the Trial's going off *pro defectu Juratorum*; and therein, of drawing a Juror. iii. 742
In what Cases and in what Manner a Tales *is grantable.* iii. 743
In what Cases and in what Manner special Juries are appointed. iii. 745
Who are to be returned; and therein, of the Qualifications and several Causes for which they may be challenged.
1. Of Challenges to the Array or to the Polls; and therein, where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge, or to the Favour. iii. 747
2. Where Insufficiency and not being *liber Homo* is a good Cause of Challenge to the Polls. iii. 750
3. Where the Want of Freehold, or a competent Estate, is a good Cause of Challenge. iii. 751
4. Where the Jury's not being convened from a right Place is a good Cause of Challenge. iii. 754
5. Where Partiality in the Juror is a good Cause of Challenge; and therein, where it shall be said a principal Cause of Challenge, or to the Favour. iii. 756
6. Where the Quality of the Juror is a good Cause of Challenge; and therein, who are exempt from serving on Juries. iii. 758
7. Where from the Quality of either Party it is a good Cause of Challenge that a Knight is not returned. iii. 759
8. Of Trials *per Medietatem Linguæ*, where an Alien is Party. iii. 760
9. Of peremptory Challenges. iii. 761
10. Of Challenges by the Crown. iii. 763
11. At what Time a Challenge is to be taken. iii. 764
12. How such a Challenge is to be tried. iii. 765
How Jurors are to be impannelled and sworn. iii. 766
How to be kept and discharged. iii. 768
In what Cases and in what Manner to have a View. iii. 769
What Irregularities and Defects in convening, or in the Qualifications of the Jurors, are amendable and aided after Verdict. iii. 774
What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent. iii. 777
When and by whom to be paid. iii. 777
For what Misdemeanors punishable.
1. Where punishable by Attaint. iii. 778
Of the Judgment in Attaint. iii. 782
2. How otherwise punishable. iii. 783
3. Where Abuses by others in relation to them are punishable; and therein, of the Offence of Embracery. iii. 785

Justices of Peace. Vol. III. Page 786.

Of the antient Officers, called Conservators of the Peace. iii. 787
Of the first Institution, and general Statutes which give Justices of Peace a Jurisdiction. iii. 788

Of their Commiſſion, and Manner of appointing them. Vol. iii. 790
Who are qualified for the Office. iii. 792
Of their Authority and Juriſdiction purſuant to their Commiſſion, and the general Statutes relating to them.
1. What Juriſdiction they have in relation to Treaſon and Miſprision of Treaſon. iii. 794
2. What in relation to Felonies. iii. 795
3. What in relation to inferior Offences. iii. 796
4. How far they have Power to proceed on Indictment not taken before themſelves. iii. 796
5. By what Juſtice the Juriſdiction muſt be exerciſed; and therein, how far a Juſtice of a County may act out of it, or within a Liberty. iii. 797
Their Indemnity and Protection by the Law in the right Execution of their Office; and their Puniſhment for the Omiſſion of it. iii. 802

Leaſes and Terms for Years. Vol. IV. Page 1.

Of what Things Leaſes may be made for Years. iv. 7
Of the Perſon by whom Leaſes may be made; and therein, of Leaſes by Infants. iv. 11
Of Leaſes made by Huſband and Wife.
1. Of Leaſes made by Huſband and Wife by the Common Law. iv. 13
2. Of Leaſes made by them purſuant to the Statute of 32 *H.* 8. *c.* 28. iv. 18
Of Leaſes by Tenant in Tail.
1. What Leaſes Tenant in Tail might have made by the Common Law. iv. 18
2. What Leaſes Tenant in Tail may now make to bind his Iſſue, ſince the 32 *H.* 8. *c.* 28. iv. 30
3. When and in what Caſes the Iſſue in Tail, or Strangers, ſhall be bound by voidable Leaſes made by Tenant in Tail. iv. 33
Of Leaſes for Lives or Years by Eccleſiaſtical Perſons.
1. What Leaſes they might have made by the Common Law, and of the ſeveral enabling and diſabling Statutes, with ſome general Obſervations on them. iv. 39
2. Of the Rules to be obſerved, and Qualifications requiſite to the Perfection of ſuch Leaſes.
Rule 1. Where an Indenture or Deed is neceſſary. iv. 50
Rule 2. When ſuch Leaſes are to begin.
1. When ſuch Leaſes as have no Date at all, or a void or impoſſible Date, are to begin. iv. 55
2. Such Leaſes as have a good Date, and are delivered on the ſame Day; in what Caſes the Day of the Date or Delivery is to be taken incluſive, and in what Caſes excluſive. iv. 55
3. Such Leaſes as have a good Date, but are not delivered till a Week or Month, *&c.* after, when they are to begin, and how the Declaration on ſuch Leaſes is to be framed. iv. 57.
Rule 3. Within what Time the old Leaſe is to be ſurrendered; and therein, of concurrent Leaſes. iv. 61
Rule 4. That ſuch Leaſes are not to exceed three Lives or twenty-one Years. iv. 69

Rule 5. Of what Things Leaſes may be made to bind the Succeſſor. Vol. iv. 70
Of Grants of Offices by Biſhops, &c. within theſe Statutes, *vide Tit.* Offices.
Rule 6. What ſhall be ſaid a uſual Letting to Farm upon the ſeveral Statutes, and by what Perſons. iv. 74
Rule 7. What Rent is to be reſerved.
1. That there muſt be a Rent reſerved. iv. 78
2. That this Rent muſt continue due and be payable to the Leſſors and their Succeſſors. iv. 78
3. That ſuch Rent muſt be the ſame, or more in Quantity than hath been reſerved within twenty Years next before ſuch Leaſe made.
1. What ſhall be ſaid to be the ancient Rent where Variety of Rents have been reſerved, or ſomething formerly reſerved now omitted or varied. iv. 79
2. In what Manner ſuch Reſervation is to be made. iv. 82
3. Where the Addition of more Land, with or without the Addition of more Rent, ſhall avoid ſuch Leaſes. iv. 84
4. Where a Reſervation of the whole Rent, or only *pro Rata* on a Leaſe of Part, ſhall be good iv. 85
Rule 8. That ſuch Leaſes muſt not be made without Impeachment of Waſte. iv. 87
Of Leaſes by Parſons, Vicars, and others, with reſpect to other Qualifications. iv. 88
Of the Conſent or Confirmation of others to Leaſes made by Eccleſiaſtical Perſons.
1. Where Confirmation is neceſſary, either in reſpect of the Leaſes or Eſtates made, or of the Perſons making the ſame. iv. 98
2. What Perſons are to confirm ſuch Leaſes or Eſtates, and in what Manner. iv. 99
3. What Eſtates they who make ſuch Confirmation are to have. iv. 111
4. At what Time ſuch Confirmation is to be made. iv. 114
5. How far Regard is to be had to the true naming of the Corporation or Perſons who do confirm. iv. 117
Of void or voidable Leaſes by Eccleſiaſtical Perſons.
1. Againſt whom Leaſes not purſuant to the Statutes, or otherwiſe defective, are void or only voidable. iv. 117
2. By what Means and in what Caſes ſuch voidable Leaſes may be made good. iv. 124
3. The Manner of avoiding ſuch Leaſes as are only voidable. iv. 124
Of Leaſes made by thoſe who have but a particular Eſtate or Intereſt in the Lands leaſed.
1. Of Leaſes made by Tenant in Dower or Curteſy. iv. 126
2. Of Leaſes made by Tenant for Life. iv. 126
3. Of derivative Leaſes, or by one who is but a Leſſee for Years himſelf. iv. 127
4. Of Leaſes made by a Diſſeiſor or Diſſeiſee. iv. 129
5. Of Leaſes made by Joint-tenants or Tenants in Common. iv. 130
6. Of Leaſes made by Copyholders. iv. 132
7. Of Leaſes made by Executors or Adminiſtrators. iv. 136
8. Of

8. Of Leaſes made by a Bailiff of a Manor. Vol. iv. 137
9. Of Leaſes made by a Guardian. iv. 138
10. Of Leaſes made purſuant to Authority. iv. 140
11. Of Leaſes made purſuant to Powers in private Conveyances and Settlements. iv. 143. vii. 483
By what Form of Words Leaſes may be made. iv. 160. vii. 485
What Certainty is requiſite to Leaſes for Years as to their Beginning, Continuance, and Ending. iv. 168. vii. 486
1. With regard to the Date of the Leaſe. iv. 168
2. With regard to other Circumſtances taken notice of in the Deed of Leaſe, whereby to aſcertain the Commencement thereof. iv. 174
3. The Certainty of Leaſes for Years as to their Continuance. iv. 176
4. The Certainty of Leaſes for Years as to their Duration and Ending. iv. 181
In what Caſes and to what Reſpects an Entry by the Leſſee is requiſite to the Perfection of his Leaſe. iv. 183
Leaſes for Years, when to take Effect as a Reverſion, when as a future Intereſt, and when neither the one nor the other. iv. 185
Leaſes for Years by Eſtoppel, how far and againſt whom ſuch Leaſes are good. iv. 189
Leaſes for Years and future Intereſts, how far they may be barred or deſtroyed, and how far not, and where an Entry before the Term begun is a Diſſeiſin. iv. 195
How far and by what Means Leaſes for Years in Truſt to attend an Inheritance may be barred or deſtroyed. iv. 198
Leaſes for Years, when merged by Union with the Freehold or Fee. iv. 201
Of Surrenders of Leaſes for Years.
1. Of Surrenders in Fact or expreſs.
1. By what Words ſuch Surrender may be made. iv. 209
2. Upon what Eſtate ſuch Surrender may operate. iv. 211
2. Of Surrenders in Law, or implied Surrenders.
1. With regard to Leaſes in Poſſeſſion. iv. 212
2. With regard to Leaſes *in futuro*. iv. 216
3. With regard to the Thing itſelf ſo ſurrendered. iv. 216
Leaſes when determined by cancelling the Deed. iv. 218
Leaſes when forfeited. iv. 219. vii. 488
Of the Renewal of Leaſes. iv. 221. vii. 488

Legacies. Vol. IV. Page 336.

What a Legacy properly is. iv. 337
Where a Legacy ſhall be ſaid to be well given.
1. What Words make a good Bequeſt. iv. 339. vii. 493
2. What ſhall be ſufficient Deſcription of the Perſon to take. iv. 341. vii. 493
3. What ſhall be ſufficient Deſcription of the Thing given, and what ſhall be ſaid to be bequeathed. iv. 350
What ſhall be an Ademption or Extinguiſhment of a Legacy. iv. 354
Where a Legacy ſhall be preſumed to be a Satisfaction of a Debt or Duty owing from the Teſtator. iv. 362

Of Legacies veſted or lapſed.
1. Where it ſhall be a lapſed Legacy by the Legatees dying in the Lifetime of the Teſtator, and where in ſuch Caſe it ſhall veſt in another Perſon to whom it is limited over. Vol. iv. 387
2. Where a Legacy ſhall be ſaid to be veſted or lapſed, being to be paid at a future Time, to which the Legatee did not arrive. iv. 393.

Where Legacies or Portions charged on the Real Eſtate are veſted, for the Benefit of the Heir at Law, ſee *Tit.* Heir and Anceſtor.

Of conditional Legacies, and how far the Condition muſt be complied with, otherwiſe the Legacy will be forfeited. iv. 410. vii. 495
Of ſpecific and pecuniary Legacies, and the Difference between them. iv. 425
Of abating, refunding, and giving Security for that Purpoſe. iv. 427
Of reſiduary Legacies and Legatees. iv. 428
Of the Payment of Legacies.
1. What ſhall be a good Payment and to whom to be made. iv. 429
2. At what Time a Legacy is to be paid. iv. 434
3. Where the Legatee ſhall have Intereſt, and Maintenance in the mean Time iv. 435. vii. 497

Of the Executor's Aſſent to a Legacy. iv. 444
Legacies in what Court, and how properly recoverable. iv. 446

Libel. Vol. IV. Page 449. Vol. VII. Page 498.

What ſhall be ſaid a Libel.
1. How far it is neceſſary that it ſhould be in Writing. iv. 449
2. What Degree of Defamation will amount to a Libel. iv. 450
3. What Certainty in the Matter and Application will make it a Libel. iv. 453
4. Whether any Proceedings in a Court of Juſtice will amount to a Libel. iv. 454
5. Whether any Thing of this Kind can be juſtified. iv. 455

Who ſhall be ſaid a Libeller.
1. Who ſhall be ſaid the Author or Compoſer of a Libel. iv. 457
2. Who the Publiſher. iv. 458

The Offenders how puniſhed. iv. 459

Limitations of Actions. Vol. IV. Page 460.

Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8. cap. 2. iv. 461
Of the Limitation of real Actions, purſuant to 32 H. 8. cap. 2. *and* 21 Jac. cap. 16. iv. 462
Of the Limitation of Time in regard to Actions on Penal Statutes. iv. 466
Of the Limitation of Time in regard to perſonal Actions, purſuant to 21 Jac. 1. cap. 16.
1. Of Actions of Aſſault and Battery. iv. 469
2. Of Actions of Slander. iv. 469
3. Of Actions ariſing upon Contract and founded *in Maleficio.*
1. Of what Nature or Degree the Action muſt be, ſo as to be barred by the Statute. iv. 470
2. Whether

2. Whether a Truſt or equitable Demand be within the Statute. Vol. iv. 473
3. At what Time the Right of Action ſhall be ſaid to have accrued, before which the Statute can be no bar. iv. 474
4. In what Court the Demand muſt be made, or what Courts are bound by the Statute. iv. 475
Of the Exceptions in the Statute 21 Jac. cap. 16. *and what will ſave a Bar thereof.*
1. What Actions are within the Savings of the Statutes. iv. 477
2. Of the Exception in relation to Infants, &c. iv. 477
3. Of the Exception in relation to Accounts between Merchants. iv. 478
4. Of the Exception in relation to Perſons beyond Sea. iv. 478
5. Where no Executor or Adminiſtrator to ſue or be ſued. iv. 479
6. Where no Juriſdiction to ſue on, or hindered by ſome Authority. iv. 480
7. Where the ſuing out a Writ will ſave the Bar of the Statute. iv. 481. vii. 499
8. Where a Debt barred by the Statute ſhall be ſaid to be revived. iv. 483
Of the Manner of pleading and taking Advantage of the Statute of Limitations. iv. 484. vii. 499

Maihem. Vol. IV. Page 486.

What it is. iv. 486
How puniſhed. iv. 486

Maintenance, and the Offence of Buying or Selling a pretended Title. Vol. IV. Page 488.

What ſhall be ſaid to amount to an Act of Maintenance. iv. 489
In what Reſpects ſome ſuch Acts may be juſtified
1. How far they are juſtifiable in reſpect of an Intereſt in the Thing in Variance. iv. 490
2. How far in reſpect of Kindred or Affinity. iv. 491
3. How far in reſpect of other Relations; as that of Lord and Tenant, Maſter and Servant. iv. 491
4. How far in reſpect of Charity. iv. 491
5. How far in reſpect of the Profeſſion of the Law. iv. 491
How Maintenance is reſtrained and puniſhed by the Common Law. iv. 492
How reſtrained and puniſhed by Statute. iv. 493
Of the Offence of Buying or Selling a pretended Title. iv. 494

Mandamus. Vol. IV. Page 495.

Of the Nature of the Writ; and therein, of the Suggeſtion and Manner of awarding thereof. iv. 497
Of the Form thereof, and for what Irregularities it may be quaſhed or ſuperſeded. iv. 498
In what Caſes to be granted.
1. Where it lies to reſtore or admit a Perſon to an Office, and what ſhall be ſaid ſuch a Public Office for which a *Mandamus* will lie. iv 500

2. Where the Party's having another Remedy is a ſufficient Foundation to deny it; and therein, of granting *Mandamus's* to reſtore Members of Colleges, &c. Vol. iv. 504
3. What Removal or turning out of an Officer will entitle him to a *Mandamus*. iv. 507
Where it lies to inferior Courts and Magiſtrates, to oblige them to do that Juſtice, which the Public Good requires and the Law enjoins. iv. 507
Of the Authority by which it iſſues; and therein, of the diſcretionary Power in the Court, of granting or refuſing it. iv. 514
To whom to be directed. iv. 515
By whom to be returned. iv. 516
Of the Manner of enforcing Obedience to the Writ, and compelling a Return. iv. 517
What ſhall be ſaid a good Return. iv. 518
Of traverſing the Return, and taking Iſſue thereon. iv. 520
Of the Party's Remedy for a falſe Return. iv. 521
Of awarding a peremptory Return. iv. 522

Marriage and Divorce. Vol. IV. Page 523.

What Perſons may marry within the Levitical Degrees. iv. 525
Of Eſpouſals and Marriage Contracts; and therein, of the Difference between Contracts in præſenti *and* futuro, *and the Remedies for the Violation thereof.* iv. 529
Of the Solemnization and Ceremonies requiſite to a complete Marriage; and therein, of the Offence of performing the Ceremony without due Authority or Licence. iv. 531
Of Offences againſt the Rights of a Marriage.
1. Of the Offence of a forcible Marriage. iv. 538
2. Of the Offence of marrying an Infant Female under the Age of ſixteen, without Conſent of Guardian. iv. 540
3. Of the Offence of procuring an improvident Marriage; and therein, of Marriage Brokage Contracts and Agreements. iv. 540
Marriage how long to continue; and therein, of the ſeveral Kinds of Divorces.
1. Of Elopement. iv. 549
2. Of the Offence of taking away a Wife, and of criminal Converſation. iv. 551
3. Of the ſeveral Kinds of Divorces. iv. 553

Maſter and Servant. Vol. IV. Page 556.

Of the Manner of hiring and binding a Perſon, Servant, or Apprentice. iv. 557. vii. 500
Who may ſerve or are capable of binding themſelves Servants or Apprentices. iv. 562. vii. 500
Of the Juriſdiction of Juſtices of Peace in binding out Apprentices, in obliging Maſters to provide for them, in compelling them to refund the Money had with them, and in diſcharging Apprentices from their Maſters. iv. 564. vii. 500
Of the Neceſſity of ſerving an Apprenticeſhip, as a Qualification to follow a Trade within the 5 Eliz. cap. 4. iv. 571
1. What ſhall be ſaid a Trade, which a Perſon is prohibited to follow, within the Statute. iv. 572
2. What

2. What Manner of following or exerciſing a Trade ſhall be ſaid within the Statute. Vol. iv. 574
3. What Kind of Service will be a ſufficient Qualification within the Statute. iv. 574
4. By whom the Offence of following a Trade without a Qualification is cognizable. iv. 574
5. Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified. iv. 576
Of aſſigning and turning over Apprentices to other Maſters. iv. 577
Of making Apprentices free. iv. 578
How Apprentices are to be taken care of when their Maſters happen to die. iv. 579
Of Servants' Wages, how recoverable. iv. 580
What Acts of the Servant are deemed the Maſter's, of which the Maſter may take Advantage. iv. 582
What Acts of the Servant ſhall be deemed the Maſter's, for which the Maſter ſhall anſwer and be bound. iv. 583
For what Acts of his ſhall the Servant himſelf anſwer to others. iv. 587
For what Acts of his ſhall the Servant anſwer, and be reſponſible to his Maſter.
1. Where by an implied Truſt or Confidence a Servant ſhall anſwer in a Civil Action. iv. 588
2. Where Servants and Apprentices ſhall be puniſhed criminally, for Acts done in relation to their Maſters. iv. 589
Of the Maſter's Authority over his Servant, and how far he may correct and puniſh him. iv. 592
Of the Maſter's Remedies againſt others for inticing away, and other Injuries done, in relation to his Servant. iv. 593
What a Maſter or Servant may juſtify doing in each other's Defence. iv. 594

Merchant and Merchandize. Vol. IV. Page 595.

Of Alien Merchants. iv. 597
Of Principals and Factors. iv. 599. vii. 500
Of Partners and joint Traders. iv. 603. vii. 501
Of Owners and Maſters of Ships. iv. 611
Of Mariners. iv. 617
Of Average. iv. 621
Of Hypothecation. iv. 625
Of Charter Parties. iv. 626
Of Policies of Inſurance.
1. Of Marine Inſurances. iv. 629. vii. 501
2. Inſurances upon Lives. iv. 673
3. Inſurance againſt Fire. iv. 675
Of Bottomry and Reſpondentia. iv. 676
Of Bills of Lading. iv. 683
Of Bills of Exchange.
1. Of the Nature and different Kinds of Bills of Exchange and negotiable Notes.
1. Of Foreign Bills. iv. 685
2. Of Inland Bills. iv. 687
3. Of Promiſſory and negotiable Notes. iv. 689
2. What ſhall be ſaid a Bill of Exchange, or negotiable Note, within the Cuſtom of Merchants. iv. 695

3. Who ſhall be ſaid liable to the Payment thereof; and therein, of ſuing the Drawer, Indorſer, or Acceptor. Vol. iv. 701
4. Who ſhall be ſaid entitled to the Money. iv. 703
5. Of the Indorſement. iv. 703
6. Of the Acceptance.
1. What ſhall be ſaid a good Acceptance. iv. 711
2. Whoſe Acceptance ſhall bind. iv. 713
3. Whether an Acceptance may be qualified. iv. 714
4. Of the Effect of an Acceptance. iv. 719
7. Of the Proteſt.
1. Of the Neceſſity and Validity of the Proteſt. iv. 724
2. At what Time to be made; and therein, of giving Notice to the Drawer; of the Drawer's Refuſal, ſo as to entitle the Party to Principal, Intereſt, and Coſts. iv. 725
8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein. iv. 731

Of the Proviſions for the Encouragement of Shipping and Navigation.

1. Of the Plantation Trade.
1. Of the general Trade with the Foreign Dominions of his Majeſty in *Aſia*, *Africa*, and *America*. iv. 741
2. Of the Trade of the Colonies with the Territories of the *United States*. iv. 742
2. Of the Trade with *Aſia*, *Africa*, and *America*. iv. 743
3. Of the European Trade. iv. 744
4. Of the Coaſting Trade. iv. 745
5. Of the Fiſheries. iv. 745
6. Of Britiſh Ships. iv. 746

Miſnomer and Addition. Vol. IV. Page 751.

What Names are the ſame, and may or may not be miſtaken. iv. 752
What Names and Additions are required by Law, and muſt be truly inſerted.
1. Of the Difference between the Chriſtian Name and Surname. iv. 752
2. Of the Addition of the Eſtate or Degree. iv. 753
3. Of the Addition of the Myſtery. iv. 756
4. Of the Addition of the Town, Hamlet, Place, or County. iv. 757
5. Of Additions which are only Conveyances to the Action. iv. 758
Where the Name is truly put at firſt, and afterwards varied from. iv. 758
Of the Difference between a Miſtake in Grants, Obligations, &c. and judicial Proceedings. iv. 760
At what Time the Miſtake muſt be taken Advantage of, and how the ſame is ſalved. iv. 761
Of the Manner of taking Advantage of and pleading a Miſnomer, or Want of Addition. iv. 762
Who may take Advantage thereof. iv. 763

Monopoly. Vol. IV. Page 76.

Monopoly, what it is, and how reſtrained by the Common Law. iv. 764
How reſtrained by Statute. iv. 765

Mortgage.

Mortgage. Vol. V. Page 1.

Of the Original and ſeveral Kinds of Mortgages. Vol. v. 2
What ſhall be deemed a Mortgage, or Eſtate redeemable. v. 5
Of the Nature of a Mortgage as to the diſtinct Intereſts of the Mortgagor and Mortgagee. v. 15
Of the legal Performance of the Condition. v. 22. vii. 503
Of the Equity of Redemption and Foreclosure.
1. Who may redeem, and by whom the Mortgage-money ſhall be paid. v. 22
2. To whom the Mortgage-money ſhall be paid. v. 37
3. Of the Precedency and Right of Redemption, where there are ſeveral Mortgagees or Incumbrancers; and therein, of their Remedies againſt each other, as well as againſt the Mortgagor. v. 40
4. How far the Purchaſing in a precedent Mortgage or Incumbrance will protect ſuch Purchaſer, and entitle him to a Precedency of Redemption. v. 55
5. Of the Equity which muſt be done by him, who would redeem, to the Perſon againſt whom a Redemption is prayed. v. 80
6. At what Time the Redemption muſt be. v. 90
7. Of the Manner of redeeming and foreclosing. v. 96
Mortgagees and their Aſſignees, how to account, and what Allowances to make. v. 103. vii. 504

Murder and Homicide. Vol. V. Page 116.

In what Caſes a Man may be ſaid to kill another. v. 118
Who are ſuch Perſons, by killing of whom a Perſon may be ſaid to commit Murder. v. 121
What ſhall be deemed Murder.
1. Where it ſhall be ſaid to expreſs Murder, and of Malice prepenſe. v. 121
2. Where the Malice ſhall be ſaid to be implied, or by Preſumption of Law.
1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice. v. 126
2. When done on an Officer or Miniſter of Juſtice. v. 127
3. When done by Perſons in the Execution of ſome other unlawful Act. v. 129
Of Manſlaughter; and therein, of Manſlaughter exempt from Clergy by the Statute of 1 Jac. 1. cap. 8. v. 131
Of juſtifiable Homicide.
1. As it happens in the due Execution and Advancement of public Juſtice. v. 133
2. As it happens in the Defence of a Man's Perſon, Houſe, or Goods. v. 135
Of excuſable Homicide.
1. Of Homicide *per infortunium*, or Chance-medley. v. 137
2. Of Homicide *ſe defendendo*. v. 138

Nonſuit. Vol. V. Page 140. Vol. VI. Page 505.

Of the Nature thereof, and how it differs from a Retraxit. Vol. v. 140
Who may be nonſuit. v. 142
In what Actions there may be a Nonſuit. v. 143
At what Time a Nonſuit may be. v. 143
How far the Nonſuit of one ſhall be the Nonſuit of another. v. 144
How far a Nonſuit for Part of the Thing in Demand ſhall be a Nonſuit for the Whole. v. 145
Of the Effect of a Nonſuit; and therein, of its being a peremptory Bar. v. 145

Nuiſances. Vol. V. Page 146.

What ſhall be ſaid a Nuiſance. v. 146
How far the Indictment muſt charge it to be an Annoyance to all the King's Subjects. v. 151
How a Nuiſance is to be removed or abated. v. 152
How the Offence is puniſhable. v. 153

For Nuiſances relating to the Highways, ſee *Tit.* Highways.

For thoſe relating to Bridges, ſee *Tit.* Bridges.

For thoſe relating to Public Houſes, ſee *Tit.* Inns and Innkeepers.

Obligations. Vol. V. Page 154.

Of the Nature of the Security called a Bond or Obligation. v. 154 vii. 505
What Words create ſuch a Security. v. 157
Of the Ceremonies requiſite to a Bond or Obligation; and therein, of Signing, Sealing, Date, and Delivery. v. 159
Of the Parties to the Obligation.
1. Who may bind themſelves, or be Obligors. v. 160
2. Who may take ſuch Security, or be Obligees. v. 161
3. Who ſhall be ſaid to be the Obligee; and therein, of making ſeveral Obligees. v. 162
4. Where there are ſeveral Co-obligors or Sureties; and therein, where they ſhall be ſaid to be jointly and ſeverally bound, and of the Obligee's Remedy againſt all or any of them. v. 163. vii. 506
5. Of their Remedies againſt each other. v. 168. vii. 507
Of the Condition and Conſideration of the Obligation. v. 169
How the Breach muſt be aſſigned and ſet forth, and the Manner of pleading Performance, and in Bar. v. 169

Offices and Officers. Vol. V. Page 178. Vol. VII. Page 508.

Of the Nature of an Office, and the ſeveral Kinds of Offices. v. 179
Offices, by what Authority created. v. 180
Who hath a Right of granting or aſſigning an Office; and therein, of one Office being incident to another. v. 182
Of the Grant of Offices by Eccleſiaſtical Perſons. v. 183

Of

Of the Ceremony requiſite to a complete Creation or Grant, and of the Oaths required by Statute. Vol. v. 188
Of the Offence of buying or ſelling an Office, and what Offices are prohibited to be thus diſpoſed of. v. 191
What Remedies a Perſon having a Right to an Office muſt purſue, to be let into the Enjoyment of it, and how a Diſturbance is puniſhable. v. 197
Of the Nature of Offices as to their Duration and Continuance; and therein, of their being grantable in Fee, for Life, Years, at Will, and Reverſion. v. 199
Offices by whom to be executed, and who are incapable thereof. v. 203
Of the Manner of executing them; and therein, of Offices that are incompatible, and where an Office may be executed by two or more Perſons. v. 204
Of the Execution of an Office by Deputy; and therein, of Superiors being anſwerable for their Deputies. v. 206
Of the Forfeiture of an Office. v. 210
Where for Corruption and oppreſſive Proceedings Officers are puniſhable; and therein, of Bribery and Extortion. v. 212

Outlawry. Vol. V. Page 214.

In what Caſes Proceſs of Outlawry lies. v. 217
By what Juriſdiction ſuch Proceſſes are to iſſue. v. 218
Againſt whom Proceſs of Outlawry may be awarded.
1. Whether it may be awarded againſt a Peer. v. 219
2. Whether Proceſs of Outlawry may be awarded againſt an Infant. v. 220
3. Of awarding Proceſs of Outlawry againſt a Feme Sole or Covert, and the Proceedings thereon. v. 220
4. Of awarding Proceſs of Outlawry againſt ſeveral Defendants, and the Proceedings thereon. v. 221
5. Of awarding Proceſs againſt Principal and Acceſſary. v. 222
What Forfeitures and Diſabilities an Outlawry ſubjects the Party to.
1. Where it is of the ſame Effect with a Sentence or Judgment. v. 223
2. Of the Forfeiture as to Lands, Goods, &c. and therein, of the Difference between Outlawries in Criminal and Civil Caſes, and of the King's and Party's Intereſt at whoſe Suit the Outlawry was had.
1. Of the Difference between the Forfeiture in a Criminal and Civil Caſe. v. 224
2. What Things are forfeited by the Outlawry. v. 225
3. To what Time the Forfeiture ſhall relate. v. 228
4. Of the King's and Party's Intereſt at whoſe Suit the Outlawry was had, in the Eſtate and Effects of the Party outlawed, and their Remedies for the ſame. v. 230
3. Of the Party's Diſability to bring any Action. v. 233
4. What further Diſabilities Outlawries ſubjects the Party to. v. 237
Of the Regularity of the Proceedings on an Outlawry, and for what Errors it may be reverſed.
1. Where for want of ſuch Proceſs as required by Law the Outlawry may be reverſed. v. 238

2. Where

2. Where for want of Form in ſuch Proceſſes the Outlawry may be reverſed. Vol. v. 239
3. Where for Variance in ſuch Proceſſes the Outlawry may be reverſed. v. 240
4. Where for a defective Execution and Return the Outlawry may be reverſed.
1. To whom ſuch Proceſs is to iſſue and be executed. v. 241
2. To what Place the Proceſs is to iſſue; and therein, of the *Quinto exactus*, and Proclamations on an Outlawry. v. 242
3. What ſhall be ſaid a good Execution and Return. v. 246
Of the Manner of reverſing an Outlawry; and therein, of the Difference between Errors in Fact and in Law. v. 248
What the Party muſt do in order to entitle him to a Reverſal.
1. Of appearing in Perſon or by Attorney, and giving Bail. v. 251
2. Of ſuing out a *Scire Facias*. v. 254
The Effect and Conſequences of a Reverſal.
1. Where the Proceedings on the Reverſal are in the ſame Plight as if no Outlawry, had been. v. 255
2. To what the Party ſhall be reſtored on the Reverſal of the Outlawry. v. 256

Papiſts and Popiſh Recuſants. Vol. V. Page 257.

The Diſabilities, Reſtraints, Forfeitures, and Inconveniencies which Popiſh Recuſants are ſubject to.
1. Of their Diſability to bring any Action. v. 258
2. Of bearing any public Office or Charge. v. 259
2. Of claiming any Part of a Huſband's Perſonal Eſtate. v. 260
3. Of claiming an Eſtate by Curteſy or by way of Dower, after a Marriage againſt Law. v. 261
Of the Reſtraints they are put under.
1. From going five Miles from Home. v. 261
2. From coming to Court. v. 262
3. From keeping Arms. v. 262
4. From coming within ten Miles of *London*. v. 262
Of the Forfeitures they are liable to.
1. That of two Parts of a Jointure or Dower. v. 263
2. That of 20*l.* for not receiving the Sacrament yearly after Conformity. v. 263
3. That of 100*l.* for an unlawful Marriage. v. 263
4. That of 100*l.* for an Omiſſion of lawful Baptiſm. v. 263
5. That of 20*l.* for an unlawful Burial. v. 264
Of the Inconveniencies they are ſubject to.
1. That their Houſes may be ſearched for Reliques, whether they be Men or Women. v. 264
2. If they be Women, and married, that they may be committed. v. 264
Of the Offence of not making a Declaration againſt Popery, and the Reſtraints it ſubjects them to.
1. From ſitting in Parliament. v. 264
2. Holding a Place at Court. v. 265
3. From living within ten Miles of *London*. v. 265
4. From keeping Arms. v. 266

Of

Of the Offence in promoting or profeſſing the Popiſh Religion.
1. Of the Offence of ſaying or hearing Maſs or other Popiſh Service. Vol. v. 266
2. Of giving or receiving Popiſh Education. v. 267
3. Of buying or ſelling Popiſh Books. v. 270
4. Of keeping School. v. 270
5. Of withholding a competent Maintenance from a Proteſtant Child. v. 270
6. Of the Diſability of thoſe profeſſing the Popiſh Religion to preſent to a Church. v. 270
7. Of their Diſability to purchaſe. v. 273

Pardon. Vol. V. Page 285.

By whom to be granted. v. 285
In what Caſes, and for what Offences it may be granted. v. 286
Where a Pardon is grantable of common Right. v. 289
Of the Validity of a Pardon; and therein, by what Words, Treaſons, Murder, Felony, and other Offences may be pardoned; and therein, of Pardons by Implication, and where the King ſhall be ſaid to be deceived in his Grant thereof. v. 290
Whether a Pardon may be conditional. v. 292
Who may take Advantage of a Pardon, and to whom it ſhall be ſaid to extend. v. 293
In what Manner a Pardon is to be taken Advantage of.
1. In what Manner a general Pardon by Parliament is to be taken Advantage of. v. 293
2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of. v. 294
The Effects and Conſequences of a Pardon, and to what the Party ſhall be reſtored. v. 295

Pauper. Vol. V. Page 297.

Of the Right to ſue in pro formâ pauperis, *and the Manner of Admittance.* v. 297
Whether the Defendant may be allowed to defend, as well as a Plaintiff to ſue, in formâ pauperis. v. 299
In what Caſes to be ſo admitted. v. 300
In what Caſes to be diſpaupered and to pay Coſts. v. 300

Perjury. Vol. V. Page 301. Vol. VII. Page 508.

What it is by the Common Law, and how reſtrained and puniſhed. v. 302
How reſtrained and puniſhed by Statute. v. 303

Piracy. Vol. V. Page 310.

Piſchary. Vol. V. Page 318.

Pleas

Pleas and Pleading. Vol. V. Page 321.

The ſeveral Parts and the Order of Pleading. Vol. v. 326

The Declaration.

1. The Nature thereof; and therein, of adding ſeveral Counts in the ſame Declaration. v. 328
2. Who may join or be joined in the ſame Declaration. v. 330
3. What Matters may be joined in the ſame Declaration. v. 330
4. Of the Declarations agreeing with the Writ. v. 331
5. Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Giſt of the Action.
   1. Where by the Declaration it muſt appear that the Plaintiff hath a Right. v. 332
   2. Where the Plaintiff muſt ſhew that he hath performed what was requiſite on his Part. v. 337
   3. Where general Allegations in the Declaration are ſufficient; and therein, of Miſrecitals and Omiſſions. v. 339
   4. Where the Averments muſt be poſitive and expreſs in the Declaration. v. 345
   5. Of the Certainty required in the Deſcription of the Thing declared for. v. 347
   6. Of the Declaration's being good in Part and void in Part. v. 349

Of Imparlance.

1. Of the Nature thereof, and the ſeveral Kinds. v. 351
2. What the Defendant muſt do before any Imparlance. v. 352
3. What he is to plead after the general Imparlance. v. 353
4. What may be pleaded after the ſpecial Imparlance. v. 354
5. In what Caſes the Courts exerciſe a diſcretionary Power in granting or refuſing an Imparlance. v. 355

Of making Defence; and therein, of the Difference between full and half Defence. v. 356

The ſeveral Kinds of Pleas.

1. Of Pleas to the Juriſdiction.
   1. To what Courts to be pleaded, and of the Difference between a Plea to the Juriſdiction and a Claim of Conuſance. v. 357
   2. The Manner and Time of Pleading to the Juriſdiction. v. 360
2. Of Pleas in Abatement. *Vide Tit.* Abatement.

Of Foreign Plea. vii. 383

Of Pleas in Bar and in Chief.

1. Of the General Iſſue, and how formed. v. 361
2. Immaterial and informal Iſſues, and where aided. v. 364
3. Of ſpecial Pleas; and therein, of Pleas amounting to the general Iſſue, and of Matters which may be pleaded or given in Evidence. v. 370
4. Of ſham Pleas, and the Conſequence of falſe Pleading. v. 377

Traverſe.

1. The Nature thereof. v. 378
2. In what Caſes a Traverſe is permitted. v. 381
3. In what Caſes a Traverſe is neceſſary. v. 383
4. Whether there may be a Traverſe upon a Traverſe. v. 385

5. To

5. To what Point the Traverſe ſhall be taken; and therein, what Matters are traverſable, and of the Manner of taking thereof. Vol. v. 390

Pleas in Bar, their Sufficiency and Certainty.

1. That the Plea muſt be proper, and adapted to the Action. v. 400
2. That the Plea muſt be good in Subſtance; and therein, of Matter of Inducement, and that which is the Gift of the Defence. v. 404
3. Of general Pleading to avoid Prolixity; and therein, of affirmative and negative Pleas. v. 408
4. Of Surpluſage and Repugnancy in Pleading. v. 414
5. That the Pleading ought to be direct and not argumentative. v. 418
6. Negative Pregnant. v. 419
7. That Things muſt be pleaded according to their Operation in Law. v. 421
8. Of Colour in Pleading. v. 423
9. Of pleading Non-tenure and Diſclaiming. v. 426
10. Pleading *Hors de ſon fee*. v. 427
11. Eſtoppels in Pleading. v. 428
12. Pleading with a *Profert*, and demanding Oyer.
    1. In what Caſes there muſt be a *Profert* or *Monſtrans de fait*. v. 432
    2. Of demanding Oyer. v. 436
13. Pleading a Recovery in a former Action. v. 439

Duplicity in Pleading.

1. The Reaſon why Duplicity is a Fault, and the Manner of taking Advantage thereof. v. 443
2. What ſhall be ſaid Duplicity in Pleading. v. 445
3. Of pleading double by Leave of the Court. v. 447

Departure in Pleading. v. 449

Repleader.

1. Of the Nature of a Repleader, and Manner of awarding it. v. 453
2. A Repleader in what Caſes to be awarded. v. 454
3. Repleader at what Time to be awarded. v. 457

Demurrer.

1. The Definition and Nature of a Demurrer. v. 457
2. The Manner and Form of demurring; and therein, of joining in Demurrer, and waiving thereof. v. 458
3. What Facts are admitted by a Demurrer. v. 460
4. How far a Judgment on a Demurrer is peremptory. v. 460
5. Of the Difference between a general and ſpecial Demurrer. v. 461
6. What Things are good on a general Demurrer, that would be otherwiſe on a ſpecial one. v. 463
7. Demurrer to Evidence. v. 466

Plea at what Time to be put in, and the Ceremony requiſite therein. v. 469

Continuance and Diſcontinuance in Pleading. v. 473

Pleas. Puis darrein continuance. v. 477

For more of Pleadings, *vide* the Diviſion *Pleadings* under many Titles.

Premunire. Vol. V. Page 481.

What Offences come under the Notion of a Premunire. Vol. v. 481
Of the Puniſhment therein. v. 484

Prerogative. Vol. V. Page 486.

When the King commences his Reign, and the Ceremony requiſite therein. v. 491

Of the King's Prerogative as univerſal Occupant.

1. That he is univerſal Occupant, and entitled to all derelict Lands. v. 494
2. Of his Prerogative in Eſcheats. v. 495
3. Of his Prerogative in Seas and Navigable Rivers. v. 497
4. Of his Prerogative in Swans and Royal Fiſhes. v. 501
5. Of his Prerogative in Ports and Havens. v. 502. vii. 509
6. Of his Prerogative in *Beacons* and Light-Houſes. v. 510
7. Of his Prerogative in Wreck. v. 511
8. Of his Prerogative in Relation to Coins and Mines. v. 513
9. Of his Prerogative in derelict Goods; and therein, of Waifs, Strays, and Treaſure Trove. v. 516
10. Of his Prerogative in Fines and Forfeitures. v. 518

Of his Prerogative over the Perſons of his Subjects.

1. Who ſhall be ſaid his Subjects. v. 519
2. That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths injoined them. v. 520
3. That he may reſtrain his Subjects from going abroad; and therein, of the Writ *de Ne exeat Regno*. v. 522
4. That he may command his Subjects to return home; and therein, of awarding a Privy Seal. v. 524

Of the King as the Fountain of Juſtice, and entruſted with the Execution of the Laws.

1. That all Civil Juriſdiction flows from the King. v. 526
2. Of the King's Prerogative in Eccleſiaſtical Matters. v. 527
3. Of his Prerogative in creating Officers. v. 531
4. Of his Prerogative in making War and Peace. v. 532 vii. 511
5. Of his Prerogative in taking care of Infants, Idiots, Lunaticks, and Charitable Uſes. v. 533
6. Of his Prerogative in pardoning. v. 534
7. Of Diſpenſations and *Non obſtantes*. v. 534
8. Of his Proclamations. v. 548

How the Rules of Law differ with reſpect to the King and a private Perſon. v. 550. vii. 511

1. Of what Things incapable from the Dignity of his Perſon and Office. v. 550
2. What Things enure to him in his natural, what in his political Capacity. v. 551
3. Of the Difference in the Rules of Law as directing the King's Property, otherwiſe than that of a Subject. v. 552
4. That his Rights ſhall be preferred to the Subjects where they happen to meet. v. 558

5. Of

5. Of Acts of Parliament which extend to or bind not the King. Vol. v. 559
6. That no Laches can be imputed to him; and therein, of the Maxim *Nullum Tempus occurrit Regi*. v. 562
7. Of his Prerogative in his Suits and Proceedings in Courts of Juſtice. v. 564
Of the Kings Grants and Letters Patents.
1. What Things the King may grant. v. 577. vii. 513
1. Of Grants ariſing from his Prerogative of Power, and which are inſeparably annexed to the Crown. v. 577
2. Of Grants ariſing from his Intereſt. v. 579
3. How far the King muſt have an Intereſt, in order to enable him to grant. v. 590
4. Grants tending to a Monopoly; and therein, of Things of a new Invention. v. 591
5. Grants of the ſole Liberty of Printing. v. 594
2. Of the Conſtruction of the King's Grants and Letters Patents, as to their being good or void; and therein, of the King's being deceived in his Grant. v. 602
3. Where the King's Grantee ſhall partake of his Prerogative. v. 606

Privilege. Vol. V. Page 607.

The Duties and Offices from which certain Perſons by reaſon of their Privilege are exempt. v. 608
The particular Privileges in Suits allowed Officers and Attendants in the Courts of Juſtice.
1. Who are the Officers thus entitled to Privilege. v. 613
2. Of the Privilege and Protection allowed thoſe whoſe Attendance is neceſſarily required. v. 616
3. In what Caſes this Privilege is to be allowed. v. 618
4. Of claiming and allowing Privilege; and therein, that it muſt be ſet forth and pleaded. v. 619
5. How privileged Perſons are to ſue and be ſued. v. 623 vii. 513
6. Whether there can be Privilege againſt Privilege. v. 625
Privilege of Peers and Members of Parliament.
1 Who are entitled to this Privilege. v. 626
2. How far this Privilege extends to their Servants and Attendants v. 627
3. In what Caſes this Privilege is to be allowed. v. 629
4. Of the Commencement and Continuance of this Privilege. v. 631
5. How Privilege is to be claimed and taken Advantage of. v. 634
6. What ſhall be deemed a Breach of Privilege. v. 637
7. Of the Proceedings in Courts by and againſt Perſons entitled to Privilege of Parliament. v. 638

Prohibition. Vol. V. Page 646.

What Courts may grant a Prohibition. v. 648
Whether the granting a Prohibition be diſcretionary or ex debito juſtitiæ. v. 649

Who have a Right to ſuch Writ, and may demand it. Vol. v. 650
Who may join in ſuch Writ. v. 651
Of the Suggeſtion and Manner of obtaining a Prohibition. v. 651
When to be granted abſolutely, or hoc uſque *only; and therein, of directing the Party to declare on his Prohibition* v. 660
Whether more than one ſuch Writ is to be awarded. v. 661
At what Time to be granted; and therein, in what Caſes it may be granted after Sentence v. 663
To what Courts a Prohibition may be awarded; and therein, that the Superior Courts are to determine the Boundaries of all Inferior Juriſdictions. v. 664
Prohibitions to Inferior Temporal Courts in what Inſtances to be granted. v. 667
Prohibitions to the Spiritual Court in what Inſtances.
1. Where they meddle with a Matter purely Temporal. v. 670
2. Where they determine on a Matter of Freehold. v. 672
3. In what Caſes a Prohibition lies when they determine on Criminal Offences. v. 673
4. Where the Eccleſiaſtical Courts determine on Acts of Parliament. v. 674
5. In what Caſes they have a concurrent Juriſdiction, and may determine Incidents. v. 675
The Offence of paying Diſobedience to a Prohibition. v. 679

Releaſe. Vol. V. 680.

Releaſes that are expreſs and by Deed.
1. Of the Words and Ceremony requiſite in an expreſs Releaſe. v. 681
2. How far a Covenant or Agreement may operate as a Deſeaſance or Releaſe. v. 683
3. How far a Diſpoſition by Will may operate as a Releaſe. v. 684
Releaſe by Operation of Law, how created, and the Effect thereof. v. 685
Releaſes of Lands and Hereditaments, how they enure. v. 689
1. Of Releaſes that enure by way of *Mitter le Eſtate.* v. 689
2. Releaſes by way of *Mitter le Droit.* v. 690
3. Releaſes that enure by way of Extinguiſhment. v. 692
4. Releaſes that enure by way of Enlargement; and therein, of the modern Manner of Conveyancing by Leaſe and Releaſe. v. 694
5. What Eſtate or Intereſt paſſes by the Releaſe; and therein, of the Words requiſite to an Enlargement. v. 697
Who in reſpect of their Right and Intereſt are capable of releaſing. v. 698
Of Releaſes by Executors and Adminiſtrators. v. 700
How far the Huſband's Releaſe ſhall bind the Wife. v. 701
To whoſe Benefit a Releaſe ſhall enure; and who ſhall be bound thereby, though not a Party to the Releaſe. v. 702
How far a Poſſibility or Contingent Intereſt may be releaſed. v. 704
How the operative Words in a Releaſe have been conſtrued; and therein, of the Words.
1. Claims and Demands, what are releaſed thereby. v. 706
2. By a Releaſe of all Actions and Suits. v. 709

Releaſe, in what Caſes reſtrained to the ſpecial Purpoſe of which it was given. Vol. v. 710
What Right and Intereſt ſhall be ſaid to be releaſed; and therein, of Miſrecitals and Exceptions in Releaſes. v. 712

Remainder and Reverſion. Vol. V. Page 715.

Of what Things a Remainder may be made. v. 719
What Words are ſufficient to create a Remainder.
1. Of the Propriety of the Words made uſe of to paſs the Remainder. v. 723
2. Of the Deſcription or Deſignation of the Perſon who is to take the Remainder. v. 724
Of the ſeveral Kinds of Remainders as diſtinguiſhed into Remainders veſted, or in Contingency and Abeyance. v. 735
Of Remainders in Abeyance and Contingency; what Eſtate is ſufficient to ſupport them; where they are to take effect; and by what Means they are to be deſtroyed or prevented from coming in eſſe; *and therein, of Remainders by way of Executory Deviſe or future Intereſt.* v. 754
Of Remainders that ariſe on Conditions precedent or ſubſequent. v. 799
1. Of the Difference between a Condition and a Limitation, and in caſe of the Condition when it precedes the veſting of the Remainder as the Cauſe thereof, and is annexed to the firſt Eſtate, and when it is annexed abſolutely without any Regard to the Remainder. v. 800
2. Between a Deed and a Will, when in both the ſame Words of Condition are made Uſe of for veſting the Remainder. v. 801
3. Between a Limitation over in caſe of a Will, and where no Limitation is made over. v. 808
4. Between Remainders that are to ariſe upon Conditions agreeable to the Rules of Law, and ſuch as are to ariſe upon Conditions repugnant and againſt the Rules of the Law. v. 809
5. Between ſuch Words as actually make a Condition, and ſuch as are only deſcriptive of the Manner when and how the Remainders are to ariſe. v. 812
Of Croſs-Remainders, or thoſe ariſing by Implication and Conſtruction of Law. v. 819
Of veſted Remainders, and of the particular Eſtate to ſupport them in their Creation; how long it muſt continue; when by Determination, Grant, or Refuſal thereof, the Remainder is diſcontinued, barred, or deſtroyed, and when not. v. 821
In what Caſes a Remainder or Reverſion ſhall be ſubject to the Acts or Charges of the particular Tenant. v. 861
To what Purpoſes the Remainder is accounted but as one with the particular Eſtate, and where they are regarded as ſeveral Eſtates. v. 864

Rent. Vol. VI. Page 1.

Of the ſeveral Kinds of Rents.
1. Of Rent-Service. vi. 4
2. Of a Rent-Charge. vi. 6
3. Of a Rent-Seck. vi. 6

Out of what Things a Rent may iſſue. Vol. vi. 8
Upon what Conveyance a Rent Service may be reſerved. vi. 10
By what Words a Rent may be reſerved or created. vi. 11
How ſeveral Rents may be reſerved in the ſame Deed. vi. 13
Of the Days of Payment. vi. 14
To whom Rents may be reſerved or granted. vi. 17
Of the Continuance of the Rent, and to whom to be paid; and therein, of the diſtinct Intereſts of the Heir and Executors of the Leſſor. vi. 20
Of the Recovery and Demand of the Rents.
1. In what Caſes a Demand is neceſſary. vi. 25
2. The Time of Demand. vi. 31
3. The Place where a Demand is to be made. vi. 31
The ſeveral Remedies for Recovery of Rents.
1. Of the Remedy by Diſtreſs. vi. 34
2. Of the Remedy by Writ of Annuity. vi. 37
3. Of the Remedy by Aſſiſe. vi. 37
4. Of the Clauſe of Re-entry. vi. 37
5. Of the *Nomine pœnæ*. vi. 39
6. Of the Remedy by Action of Debt, and as grounded on ſeveral Acts of Parliament. vi. 41
Rent when, and how diſcharged; and therein, of the Eviction of the Tenant. vi. 44
Of Apportionment; and therein, of the Suſpenſion and Extinguiſhment of the Rent.
1. In what Caſes a Rent may be apportioned by the Act of the Parties; and therein, of the Difference between a Rent-Service and a Rent-charge. vi. 47
2. In what Caſes they may be apportioned by the Act of Law or the Act of God. vi. 49
3. The Manner of ſuch Apportionment, and how the Tenant ſhall take Advantage of it. vi. 50

Replevin and Avowry. Vol. VI. Page 51.

The Nature and Deſcription thereof. vi. 52
The different Kinds of Replevins; and therein, of Replevin by Writ at Common Law, and by Plaint or Act of Parliament. vi. 53
Replevins, out of what Courts and by what Authority they iſſue; and therein, of the Power and Duty of the Sheriff. vi. 54
Of the Pledges in Replevin, and the Proceedings againſt them. vi. 57
Of the Writs or Proceſſes in Replevin.
1. Of the Original Writ of Replevin. vi. 60
2. Of the Withernam. vi. 61
3. Of the Writ of Second Deliverance. vi. 63
4. Of the Writ *de proprietate probanda*, and the Claim of Property. vi. 65
5. Of the Writ *de retorno habendo*. vi. 66
6. Of Returns irreplevisable. vi. 67
7. In what Manner the Sheriff is to return and execute ſuch Proceſſes. vi. 67
Of what Property, and for what Things a Replevin lies. vi. 68
Replevin for and againſt whom it lies. vi. 69
Of the Declaration in Replevin. vi. 71
Pleas in Replevin. vi. 73

Avowries in Replevin; and therein, of what Seiſin and Services, and the Certainty required therein. Vol. vi. 74
Of the Judgment in Replevins. vi. 83
Coſts and Damages in Replevin. *Vid. Tit.* Coſts, letter (F).

Reſcue. Vol. VI. Page 87.

What it is, and of what Things it may be. vi. 87
In what Caſes a Reſcue may be juſtified. vi. 88
Of the Offence of making a Reſcue, and how the Offenders are to be proceeded againſt vi. 88
The Form of the Proceedings on a Reſcous. vi. 92
Of the Return of a Reſcous.
1. In what Caſes the Sheriff may return a Reſcous; and therein, of the Difference between a Reſcous on meſne Proceſs and Execution. vi. 93
2. Of the Form of the Return, and for what Defects it may be quaſhed. vi. 94
3. Whether the Sheriff's Return of a Reſcue be traverſable. vi. 96

Scandalum Magnatum. Vol. VI. Page 96.

The Perſons who may bring this Action. vi. 97
For what Words it lies. vi. 98
The Proceedings in this Action. vi. 100

Scire Facias. Vol. VI. Page 102. Vol. VII. Page 513.

The Nature of the Writ. vi. 102
In what Caſes it is a proper Remedy. vi. 103
In what Caſes neceſſary; and therein, who are to be Parties to it, and of the Privity required therein.
1. Of the *Sci. Fa.* to revive Judgments, and after what Time neceſſary. vi. 104
2. Of the *Sci. Fa.* on Recognizances and Statutes. vi. 108
3. Of the *Sci. Fa.* on Letters Patent. vi. 111
4. *Sci. Fa.* by and againſt Executors and Adminiſtrators. vi. 112
5. By and againſt Heirs and Tertenants. vi. 113
6. By and againſt Huſband and Wife. vi. 116
7. *Sci. Fa.* againſt Bail. vi. 117
The Form of the Writ and Proceedings, and how far it muſt purſue the Nature of the original Action. vi. 119
Pleadings to a Sci. Fa. vi. 123

Sequeſtration. Vol. VI. Page 126.

The Nature and firſt Introduction of ſuch Proceſs. vi. 126
In what Caſes to be awarded.
1. Againſt what Perſons. vi. 128
2. To what Places. vi. 128

3. What Eſtate or Intereſt ſhall be liable to a Sequeſtration, and from what Time. Vol. vi. 129
Of the Power and Duty of the Sequeſtrator. vi. 130
Sequeſtration, when determined. vi. 133

Set-off. Vol. VI. Page 135.

When firſt allowed. vi. 135
In what Actions. vi. 135
What Debts may be ſet off. vi. 136
Where the Defendant may plead a Set-off, and where he may give Notice of Set-off; and therein, of the Form of each. vi. 137

Sheriff. Vol. VI. Page 138.

The Nature of his Office. vi. 139
Who are qualified or exempt from ſerving. vi. 141. vii. 513
Manner of appointing him; and therein, of his Oath. vi. 144
That he muſt attend his Office ſingly, and cannot execute any other. vi. 146
How long to continue in his Office, and by what determined. vi. 147
That he muſt be reſident in his County, and whether he hath any Juriſdiction out of it. vi. 148
Cannot diſpoſe of his Bailiwick. vi. 148
Of the High Sheriff's Power and Duty in appointing an Under Sheriff and other Deputies.
1. Of the Under Sheriff, and in what Manner appointed. vi. 149
2. Of Covenants between the High Sheriff, his Under Sheriff, and other Officers. vi. 151
3. Of Acts that may be done by either of them, or where the High Sheriff muſt himſelf be perſonally preſent. vi. 153
4. The Manner of appointing Bailiffs and others Officers, and therein, of his being anſwerable for their Acts. vi. 155 vii. 514
5. Of his Juriſdiction over Gaols and Gaolers. vi. 157
Of the preceding and ſucceeding Sheriff, and therein, of the Acts neceſſary to be done by each of them. vi. 159. vii. 514
Where more than one Sheriff. vi. 162
Of his Duty and Acts as a Judicial Officer. vi. 163
Of his Duty and Acts as a Miniſterial Officer.
1. That he is the proper Officer to execute all Writs, except in caſe of Partiality. vi. 164
2. That he cannot diſpute the Authority by which they iſſue, nor any Irregularity in them. vi. 166
How he is to execute ſuch Writ.
1. That it muſt be without Favour or Oppreſſion, and after the Writ is actually taken out, and before it is returnable. vi. 168
2. Of his raiſing the *Poſſe Comitatus.* vi. 169
3. Of breaking open Doors. vi. 170
4. Whether he can execute his Writ on a *Sunday.* vi. 172
5 In what Manner he is to do Execution. vi. 173
Of his Duty in admitting Perſons to Bail; and therein, of Securities taken for Eaſe and Favour. vi. 179. ii. 514

Simony.

Simony. Vol. VI. Page 184.

In what this Offence conſiſts. Vol. vi. 186
How far a Bond for reſigning a Benefice is good in Law. vi. 192
Of the Power exerciſed over ſuch a Bond by Courts of Equity. vi. 193
Whether the Penalty is ſaved where the Ordinary refuſes to accept a Reſignation. vi. 194
Some Objections to thoſe Bonds conſidered. vi. 195
Of the Forfeitures, Penalties, and Puniſhment incurred by this Offence.
1. By the Incumbent. vi. 196
2. By the Patron. vi. 197
3. By the Ordinary. vi. 198
In what Caſes and at what Time Advantage may be taken of the Forfeitures and Penalties.
1. By the King. vi. 198
2. By other Perſons. vi. 199
Of the Juriſdiction of Eccleſiaſtical Courts in this Offence. vi. 200
Pleadings in Simony. vi. 200

Slander. Vol. VI. 201.

Where an Action upon the Caſe in general lies. vi. 205
Of Words that are actionable in themſelves.
1. Such as import the Charge of a Crime.
1. Treaſon. vi. 206
2. Murder. vi. 206
3. Purjury. vi. 207
4. Forgery. vi. 208
5. Theft. vi. 208
6. Other Crimes. vi. 209
2. Such as charge the having a contagious Diſtemper. vi. 212
3. Such as are ſpoken of Perſons in Office. vi. 212
1. Of Judicial Officers. vi. 213
2. Of Perſons in an Office of Truſt. vi. 214
4. Such as are a Diſgrace in a Profeſſion or Trade. vi. 214
1. To a Divine. vi. 215
2. To a Phyſician or Surgeon. vi. 215
3. To a Counſellor or Attorney. vi. 216
4. To other Artiſts. vi. 217
5. To a Tradeſman. vi. 218
Of Words which become actionable by reaſon of the ſpecial Damage received from them. vi. 220
Certain Circumſtances which are to be regarded in the ſpeaking of Words in themſelves actionable.
1. The Time when ſpoke. vi. 222
2. The Place where. vi. 223
3. The Language they are ſpoken in. vi. 224
4. The Occaſion of ſpeaking them. vi. 224
5. The Deſign of the Speaker. vi. 225
Of Slander in a Courſe of Juſtice. vi. 225
Of Words ſpoken in the paſt or future Tenſe. vi. 227
In what Senſe Words in themſelves actionable muſt be affirmative. vi. 227

Of the Certainty required in them. Vol. vi. 229
Where the Want of Certainty is ſupplied,
1. By the apparent Intention of the Speaker. vi. 230
2. By Averment. vi. 231
In what Caſes uncertain Words are to be conſtrued in mitiori ſenſu. vi. 233
Where they are not to be ſo conſtrued. vi. 234
Of adjective Words. vi. 236
Of Words which import only an Intent to do an act. vi. 236
Of Words in the Diſjunctive. vi. 237
Of repugnant Words. vi. 237
Of repeating Words which another has been heard to ſay. vi. 238
Of ſubſequent Words. vi. 239
Of Pleadings in Slander.
1. In general. vi. 240
2. Where an Averment muſt be. vi. 243
3. Of the Colloquium. vi. 247
4. Of the Uſe of an Innuendo. vi. 249
5. What is a Juſtification of Words. vi. 250
In what Kind of Slander the Spiritual Court has Juriſdiction. vi. 253
Where a Prohibition will lie.
1. If actionable Words are coupled with ſuch as are a mere Spiritual Defamation. vi. 255
2. Where any Temporal Damage is received from them. vi. 255
3. Where the Offence charged is not puniſhable in the Eccleſiaſtical Court. vi. 257

For written Slander, *vide Tit.* Libel.

For Slander of Peers or the great Men of the Realm, *vide Tit.* Scandalum Magnatum.

Smuggling. Vol. VI. Page 258.

Of the Cuſtoms in general. vi. 259
Of the Origin of the Cuſtoms. vi. 260
Of the ancient State of certain Cuſtoms.
1. Of the Duties upon Wool, Wool-fells, and Leather. vi. 268
2. Of the Duty of Tonnage. vi. 269
3. Of that of Poundage. vi. 270
Of the preſent State of the Cuſtoms. vi. 270
1. Of the Duty of Tonnage. vi. 271
2. Of that of Poundage. vi. 275
3. Of the Duties to which Aliens are liable. vi. 282
Of prohibited Goods. vi. 285
Of the Penalties and Forfeitures incurred by Perſons guilty of this Offence, or illicit Practices which have a natural Tendency thereto. vi. 286
1. In Ships at Sea. vi. 286
2. By the ſhipping or unſhipping of Goods at any Port, Member, or Wharf, not lawfully appointed for ſuch Purpoſes. vi. 292
3. In Ships in Port inwards bound. vi. 294
4. In Ships in Port outwards bound. vi. 299
5. By coaſting Veſſels. vi. 302
6. In the Caſe of certificate and prohibited Goods. vi. 305
7. In divers other Caſes. vi. 309

Of the corporal Puniſhments to which Perſons guilty of this Offence or Practices thereto tending are liable.
1. Impriſonment. Vol. vi. 315
2. Whipping. vi. 317
3. Tranſportation. vi. 318
4. Death. vi. 320

Sodomy. Vol. VI. Page 325.

Soldiers. Vol. VI. Page 327.

Of inliſting Men. vi. 328
In what Caſes Soldiers are free from Arreſt. vi. 331
Of the quartering of Soldiers. vi. 334
How Carriages for the Uſe of his Majeſty's Forces are to be furniſhed. vi. 345
Of Deſertion. vi. 347
Of the Puniſhments to which Soldiers are liable by martial Law. vi. 350
Of the Civil Puniſhments to which Soldiers are liable. vi. 353
Of the Liberty given to diſcharged Soldiers of exerciſing Trades. vi. 355
Of divers Things not properly reducible under any of the foregoing Heads. vi. 357

Stamps. Vol. VI. P. 359. Vol. VII. P. 515.

Statutes. Vol. VI. Page 364.

Of ſome Requiſites which are eſſential to the Validity of a Statute. vi. 366
Of thoſe Things which are incidental to an Act of Parliament. vi. 369
From what Time a Statute begins to have Effect. vi. 370
How long an Act of Parliament continues in Force. vi. 371
Of the vaſt Power of an Act of Parliament. vi. 373
Of publick and private Statutes. vi. 374
Of affirmative and negative Statutes. vi. 376
Whoſe Province it is to conſtrue an Act of Parliament. vi. 378
Rules to be obſerved in the Conſtruction of Statutes. vi. 379. vii. 515
1. Words and Phraſes, the Meaning of which in a former Act of Parliament have been aſcertained, are, when uſed in a ſubſequent Act, to be underſtood in the ſame Senſe. vi. 379
2. In the Conſtruction of any Part of a Statute, every other Part thereof muſt be conſidered. vi. 380
3. Where divers Statutes relate to the ſame Thing, they muſt all be taken into Conſideration in conſtruing any one of them. vi. 382
4. The Common Law is much to be regarded in the Expoſition of Statutes. vi. 383
5. The Intention of the Makers thereof muſt, in the Conſtruction of an Act of Parliament, be attended to. vi. 384
6. In what Caſes a Statute ought to have an equitable Conſtruction. vi. 386
7. Such Acts of Parliament as are of publick Concern ought to have a liberal Conſtruction, vi. 388
8. Remedial

8. Remedial Statutes muſt be expounded liberally. Vol. vi. 389
9. Penal Acts of Parliament are to be ſtrictly conſtrued. vi. 390
10. Divers other Rules to be obſerved in the Conſtruction of Statutes. vi. 391
How Perſons guilty of Diſobedience to an Act of Parliament may be puniſhed. vi. 392
Of pleading Statutes.
1. Of publick Statutes. vi. 394
2. Of private Statutes. vi. 394
3. The general Rules which muſt be obſerved in pleading Acts of Parliament. vi. 395
4. Some Rules for pleading Statutes which relate to particular Parts of the Pleadings. vi. 396
5. Of Miſrecital in pleading a Statute. vi. 396
6. Of Surpluſage in reciting an Act of Parliament pleaded. vi. 400

For the Method of paſſing Bills in Parliament, *vide Tit.* Court of Parliament.

Summons and Severance. Vol. VI. Page 400.

The Neceſſity of a Judgment of Severance in many Caſes. vi. 401
By whom a Judgment of Severance may be given. vi. 402
Where a Summons muſt iſſue before a Judgment of Severance can be had. vi. 402
At what Time Judgment of Severance muſt be prayed in a Writ of Error. vi. 402
Who may pray Judgment of Severance. vi. 402
In what Actions Judgment of Severance may be given. vi. 404
Where the Writ abates after Judgment of Severance. vi. 406
The Conſequence of a Judgment of Severance to the Party ſevered. vi. 407

Superſedeas. Vol. VI. Page 408.

Of the different Kinds of Superſedeas. vi. 409
Who may grant a Superſedeas. vi. 409
Where a Writ of Superſedeas *may be awarded.* vi. 411
Of Writs which are by Implication of Law a Superſedeas.
1. A Writ of *Audita Querela.* vi. 417
2. A Writ of Second Deliverance. vi. 418
3. A Writ of *Habeas Corpus ad faciendum & recipiendum.* vi. 418
4. A Writ of *Certiorari.* vi. 418
5. A Writ of Error. vi. 419
Of ſome Requiſites which are neceſſary to the making a Writ of Error a Superſedeas *by Implication.*
1. It muſt be allowed. vi. 422
2. Bail muſt be put in to it. vi. 423
3. It muſt be proceeded in without Delay. vi. 424
To what Time a Writ of Error relates as a Superſedeas. vi. 424
What the Effect of a Superſedeas *is.* vi. 426
How Diſobedience to a Superſedeas *may be puniſhed.* vi. 427

Surety of the Peace. Vol. VI. Page 428.

In what Caſes a Juſtice of Peace may ex officio *take Surety of the Peace.* Vol. vi. 429
Who may require Surety of the Peace. vi. 429
Againſt whom Surety of the Peace may be demanded. vi. 430
In what Caſes Surety of the Peace ought to be granted. vi. 430
Of the Manner of granting Surety of the Peace by the Court of Chancery. vi. 431
How Surety of the Peace is granted by the Court of King's Bench. vi. 432
Of the Manner of granting Surety of the Peace by a Juſtice of the Peace. vi. 435
Of the Forfeiture of a Recognizance for keeping the Peace. vi. 437
In what Caſes a Recognizance for keeping the Peace may be diſcharged. vi. 439

Surety of the good Behaviour. Vol. VI. P. 440.

In what Caſes Surety of the good Behaviour may be demanded where Surety of the Peace cannot. vi. 441
What will amount to the Forfeiture of a Recognizance for being of good Behaviour, which would not have been a Forfeiture of one for keeping the Peace. vi. 442

Tender and bringing Money into Court upon the common Rule. Vol. VI. Page 443.

By whom a Tender may be made. vi. 445
What is a good Tender.
1. As to the Manner of tendering. vi. 447
2. As to the Thing tendered. vi. 448
At what Place a Tender muſt be made. vi. 450
At what Time a Tender muſt be made. vi. 451
To whom a Tender muſt be made. vi. 455
The Conſequences of a Tender and Refuſal. vi. 456
The Conſequences of being ready to tender, when the Party, to whom it was intended to have been made, was not preſent. vi. 459
Of Pleading a Tender.
1. In the general. vi. 460
2. Where *uncore priſt* is pleaded. vi. 462
3. Where *uncore priſt* together with *tout temps priſt* is pleaded. vi. 463
4. Where a *profert in curia* is pleaded. vi. 464
The Conſequences of a profert in curia. vi. 465
Of bringing Money into Court upon the common Rule. vi. 466
At what Time Money may be brought into Court upon the common Rule. vi. 469
Of Pleading where Money has been brought into Court upon the common Rule. vi. 470
The Conſequences of bringing Money into Court upon the common Rule. vi. 471
In what Caſes and Actions a Tender in the general may be made, or Money be brought into Court upon the common Rule. vi. 473

Of

Of tendering and bringing into Court upon the common Rule in particular Actions.

1. In an Action of *Aſſumpſit*. Vol. vi. 475
2. In an Action upon the Caſe. vi. 476
3. In an Action of Covenant. vi. 476
4. In an Action of Debt. vi. 477
5. In an Action of Ejectment. vi. 479
6. In an Action againſt a Juſtice of the Peace on the Account of ſomething done in the Execution of his Office. vi. 480
7. In an Action of Replevin. vi. 480
8. In an Action of Treſpaſs. vi. 481
9. In an Action of Trover. vi. 482

Tenure. Vol. VI. Page 484.

Of Tenure by Service in the general. vi. 485
By what Service an Eſtate may be holden. vi. 486
How a Service, by which an Eſtate is holden, may be extinguiſhed. vi. 487
Of whom an Eſtate may be holden, and in what Caſe an Alteration may be made, in the Service by which it is holden. vi. 488
Of Tenure in capite. vi. 490
Of Tenure in Frank Almoign. vi. 493
Of Tenure by Divine Service. vi. 494
Of Tenure by Knights Service. vi. 494
Of Tenure by Eſcuage. vi. 496
Of Tenure by Grand Serjeanty. vi. 497
Of Tenure by Petit Serjeanty. vi. 498
Of Tenure by Caſtle Guard. vi. 498
Of Tenure by Cornage. vi. 499
Of Tenure in Burgage. vi. 500
Of Tenure in Villainage. vi. 500
Of Tenure in Socage. vi. 500

Treaſon. Vol. VI. Page 501.

Who may be guilty of High Treaſon. vi. 503
Againſt whom High Treaſon may be committed. vi. 504
Of High Treaſon in the general. vi. 505
Of compaſſing or imagining the Death of certain Perſonages. vi. 507
Of violating certain Perſonages. vi. 512
Of levying War againſt the King. vi. 513
Of adhering to the King's Enemies. vi. 516
Of counterfeiting the Great Seal, Privy Seal, Privy Signet, or Sign Manual. vi. 517
Of counterfeiting or diminiſhing the Money current. vi. 519
Of bringing counterfeit Money into the Realm. vi. 524
Of ſlaying certain Officers. vi. 525
Of extolling or maintaining the Power of the See of Rome. vi. 526
Of refuſing a ſecond Time to take the Oath of Supremacy. vi. 527
Of putting a Popiſh Bull in Ure. vi. 529
Of reconciling any Perſon, or being reconciled, to the See of Rome. vi. 530
Of receiving Popiſh Orders or Education. vi. 531

Of

Of denying the Power of Parliament to limit the Succeſſion of the Crown. Vol. vi. 533
Of affirming that a Perſon, not in the Succeſſion as by Law eſtabliſhed, has a Right to the Crown. vi. 533
Of endeavouring to hinder the Perſon, next in the Succeſſion as by Law eſtabliſhed, from ſucceeding to the Crown. vi. 534
Of correſponding with the Pretender, or one of his Sons. vi. 534
Of correſponding or treating with a Rebel or Enemy. vi. 535
Of Petit Treaſon in the general. vi. 535
Of ſlaying a Huſband by his Wife. vi. 536
Of ſlaying a Maſter by his Servant. vi. 537
Of ſlaying a Prelate by an Eccleſiaſtick, who oweth Obedience to the Prelate. vi. 538
Of the Indictment of Treaſon. vi. 538
Of the Trial of Treaſon. vi. 543
Of Evidence of Treaſon. vi. 546
Of the Judgment of Treaſon. vi. 549

Treſpaſs. Vol. VI. P. 554. Vol. VII. P. 515.

In what Caſes an Action of Treſpaſs does in the general lie. vi. 556
In what Caſes an Action of Treſpaſs lies for an Act which, although it was in the firſt Inſtance lawful, becomes afterwards a Treſpaſs ab initio. vi. 559
By whom an Action of Treſpaſs may be brought.
1. Where the Injury was done to a Perſon. vi. 561
2. Where the Injury was done to perſonal Property. vi. 562
3. Where the Injury was done to real Property. vi. 566
For what Injuries to the Perſon an Action of Treſpaſs lies.
1. For a Battery. vi. 568
2. For an accidental Stroke. vi. 568
3. For a falſe Impriſonment. vi. 569
For what Injuries to perſonal Property an Action of Treſpaſs lies.
1. To living Property. vi. 575
2. To dead Property. vi. 577
For what Injuries to real Property an Action of Treſpaſs lies.
1. To Land. vi. 580
2. To a Building. vi. 585
Againſt whom an Action of Treſpaſs may be brought.
1. In the general. vi. 589
2. For an Injury to real Property. vi. 591
In what Court an Action of Treſpaſs may be brought. vi. 594
Of the Pleadings in an Action of Treſpaſs.
1. Of the Writ. vi. 595
2. Of the Declaration.
1. In the general. vi. 597
2. Of declaring with a *Continuando*. vi. 603
3. Of the Plea.
1. Of pleading in Abatement. vi. 606
2. Of pleading in Chief.
1. The General Iſſue. vi. 607
2. A Special Plea. vi. 608
3. Both the General Iſſue and Special Plea. vi. 615
4. Of giving Colour. vi. 616

4. Of

4. Of the Replication.
1. In the general. Vol. vi. 618
2. Of making a new Aſſignment. vi. 622
Of the Evidence in an Action of Treſpaſs. vi. 624

Trial. Vol. VI. Page 629.

Of a Trial by the Court.
1. In the general. vi. 630
2. Upon Inſpection. vi. 631
3. Upon the Examination of Witneſſes. vi. 634
Of a Trial by a Record. vi. 634
Of a Trial by a Certificate. vi. 637
Of a Trial by a Jury. vi. 641
Of a Trial at Bar. vi. 643
Of a Trial at Niſi Prius. vi. 646
Of Notice of Trial. vi. 647
Of putting off a Trial. vi. 650
At what Time an Indictment may be tried before Juſtices of Oyer *and* Terminer. vi. 652
Of the Manner of trying where more than one Iſſue is to be tried. vi. 653
Of granting a new Trial.
1. In the general. vi. 654
2. After a Trial at Bar. vi. 658
3. On Account of a Defect or Miſtake of the Judge before whom the Cauſe was tried. vi. 659
4. On Account of a Defect or Miſtake, or Fault of the Jury by whom the Cauſe was tried. vi. 660. vii. 516
5. On Account of a Neglect or Miſtake of a Counſellor or an Attorney in the Cauſe. vi. 671
6. On Account of a Neglect, Miſtake, or Fault of one of the Parties, or one of his Witneſſes. vi. 671
7. In an Action of Ejectment. vi. 673
8. In a Penal Action. vi. 674
9. In an Indictment or Information. vi. 675

Trover. Vol. VI. Page 676.

Of an Action of Trover in the general. vi. 678
Of a Converſion. vi. 679
Who may bring an Action of Trover. vi. 682
For what Injuries an Action of Trover lies. vi. 686
Againſt whom an Action of Trover may be brought. vi. 690
Of the Pleadings in an Action of Trover.
1. Of the Declaration. vi. 697
2. Of the Plea. vi. 702
Of the Evidence in an Action of Trover. vi. 706

Tythes. Vol. VI. 708.

Of what Things Tythe is in the general due. vi. 712
Who are liable to the Payment of a perſonal Tythe, and of what Things due. vi. 713. vii. 516

Of

Of what Things a predial Tythe is due. Vol. vi. 714
1. Of Agiſtment. vi. 715
2. Of Corn. vi. 718
3. Of Hay. vi. 718
4. Of Wood. vi. 719
5. Of divers other Things. vi. 723
Of what Things a mixed Tythe is due. vi. 723
1. Of the Young of a Beaſt. vi. 724
2. Of the Eggs and Young of a Bird or Fowl. vi. 724
3. Of Wool. vi. 725
4. Of divers other Things. vi. 725
To whom Tythe is in the general to be paid. vi. 726
To whom Parochial Tythes are to be paid. vi. 726
To whom Extra Parochial Tythes are to be paid. vi. 730
Of the Right to a Portion of Tythes in a Pariſh. vi. 730
By whom Tythe is to be paid. vi. 730
What Tythes are to be deemed ſmall Tythes. vi. 731
How far the Cuſtom of a Pariſh is to be regarded in the ſetting out of Tythes. vi. 734
Of the Time and Manner of paying Perſonal Tythes, where there is no Cuſtom in a Pariſh. vi. 736
Of the Time and Manner of ſetting out Predial Tythes, where there is no Cuſtom in a Pariſh. vi. 736. vii. 516
Of the Time and Manner of ſetting out or paying Mixed Tythes where there is no Cuſtom in a Pariſh. vi. 740
Of the Time and Manner of paying Tythes due by Cuſtom. vi. 741
In what Caſes the Payment of Tythes may be ſuſpended.
1. Of the Produce of Lands in the King's Hands. vi. 742
2. Of the Produce of Lands which have been barren. vi. 742
3. Of the Produce of Glebe Lands. vi. 743
Of a Modus Decimandi, *and Compoſition real.* vi. 743. vii. 517
1. Of a *Modus* in the general. vi. 743
2. Of the Certainty required in a *Modus*. vi. 745
3. Of a *Modus*, which amounts to a Preſcription in *Non Decimando*. vi. 747
4. Of a *Modus*, which has not been conſtantly paid. vi. 748
5. Of a leaping *Modus*. vi. 748
6. Of a *Modus*, which is too rank. vi. 748
7. Of a *Modus*, which is liable to Fraud. vi. 749
8. Of a *Modus*, for ſuch Perſons as live out of the Pariſh. vi. 750
9. Of the Extent of a *Modus*. vi. 750
Of a Preſcription in Non Decimando. vi. 751
Of a Diſcharge of Tythes by Grant. vi. 752
Of a Diſcharge of Tythes by Bull. vi. 752
Of a Diſcharge of the Payment of Tythes by Order. vi. 753
Of a Diſcharge of the Payment of Tythes by Unity of Poſſeſſion. vi. 756
Of Agreements and Leaſes concerning Tythes. vi. 758
Of a Suit in a Spiritual Court for Subtraction of Tythe. vi. 759
In what Caſes a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tythe. vi. 763
Of a Suit in a Court of Equity for Subtraction of Tythe. vi. 766. vii. 518
Of a Suit in a Court of Equity to eſtabliſh a Modus, *or a Cuſtomary Manner of ſetting out Tythe.* vi. 769. vii. 521
Of an Action upon the Statute againſt Subtraction of Tythe. vi. 770

Of recovering in a ſummary Way the Value of ſmall Tythe ſubtracted. Vol. vi. 771
Of recovering Tythe due from Quakers. vi. 772
What Remedy an Occupier has, when the Perſon entitled to Tythe does not fetch it away in a reaſonable Time. vi. 773

Verdict. Vol. VII. Page 1. 521.

Of a Verdict De bene Eſſe. vii. 2
Of a Privy Verdict. vii. 3
Of a General Verdict. vii. 3
Of a Special Verdict. vii. 4
Of the Province of the Court where a Special Verdict is to be found. vii. 7
Of a Verdict in which the Jurors did not all agree. vii. 8
Of the Power of the Jurors to depart from a General Verdict after it is given in open Court. vii. 8
In what Caſes a Verdict is bad, on Account of a Miſbehaviour in one or more of the Jurors. vii. 9
In what Caſes a Verdict is bad, on Account of a Miſbehaviour in one of the Parties. vii. 13
Of a Verdict upon an Informal or Immaterial Iſſue. vii. 14
Of a Verdict upon an Iſſue, Part of which is inſenſible or inſufficient. vii. 17
Of a Verdict which does not find all that is in Iſſue. vii. 18
Of a Verdict which finds a Thing that is not in Iſſue. vii. 20
Of a Verdict which varies from the Iſſue. vii. 22
1. In an Action of *Aſſumpſit.* vii. 22
2. In an Action upon the Caſe. vii. 24
3. In an Action of Covenant. vii. 25
4. In an Action of Debt. vii. 25
5. In an Action of Ejectment. vii. 27
6. In an Action of Replevin. vii. 28
7. In an Action of Treſpaſs. vii. 29
8. In divers other Actions. vii. 30
9. In a Criminal Proſecution. vii. 31
Of a Verdict where the Words Modo et Formâ *are contained in the Traverſe upon which Iſſue is joined.* vii. 32
Of a Verdict which does not find the Matter in Iſſue with Certainty. vii. 35
Of a Verdict which does not find the Matter in Iſſue expreſsly. vii. 37
Of a Verdict which finds a Matter in a foreign County. vii. 38
Of a Verdict which is contrary to a Matter of Record. vii. 40
Of a Verdict which is contrary to a Matter of Eſtoppel. vii. 40
Of a Verdict which is contrary to ſomething that is confeſſed, or not denied, in the Pleadings. vii. 41
What Omiſſion in the Pleadings is cured by a Verdict. vii. 42
What Miſtake, or Omiſſion, in the Copy of the Iſſue delivered is cured by a Verdict. vii. 44
Of divers Things which did not fall properly under any of the foregoing Heads. vii. 45

Viſne and Venue. Vol. VII. Page 47.

Venue, what, vii. 48
In what Caſes Venue is neceſſary. vii. 48. 522

How the Want of a Venue may be aided. Vol. vii. 49
What deemed a proper laying of the Venue. vii. 49. 522
From whence the Venue ſhall come. vii. 52
In what Caſes Venue may be changed. vii. 52
1. When the Motion for changing the Venue muſt be made. vii. 53
2. The Certainty required in the Affidavit on which the Motion is made. vii. 53. 522
3. Caſes in which the Venue cannot be changed. vii. 53

Univerſities. Vol. VII. Page 54.

Univerſities, what. vii. 54
Of their Courts and Privileges of Juriſdiction. vii. 55
1. How they are to demand Conuſance. vii. 59
2. By whom it may be demanded. vii. 60
3. At what Time it may be demanded. vii. 60
Of their Privileges with regard to their Right of Preſentation to the Livings of Papiſts. vii. 60
1. In what Caſes they ſhall preſent. vii. 60
2. Whom they ſhall preſent. vii. 61
3. How their Right of Preſentation may be prevented. vii. 61
4. How Truſts made to prevent their Right of Preſentation may be diſcovered. vii. 62
5. How their Right of Preſentation may be deveſted. vii. 63
6. How it may be avoided. vii. 63

Void and Voidable. Vol. VII. Page 64.

The Diſtinction between Void and Voidable. vii. 64
What Acts are abſolutely void. vii. 65
1. What Acts are abſolutely void as to all Purpoſes. vii. 65
2. What Acts are void as to ſome Purpoſes only. vii. 65
3. What Acts are void as to ſome Perſons only. vii. 66
4. How Acts void by Operation of Law may be made good by ſubſequent Matter. vii. 66
What Acts are voidable only. vii. 66
How voidable Acts may be made good. vii. 68
How they may be avoided. vii. 68
By whom they may be avoided. vii. 68

Uſes and Truſts. Vol. VII. Page 69.

Of the Origin and firſt Introduction of Uſes. vii. 71
Of the ſeveral Properties of an Eſtate in Uſe, at Common Law. vii. 72
1. That it is alienable; wherein of the Power of *Ceſtui que Uſe.*
1. At Common Law. vii. 72
2. By the Statute of 1 *R.* 3. *c.* 1. vii. 73
2. That it is deſcendible.
1. Of the Deſcent of a Uſe in Poſſeſſion. vii. 77
2. Of the Deſcent of a Uſe in Reverſion. vii. 79
3. That it is deviſable. vii. 80

4. That it is not extendible or Aſſets. Vol. vii. 81
5. That it is not forfeitable. vii. 82
6. That a Woman is not dowable of Uſe. vii. 82
Of the Inconveniences of Uſes. vii. 83
Of the Alterations introduced with reſpect to Conveyances to Uſes; by the 27 H. 8. c. 10. vii. 83
Of the ſeveral Sorts of Conveyances to Uſes. vii. 86
1. Of thoſe which raiſe Uſes by way of Tranſmutation of Poſſeſſion, ſuch as, 1. Feoffment. 2. Fines. 3. Recoveries. vii. 87
Of Deeds declaring the Uſes of Feoffments, Fines, and Recoveries.
1. Who may declare Uſes. vii. 87
2. To whom they may be declared. vii. 89
3. In what Manner they may be declared. vii. 89
4. At what Time they may be declared. vii. 91
5. In what Caſes Averments may be made of Uſes. vii. 91
2. Of thoſe Conveyances which raiſe Uſes without Tranſmutation of Poſſeſſion.
1. Covenants to ſtand ſeiſed to Uſes. vii. 93
1. Who may covenant to ſtand ſeiſed, and to whom. vii. 94
2. What Conſideration is neceſſary to a Covenant to ſtand ſeiſed, and how far it extends. vii. 96
3. By what Words a Man may covenant to ſtand ſeiſed. vii. 100
4. The Effect of a Covenant to ſtand ſeiſed. vii. 101
2. Of the Nature and Operation of a Bargain and Sale to Uſes. vii. 103
What Kind of Property may be conveyed by way of Uſe. vii. 103
Of the ſeveral Kinds of Uſes executed by the Statute.
1. Uſes in *Eſſe.* vii. 103
2. Uſes in Poſſibility.
1. Of Executory Fees. vii. 103
1. With regard to Freeholds. vii. 107
2. With reſpect to Chattels. vii. 109
2. Of Contingent Remainders. vii. 111
1. In what Manner they are to be executed. vii. 111
2. How they may be defeated. vii. 112
1. Where there is no Power of Revocation. vii. 112
2. Where there is an expreſs Power of Revocation. vii. 113
3. How they are to be ſuſpended, revived, or extinguiſhed. vii. 120
Of the Caſes out of the Statute. vii. 121
1. Where Uſes are limited upon Uſes. vii. 121
2. Where Terms are raiſed and limited in Truſt. vii. 121
1. Of Terms which wait on the Inheritance. vii. 122
2. Of Terms in Groſs. vii. 122
3. Where Lands are limited to Truſtees to pay over the Rents and Profits. vii. 123
Of reſulting Uſes, or Uſes by Implication. vii. 125
Of ſecond or ſhifting Uſes. vii. 133
Of the Manner of pleading Uſes. vii. 134

Truſts. Vol. VII. Page 135.

By what general Rules Truſts are governed. vii. 137
What amounts to a Declaration of a Truſt, and when a Truſt ſhall be raiſed. vii. 138
What ſhall be deemed a reſulting Truſt, or Truſt by Implication. vii. 141
What ſhall be deemed an Advancement, and what a Truſt. vii. 147
What Acts of a Truſtee ſhall be a Breach of Truſt, &c. *or ſhall be deemed to alter or vary the Nature of it.* vii. 151
What Acts of the Truſtee jointly with Ceſtui que Truſt, *or by* Ceſtui que Truſt *only, ſhall defeat the Truſt, or deſtroy contingent Remainders.* vii. 154
In what Caſes Equity will decree Truſtees to join in a Recovery, &c. *with* Ceſtui que Truſt. vii. 155
When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom. vii. 160
Truſtees in what Caſes favoured, and in what Caſes decreed to account. vii. 180
How far Truſtees are anſwerable for each other. vii. 183
In what Caſes Truſtees ſhall give Security, and when be diſcharged or removed. vii. 185
The Power of Ceſtui que Truſt. vii. 185
Of Forfeitures by Ceſtui que Truſt. vii. 186

Of Uſury. Vol. VII. Page 187. 522.

Of Uſury at Common Law. vii. 188
Of Uſury by the Statute Law. vii. 188
What Kinds of Agreements or Contracts ſhall be deemed uſurious, and what not. vii. 190
What Kind of Hazard or Caſualty will bring an Agreement, &c. *out of the Statute of Uſury.* vii. 198
In what Caſes Securities ſhall be forfeited or avoided, on account of Uſury. vii. 200
In what Caſes a Forfeiture of treble Value ſhall be incurred on account of Uſury. vii. 202
In what Caſes Relief is given againſt uſurious Contracts. vii. 203
How far Sureties are affected by uſurious Contracts. vii. 205
What Informations will lie in Caſes of Uſury, and where they are good and where not. vii. 206
Of the Pleadings in Caſes of Uſury. vii. 208
Of the Trial and Evidence in Caſes of Uſury. vii. 212

Wager of Law. Vol. VII. Page 214.

The Reaſon for allowing the Wager of Law. vii. 215
The Manner of waging Law. vii. 216
At what Time Law may be waged. vii. 216
In what Caſes Law may be waged, and in what not. vii. 218
What Perſons may wage Law, and what not. vii. 221
Againſt whom Wager of Law lies. vii. 223
In what Caſes the Defendant is barred from waging his Law, by having examined the Plaintiff or his Attorney. vii. 223

Warrant of Attorney. Vol. VII. Page 523. Vol. I. Page 298.

Of Warranty. Vol. VII. Page 225.

The ſeveral Kinds of Warranties. Vol. vii. 226
To what Things a Warranty may be annexed. vii. 226
What Words and Clauſes in a Deed will make a Warranty. vii. 227
What ſhall be deemed a good Warranty in Deed. vii. 228
What ſhall be deemed a good Warranty in Law. vii. 231
Of the Nature of a lineal Warranty, and how far it ſhall bind. vii. 232
What ſhall be deemed ſufficient Aſſets to make a lineal Warranty a Bar. vii. 233
Of the Nature of a Collateral Warranty at Common Law, and how far it ſhall bar. vii. 234
Of the Alterations introduced by the Statute Law. vii. 235
What ſhall be deemed Warranties by Diſſeiſin, Abatement, or Intruſion. vii. 236
Of the Effects of a Warranty in Deed. vii. 237
What Uſe may be made of a Warranty in Deed. vii. 238
Who may take Advantage of a Warranty, and againſt whom. vii. 240
When a Warranty ſhall be ſaid to be defeated, determined, ſuſpended, or avoided. vii. 243
How Warranties ſhall be expounded. vii. 247

Of Waſte. Vol. VII. Page 249.

In what Subjects in general Waſte may be committed. vii. 250
Of the ſeveral Kinds of Waſte. vii. 251
What Acts ſhall be deemed Waſte. vii. 251
1. What Acts ſhall be deemed Waſte in Lands. vii. 251
2. What Acts ſhall be deemed Waſte in Trees and Woods. vii. 251
3. What ſhall be deemed Waſte in digging for Gravel, Mines, &c. vii. 254
4. What ſhall be deemed Waſte in Gardens, Orchards, Fiſh-Ponds, Dove-Houſes, Parks, &c. vii. 255
5. What ſhall be deemed Waſte with reſpect to Houſes. vii. 255
6. Of what Things annexed to the Freehold Waſte may be committed. vii. 257
What ſhall be deemed Waſte, with reſpect to Eccleſiaſtical Perſons. vii. 258
What Waſte ſhall be deemed excuſable. vii. 259
What Waſte ſhall be deemed juſtifiable, by reaſon of the Intereſt of the Party. vii. 260
Who may bring an Action of Waſte. vii. 263
Againſt whom the Action may be brought. vii. 264
1. Againſt whom it may be brought for Waſte done by a Stranger. vii. 269
2. How far it lies againſt Executors, &c. vii. 270
At what Time an Action of Waſte may be brought. vii. 271
Of the Proceſs of Proceedings in Actions of Waſte. vii. 274
1. In what Caſes the Action ſhall be brought in the *Tenet.* vii. 277
2. In what Caſes it ſhall be brought in the *Tenuit.* vii. 278

Of

Of the Pleadings in Actions of Waſte. Vol. vii. 279
Of the Judgment in Actions of Waſte, and what ſhall be recovered thereby. vii. 289
In what Caſes in general Waſte may be reſtrained by Injunction in Equity. vii. 286
In what Caſes Waſte may be reſtrained in Equity, notwithſtanding the Words "without Impeachment of Waſte" be contained in the Leaſe, &c. vii. 289
What Relief may be given in Equity, in Caſes of Waſte. vii. 294

Of Wills and Teſtaments. Vol. VII. Page 298.

What is a Will and Teſtament, and wherein they differ. vii. 299
Who are capable of making a Will and Teſtament. vii. 300
Who are the Requiſites to conſtitute a good Will. vii. 302
Of the ſeveral Kinds of Wills and Teſtaments. vii. 305
1. Of Wills in Writing. vii. 305
1. What ſhall be a good Will in Writing to paſs Lands and Tenements. vii. 306
1. In what Language and Hand a Will may be written. vii. 307
2. Of the Circumſtances of ſigning, Atteſtation, and Publication, &c. vii. 308
3. Of the Republication: what will amount to a Republication, and where a Republication will make a Deviſe good. vii. 320
2. What ſhall be deemed a good Will in Writing of Goods and Chattels. vii. 328
3. What ſhall be ſufficient Proof of a Will. vii. 328
2. Of Nuncupative Wills. vii. 337
The Nature and Effect of a Will and Teſtament, and of a Codicil. vii. 340
How Wills ſhall be conſtrued. vii. 341
How Wills may be avoided.
1. What ſhall be deemed a Revocation of a Will. vii. 343
2. In what Caſes the Court will ſet aſide a Will for Fraud. vii. 378
3. Where Fraud in obtaining a Will is examinable. vii. 380

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